U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 19-0250 BLA
and 19-0250 BLA-A

ESTILE B. GREGORY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 03/11/2020
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Estile B. Gregory, Arjay, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and employer cross-appeals the Decision and Order Denying Benefits (2017-BLA-05804) of Administrative Law Judge Lauren C. Boucher on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 19, 2015.[2]

After crediting claimant with at least ten years of underground coal mine employment,[3] Decision and Order at 7, the administrative law judge found the new evidence did not establish total disability. 20 C.F.R. §718.204(b)(2). She therefore found claimant did not invoke the presumption of total disability due to pneumoconiosis at

[1] Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Jenkins is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant filed an earlier claim for benefits. Director's Exhibit 1. The district director denied that claim on August 17, 1993. *Id.* Because the record in the prior claim was sent to the Federal Records Center and eventually destroyed, it is not included in the record of this claim. Given the unavailability of the evidence from the prior claim, the administrative law judge examined whether the new evidence established all the elements of entitlement rather than the unmet element or elements from the prior claim. Decision and Order at 5.

[3] The record reflects that claimant's last coal mine employment occurred in Kentucky. Hearing Transcript at 15. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Section 411(c)(4) of the Act[4] or entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, claimant generally challenges the denial. Employer responds in support. In its cross-appeal, employer argues that its due process rights were violated because it did not have access to the record from claimant's initial claim. It therefore contends any liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that its due process rights were violated.

When a claimant files an appeal without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order Denying Benefits. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered four pulmonary function studies. Dr. Ajjarapu conducted a February 17, 2016 pulmonary function study as part of the Department of Labor (DOL) sponsored pulmonary evaluation. Director's Exhibit 17. The

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

study produced qualifying values[5] before and after the administration of a bronchodilator. *Id.* Although the report indicates that claimant provided good cooperation, it also states he was repeatedly instructed to "blast out faster" during portions of the study. *Id.* Dr. Ajjarapu characterized claimant's performance as "suboptimal technique wise," but opined that the study results nevertheless met "the reproducibility criteria." *Id*. Dr. Gaziano validated the study by checking a box indicating "vents are acceptable." Director's Exhibit 16.

Conversely, Drs. Vuskovich and Rosenberg invalidated the study. Dr. Vuskovich opined claimant's "deep breath efforts were excessively variable" and his "[n]ot taking an initial deepest breath possible artificially lowered his FVC and FEV1 results." Employer's Exhibit 2 at 5. He further noted claimant's "respiratory rate and tidal volume were not sufficient to generate valid MVV results." *Id.* Dr. Rosenberg opined the study results were not valid "based on the shape of the flow-volume and volume-time curves." Director's Exhibit 21 at 40. He also noted "incomplete efforts." *Id.*

The administrative law judge found Dr. Ajjarapu's review of the February 17, 2016 pulmonary function study equivocal, noting that while she opined that the test met the reproducibility criteria, she also characterized claimant's technique as "suboptimal." Decision and Order at 10; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also permissibly accorded Dr. Gaziano's validation less weight because he merely checked a box indicating that the study was valid without offering any explanation for his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10.

The administrative law judge found the opinions of Drs. Vuskovich and Rosenberg "corroborate one another" and credited their opinions over "Dr. Ajjarapu's equivocal observations and Dr. Gaziano's unreasoned conclusion" to find the February 17, 2016 pulmonary function study invalid. *Id.* at 10-11. Substantial evidence supports the administrative law judge's finding.

As a part of his affirmative evidence, claimant submitted the results of two qualifying pulmonary function studies conducted on October 19, 2015 and August 18, 2016. Decision and Order at 11; Director's Exhibit 19. The administrative law judge noted

[5] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

that during each of these studies, claimant was again repeatedly instructed to "blast out faster." *Id.* Although Dr. Ajjarapu reviewed and validated both studies, the administrative law judge noted she did not provide any supporting reasons. *Id.* The administrative law judge further noted Drs. Vuskovich and Rosenberg invalidated both studies based on claimant's insufficient effort.[6] Decision and Order at 11; Director's Exhibit 21; Employer's Exhibit 2.

The administrative law judge found the invalidations of Drs. Vuskovich and Rosenberg were "corroborative," and supported by the fact that claimant was repeatedly instructed to "blast out faster" during the studies. Decision and Order at 11. She therefore found the October 19, 2015 and August 18, 2016 pulmonary function studies invalid. *Id.* Substantial evidence supports the administrative law judge's findings.

