U.S. Department of Labor

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

BRB No. 20-0070 BLA

DONALD E. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/24/2020
Employer-Respondent Self-Insured	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification and the Ruling on Claimant's Motion for Reconsideration of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

J. Thomas Walker and John R. Jacobs (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb, V and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

Kathleen H. Kim (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Tracy A. Daly's Decision and Order Denying Benefits on Modification and Ruling on Claimant's Motion for Reconsideration (2018-BLA-05656) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification of his subsequent claim filed on December 12, 2014.[1]

In her June 21, 2017 Decision and Order, Administrative Law Judge Adele Higgins Odegard found the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2). She therefore found Claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and denied benefits. Claimant requested modification of that denial on October 6, 2017. Director's Exhibit 43.

In his August 21, 2019 Decision and Order that is the subject of this appeal, Administrative Law Judge Daly (the administrative law judge) credited Claimant with more than 26 years of qualifying coal mine employment based on the parties' stipulation and found Claimant did not establish a totally disabling pulmonary or respiratory impairment. He therefore found Claimant did not establish a basis for modification at 20 C.F.R. §725.310 and denied benefits. Further, the administrative law judge denied Claimant's motion for reconsideration.

On appeal, Claimant challenges the administrative law judge's finding that he failed to establish a totally disabling pulmonary or respiratory impairment necessary to invoke the Section 411(c)(4) presumption. Claimant also asserts the administrative law judge should have granted his request for modification. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with Claimant that the administrative law judge erred in weighing the evidence as a whole in finding he did not establish total disability. The Director therefore urges the Benefits Review Board to vacate the denial of benefits.[2]

[1] Claimant filed three claims for benefits. On April 9, 2013, the district director denied his most recent prior claim, filed on September 4, 2012, because he did not establish total respiratory disability. Director's Exhibit 2. Claimant filed a subsequent claim on December 12, 2014. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established more than twenty-six years of qualifying coal mine employment. *See*

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 (1965).

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a); *see* 33 U.S.C. §922; *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). "[A]ny mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment or surface coal mine employment in substantially similar dust conditions and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. 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.[4] *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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198

Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 8.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 8.

[4] Claimant worked in underground coal mining as an electrician. Director's Exhibit 46. The administrative law judge did not make a finding as to the exertional requirements of this job.

(1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge found the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 13, 17. He found the arterial blood gas studies and medical opinions do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii), (iv); Decision and Order on Modification at 13-14, 17-18, 19. Weighing the evidence as a whole, the administrative law judge found the evidence does not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order on Modification at 19-20; Order on Recon. at 2

Claimant and the Director contend the administrative law judge erred in finding the non-qualifying arterial blood gas studies and Dr. Goldstein's December 14, 2017 opinion constitute contrary probative evidence to the most recent qualifying pulmonary function studies. Claimant's Brief at 6-8; Director's Brief at 2-3.

The administrative law judge considered five previously submitted pulmonary function studies dated March 12, 2013, February 9, 2015, April 9, 2015, November 19, 2015, and August 18, 2016, and one new pulmonary function study dated December 14, 2017.[5] Decision and Order on Modification at 12; Director's Exhibits 11, 37, 39, 46. He found the March 12, 2013, April 9, 2015, and August 18, 2016 pulmonary function studies Dr. Ford conducted invalid,[6] but found the remaining three studies valid.[7] Decision and

[5] The administrative law judge permissibly resolved the height discrepancy recorded on the pulmonary function studies, finding Claimant's average height is seventy-one and three-quarter inches, which he rounded up to seventy-two inches because the table at 20 C.F.R. Part 718, Appendix B, does not contain a specific measurement for seventy-one and three-quarter inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order on Modification at 6.

[6] In the original decision in this case, Judge Odegard found these studies invalid. Director's Exhibit 42 at 8-9.