Finally, the administrative law judge considered the most recent pulmonary function study conducted on December 21, 2016, which produced qualifying values before the administration of a bronchodilator, but non-qualifying values thereafter. Director's Exhibit 21. Dr. Dahhan, who conducted the study, opined it was "invalid due to poor effort." Director's Exhibit 20 at 3. He noted "premature termination of airflow, excessive hesitation, and [a] lack of plateau formation." *Id.* Drs. Vuskovich and Rosenberg also invalidated the study due to insufficient effort. Director's Exhibit 21 at 40; Employer's Exhibit 2 at 7. Based on the "unanimous" opinions of the physicians who reviewed the test results, the administrative law judge found the December 21, 2016 pulmonary function study invalid. Decision and Order at 11. As substantial evidence supports the administrative law judge's determination that all of the pulmonary function studies are invalid, we affirm her finding they do not establish total disability. 20 C.F.R. §718.204(b)(2)(i).

[6] Dr. Vuskovich opined that claimant "did not put forth the effort require to generate valid . . . results" during the October 19, 2015 study. Dr. Rosenberg similarly opined that claimant's efforts during the October 19, 2015 pulmonary function study "were not maximal based on the shape of the flow-volume curves." Director's Exhibit 21 at 40. Dr. Vuskovich also opined that claimant also did not put forth the effort required to generate valid results during the August 18, 2016 pulmonary function study. Employer's Exhibit 2 at 3. He opined that claimant's "deep breath efforts were excessively variable" and claimant "prematurely terminated his expiratory efforts which artificially lowered his FVC result." *Id.* Dr. Vuskovich opined that claimant "did not generate one acceptable tracing." *Id.* Dr. Rosenberg similarly opined that claimant's efforts during the August 18, 2016 pulmonary function study "were not maximal based on the shape of the flow-volume curves." Director's Exhibit 21 at 40.

The administrative law judge accurately found the record contains no qualifying arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8 n.5, 12. We therefore affirm claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

The administrative law judge considered the medical opinions of Drs. Ajjarapu, Vuskovich, and Rosenberg. Based upon claimant's qualifying February 17, 2016 pulmonary function study, Dr. Ajjarapu opined that claimant is totally disabled. Director's Exhibit 17. The administrative law judge permissibly discounted Dr. Ajjarapu's opinion because it was based upon the invalid February 17, 2016 pulmonary function study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Drs. Vuskovich and Rosenberg, the only other physicians to address the extent of claimant's pulmonary impairment, opined that claimant is not totally disabled from a pulmonary impairment and thus do not assist claimant in establishing total disability. Director's Exhibit 21; Employer's Exhibit 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

For all of the reasons set forth above, substantial evidence in the record supports the administrative law judge's ruling that claimant failed to establish total disability. Decision and Order at 17. We affirm that ruling.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). When a test is not administered, is not in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c); see also 20 C.F.R. §725.456(e) (applying similar requirement to administrative law judge). The regulation at 20 C.F.R. §725.406 specifically provides that where deficiencies in a report of a pulmonary function test are "the result of lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

Claimant's February 17, 2016 pulmonary function study was conducted as part of Dr. Ajjarapu's DOL-sponsored pulmonary evaluation. As discussed above, the administrative law judge credited the opinions that the study was invalid due to insufficient

effort. Therefore, the district director must schedule claimant for further examination and testing. 20 C.F.R. §725.406(c).

Consequently, based upon the current evidentiary record, we affirm the administrative law judge's ruling that claimant failed to establish total disability; however, we vacate the denial of benefits and remand this case to the district director to "schedule [claimant] for further examination and testing." 20 C.F.R. §725.406(c); *Hodges*, 18 BLR at 1-93.

Length of Coal Mine Employment

On his application for benefits, claimant alleged fifteen years of coal mine employment. Director's Exhibits 3-5. In a Proposed Decision and Order dated March 14, 2017, the district director found claimant's Social Security Earnings Record supported a finding of ten years of coal mine employment. Director's Exhibit 57. There is no indication the district director considered any evidence other than claimant's Social Security Earnings Record. At the April 4, 2018 hearing, employer's counsel noted employer was willing to stipulate to "those [ten] years" credited by the district director. Hearing Transcript at 11. Employer also stipulated that these ten years of coal mine employment took place underground. *Id.* at 31. Claimant's lay representative agreed the ten years were underground coal mine employment. *Id.*

The administrative law judge noted that the parties "stipulated that [c]laimant engaged in ten years of underground coal mine employment." Decision and Order at 7. She therefore found that claimant "worked underground as a coal miner for *at least* ten years." *Id.* (emphasis added). The administrative law judge, however, did not address whether the evidence established additional coal mine employment. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019).