[7] Dr. Goldstein addressed the validity of the December 14, 2017 qualifying post-bronchodilator study. Director's Exhibit 46. He noted while there was no improvement following bronchodilators, Claimant was not able to meet the American Thoracic Society standards. *Id*. Finding Dr. Goldstein did not adequately explain why he invalidated the December 14, 2017 qualifying post-bronchodilator study, the administrative law judge

Order on Modification at 13. The February 9, 2015 study Dr. O'Reilly conducted produced non-qualifying results before and after the administration of a bronchodilator.[8] Director's Exhibit 11. The November 19, 2015 study Dr. Goldstein conducted produced qualifying pre-bronchodilator results, but included no post-bronchodilator results. Director's Exhibit 39. The December 14, 2017 study, also conducted by Dr. Goldstein, produced qualifying results before and after the administration of a bronchodilator. Director's Exhibit 46. Because the two most recent, valid pulmonary function studies produced qualifying results, the administrative law judge found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Modification at 12, 13.

The administrative law judge found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) as the two arterial blood gas studies dated February 9, 2015 and December 14, 2017 produced non-qualifying results. Director's Exhibits 11, 46.

determined his opinion is entitled to no weight on that issue. Decision and Order on Modification at 12, n.12; Director's Exhibit 46 at 4.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge next addressed the previously submitted opinions of Drs. O'Reilly,[9] Goldstein,[10] and Fino,[11] and summarily adopted Judge Odegard's determination these opinions "do not support a finding that Claimant is totally disabled."[12] Decision and Order on Modification at 18. He also considered Dr. Goldstein's newly submitted December 14, 2017 opinion.[13] While he found Dr. Goldstein's opinion probative as to an absence of a disabling pulmonary impairment based on the blood gas study evidence, he found this opinion not well-reasoned as to an absence of a disabling pulmonary impairment because Dr. Goldstein failed to address the qualifying pre-bronchodilator pulmonary function study he administered. Decision and Order on

[9] Dr. O'Reilly conducted diagnostic testing on February 9, 2015, and evaluated Claimant on April 21, 2015. He opined Claimant has a moderate restrictive impairment and is not completely impaired from performing his last coal mine employment. Director's Exhibit 11 at 4. At his October 24, 2016 deposition, he reviewed the August 18, 2016 pulmonary function study Dr. Ford conducted and opined Claimant would not be able to perform his usual work as an electrician. Claimant's Exhibit 5 at 18-19.

[10] Dr. Goldstein evaluated Claimant on November 19, 2015. He diagnosed a "restrictive pulmonary defect probably related to his body stature" and "reversible airways disease consistent with 'asthma'." Employer's Exhibit 1 at 4. Without addressing Claimant's qualifying pre-bronchodilator pulmonary function study results, Dr. Goldstein opined Claimant is able to perform his usual work as an electrician and "does not have any findings that suggest he is disabled, especially from a respiratory standpoint." *Id*.

[11] Dr. Fino noted the remaining valid studies were above disability levels. He opined Claimant is not disabled from any respiratory condition and could return to his last coal mine employment from a respiratory standpoint. Employer's Exhibit 4 at 3, 6.

[12] Judge Odegard found Dr. O'Reilly's original opinion well-reasoned and documented, but found his supplemental opinion not well-reasoned because it was predicated on an invalid pulmonary function study. Director's Exhibit 46 at 15. As Drs. Goldstein and Fino opined Claimant is not totally disabled, and as their opinions were consistent with the valid, objective studies of record, Judge Odegard found the preponderance of medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 16. As Claimant did not establish total disability under any subsection at Section 718.204(b)(2), Judge Odegard did not assess the probative value of these medical opinions against evidence supportive of total pulmonary disability.

[13] Dr. Goldstein evaluated Claimant on December 14, 2017. He opined Claimant "could go back to do his work as an electrician." Director's Exhibit 46 at 5.

Modification at 19. As no physician opined Claimant has a totally disabling pulmonary or respiratory impairment, the administrative law judge found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

When weighing all relevant evidence together, the administrative law judge acknowledged the pulmonary function study evidence supports a finding of total disability, but determined none of the arterial the blood gas studies produced qualifying results. He further determined the preponderant weight of the medical opinion evidence does not support a finding of total disability. Decision and Order on Modification at 19-20. Thus he found the preponderance of the overall evidence does not establish total disability. 20 C.F.R. §718.204(b)(2).

We agree with Claimant and the Director that the administrative law judge erred in crediting the blood gas studies and medical opinions over the qualifying pulmonary function studies. Because they measure different types of impairment, non-qualifying blood gas studies do not call into question valid and qualifying pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Thus, the blood gas study evidence cannot be "contrary probative evidence" that defeats a finding of total disability based on the pulmonary function study evidence.

Further, the administrative law judge did not adequately explain how Dr. Goldstein's opinion constitutes contrary probative evidence that defeats a finding of total disability based on the pulmonary function study evidence. Dr. Goldstein opined Claimant's qualifying pre-bronchodilator pulmonary function study demonstrated a mixed restrictive and obstructive defect. Director's Exhibit 46. He then stated Claimant's "blood gases improved normally and this would argue against any pulmonary dysfunction." *Id*. As the administrative law judge found Dr. Goldstein's opinion probative only as to an absence of total disability based on the blood gas study evidence, it is unclear how his opinion could defeat a finding of total disability based on the pulmonary function study evidence. *See Tussey*, 982 F.2d at 1040-41; *Sheranko*, 6 BLR at 1-798.

Moreover, the administrative law judge did not adequately explain the basis for his finding that the previously submitted medical opinions of Drs. Goldstein and Fino are well-reasoned as to the absence of a disabling pulmonary impairment. The administrative law judge adopted Judge Odegard's finding that these opinions do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Judge Odegard noted Drs. Goldstein and Fino relied on the non-qualifying pulmonary function and arterial blood gas studies in existence

when they rendered their opinions.[14] Director's Exhibit 42 at 16. She credited their opinions as supported by, and consistent with, the reliable objective medical evidence. *Id*. On modification, however, the administrative law judge found the most recent pulmonary function studies establish total disability. Drs. Goldstein and Fino did not address the December 14, 2017 qualifying pulmonary function study. As it is unclear why the administrative law judge credited Dr. Goldstein's and Dr. Fino's medical opinions in weighing the evidence as a whole, his decision fails to comply with the Administrative Procedure Act (APA).[15] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). We therefore vacate his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and remand the case for further consideration.

On remand, the administrative law judge must assess the probative value of the contrary medical opinions and then weigh any probative medical opinions against the qualifying pulmonary function study evidence. *Defore*, 12 BLR at 1-28-29. In so doing, he must make a finding as to the exertional requirements of Claimant's usual coal mine work and assess whether the medical opinions are well-reasoned and documented. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."). Further, the administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. In light of our decision to vacate the administrative law judge's total disability

[14] Judge Odegard found Claimant's average measured height was seventy-one and seven-tenths inches. She used this height, rather than the height of seventy-two inches the administrative law judge used on modification, to assess whether Claimant's pulmonary function studies produced qualifying values. Director's Exhibit 42 at 8. Consequently, Judge Odegard found Dr. Goldstein's November 19, 2015 pre-bronchodilator study produced non-qualifying results. *Id*. As the remaining valid studies produced non-qualifying results, she found the pulmonary function studies did not support total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 9.

[15] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

finding, we also vacate his finding that Claimant did not establish a basis for modification of the prior denial.[16] 20 C.F.R. §725.310.

If the administrative law judge determines Claimant is totally disabled, he will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether Employer rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If the administrative law judge finds Claimant establishes entitlement to benefits on remand, he must address whether he is granting modification based on a change in conditions or a mistake in a determination of fact, and therefore determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(b). If the administrative law judge finds the evidence does not establish total disability, he must deny benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, we vacate the administrative law judge's Decision and Order Denying Benefits on Modification and Ruling on Claimant's Motion for Reconsideration. We remand the case to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[16] Although the administrative law judge found Claimant did not establish a basis for modification, he nonetheless determined granting modification would render justice under the Act. Decision and Order on Modification at 6.