Claimant alleged fifteen years of coal mine employment on his application for benefits. Director's Exhibit 3. On his "Employment History" and "Description of Coal Mine Work" forms, claimant listed over fifteen years of coal mine employment (from June of 1968 to February of 1985, and from March of 1988 to June of 1995). He also testified at the hearing to employment as a truck driver that could constitute coal mine employment.[7]

[7] In addition to ten years of coal mine employment with employer, claimant's Employment History and Description of Coal Mine Work forms list employment with Brown's Creek Coal ("coal mining/transportation"), Mary Helen Coal ("coal mining"), Jock Coal ("coal mining"), and Gambrel Trucking ("transportation in coal mining"). Director's Exhibits 4, 5. At the hearing, when asked if all of his coal mine employment was underground, he responded, "I've got some where I drove the truck for Kurt Junior

Director's Exhibits 4, 5. Claimant's Social Security Earnings Record also includes employment with potential coal mine operators other than employer.[8]

On remand, if the administrative law judge finds the evidence establishes total disability, she must address whether claimant is entitled to credit for additional coal mine employment. If he establishes at least fifteen years of underground or substantially similar surface coal mine employment, he is entitled to the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). If claimant invokes the presumption, the burden of proof shifts to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). However, if the administrative law judge finds the evidence does not establish total disability on remand, she must deny benefits as claimant will not have established a required element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Due Process

In its cross-appeal, employer contends that the destruction of the prior claim file violated its right to due process. Employer's Brief at 13-18. Section 725.309(c)(2) provides that "[a]ny evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim." Citing *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000), employer contends that DOL's failure to preserve the record from the prior claim mandates that any liability for benefits transfer to the Trust Fund. Employer's Brief at 14. We disagree.

In the absence of deliberate misconduct, "the mere failure to preserve evidence – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009). To be successful in such a claim, employer therefore must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Holdman*, 202 F.3d at 883-84; *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

Hoskins" for four years. *Id.* at 15, 22-23. He further testified he drove a truck for "six, seven years" for "Glenn Gamble" who paid him in cash. *Id.* at 23-24.

[8] Claimant's Social Security Earnings Record lists employment with Coal Resources Corporation in 1973 and with V&W Coal Company in 1984. Director's Exhibits 12, 13.

Employer's reliance upon *Holdman*, in which the Director ignored repeated instruction from the Board and the administrative law judge to reconstruct a lost file and determine entitlement, is misplaced. The court held it would violate fundamental fairness under those circumstances to require the operator to defend a fourteen-year-old open claim without the hearing transcript and medical evidence. *See Holdman*, 202 F.3d at 883-84.

As the administrative law judge found, the facts of this case distinguish *Holdman.* She noted the *Holdman* case file had been lost while the award of benefits was pending reconsideration before the administrative law judge. Decision and Order at 4. Conversely, here the prior claim had been administratively closed nearly twenty-two years before claimant filed his current claim. *Id.* Moreover, notwithstanding the destruction of the prior claim record, employer had a full and fair opportunity to defend this claim, develop and submit evidence, and appear and participate in the hearing. *Id.* After noting that claimant has the burden to establish his entitlement to benefits and employer "had every opportunity to submit rebuttal evidence in accordance with the regulations," the administrative law judge found "the loss of [the evidence from the prior claim] has not stripped [e]mployer of 'a fair opportunity to mount a meaningful defense.'"[9] *Id.*

We agree with the administrative law judge that employer's due process argument is unpersuasive. Employer has failed to demonstrate, or even allege, any specific prejudice resulting from the destruction of the twenty-two-year-old *prior* claim record in this case. Employer was timely notified of the current claim, developed evidence, and participated in every stage of the adjudication. Accordingly, we reject employer's assertion that liability for benefits, if any, should transfer to the Trust Fund.

[9] As the United States Court of Appeals for the Tenth Circuit noted:

> The critical fact in *Holdman* was not the unadorned loss of evidence, but rather the centrality of that evidence to the dispute and the resulting impossibility of fairly assessing the [administrative law judge's] findings without considering the key pieces of evidence on which those findings were actually based.

Energy W. Mining Co. v. Oliver, 555 F.3d 1211, 1221 (10th Cir. 2009).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the district director for further development of the evidence.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge