U.S. Department of Labor

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

BRB No. 19-0490 BLA

WILLIAM E. STUMP Claimant-Respondent v. PITT FAIR COAL, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-05525) rendered pursuant to the Black Lung Benefits Act, 30 U.S.C. §901-944 (2018) (Act). Claimant filed his subsequent claim on January 11, 2016.[1]

The administrative law judge found Claimant established twenty-five years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309. The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief.

The Benefits Review 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

[1] Claimant filed an initial claim on November 15, 2010. Director's Exhibit 1. The district director denied the claim for failure to establish total disability. *Id.*

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he 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).

evidence, and in accordance with applicable law.[4] 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).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and 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.[5] 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). Employer challenges the administrative law judge's weighing of the blood gas studies and medical opinions.

The administrative law judge considered three blood gas studies. Decision and Order at 12. Dr. Habre's March 24, 2016 study had qualifying values at rest and no exercise test was performed. Director's Exhibit 15. Dr. Zaldivar's March 24, 2017 study had non-qualifying[6] values at rest and with exercise. Director's Exhibit 29. Dr. Cordasco's November 2, 2018 study had qualifying values during two separate resting tests and no exercise test was performed. Claimant's Exhibit 1. The administrative law judge found because "there are three tests that are qualifying and two that are non-qualifying, and the fact that the most recent test is qualifying, the preponderance of the evidence supports a finding of total disability . . . ." Decision and Order at 12.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 11-12.

[6] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Employer asserts the administrative law judge erred in not addressing Dr. Zaldivar's opinion that Dr. Habre's resting study is unreliable and that Dr. Cordasco's two resting studies are invalid.[7] We agree.

In evaluating blood gas study evidence, an administrative law judge must consider whether a study substantially conforms to the quality standards set forth at 20 C.F.R. §718.105 and Part 718, Appendix C. *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"). The quality standards specifically state that a blood gas study "must not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. Part 718, Appendix C.

Dr. Zaldivar reviewed Dr. Habre's blood gas study and examination report. Director's Exhibit 29. He asserted Claimant's improvement between Dr. Habre's March 24, 2016 blood gas study and his own testing on March 24, 2017 shows Claimant was suffering from an acute respiratory illness at the time of Dr. Habre's testing. *Id*. He noted that Dr. Habre heard wheezes in Claimant's lungs and that Claimant "was on steroids in the form of methylprednisolone taper presumably for breathing problems, although this was not specified." *Id*. Dr. Zaldivar explained prednisone taper "normally is given for individuals who have bronchospasm" and "prednisone reduces the inflammatory response in the lungs." *Id*. He stated "[i]t appears from these two pieces of information that [Claimant] was actively being treated for the bronchospasm, and the blood gases and breathing abnormalities reflected [Claimant's] acute illness which was an exacerbation of [chronic obstructive pulmonary disease]." *Id*. The administrative law judge erred in failing to address Employer's contention that Dr. Zaldivar's opinion establishes Dr. Habre's qualifying study was performed when Claimant was suffering an acute respiratory illness. Employer's Post-Hearing Brief at 10.

With regard to Dr. Cordasco's study, Dr. Zaldivar stated that "over the last several years, I have become aware that they were not icing the blood at Norton Community

[7] Employer also contends Dr. Zaldivar's non-qualifying blood gas studies are consistent with Dr. Rasmussen's February 1, 2010 non-qualifying resting and exercise blood gas studies obtained in Claimant's prior claim. Employer's Brief at 9, *citing* Director's Exhibit 1. The administrative law judge permissibly found, however, that Dr. Rasmussen's blood gas studies are "minimally probative of Claimant's current condition because of [their] age." Decision and Order at 21; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Hospital after collecting it." Employer's Exhibit 4. Citing medical literature, Dr. Zaldivar explained that "the blood should be kept in an icy slurry from the moment it is collected until the moment it is analyzed in order to minimize the consumption of oxygen by platelets and white cells." *Id*. He contends that if this standard procedure is not followed, the test results are typically lower. *Id*. The administrative law judge erred in failing to address Employer's contention that Dr. Zaldivar's opinion established Dr. Cordasco's study is technically invalid. Employer's Post-Hearing Brief at 11.

Because the administrative law judge did not address Dr. Zalidvar's opinion in weighing the resting blood gas studies[8] or adequately explain how she resolved the overall conflict in the blood gas study evidence, her Decision and Order does not satisfy the Administrative Procedure Act (APA).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to address relevant evidence requires remand).

In weighing the medical opinion evidence, the administrative law judge credited Dr. Habre's opinion that Claimant is totally disabled and rejected Dr. Zaldivar's contrary opinion.[10] We see no error in the administrative law judge's finding that Dr. Zaldivar's

[8] Our dissenting colleague asserts Dr. Zaldivar's "speculative" criticisms of Drs. Habre's and Cordasco's qualifying blood gas studies are deficient on their face and therefore remand is not warranted. However, the finding of facts and the determination of the credibility of an opinion lie within the province of the administrative law judge, not the Board. We decline to render findings that are within the discretion of the administrative law judge in the first instance. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion).

[9] Employer generally asserts Dr. Zaldivar's non-qualifying exercise study is more probative of Claimant's response to exertion. Employer's Brief at 11. Although the administrative law judge is not required to credit exercise studies over resting studies, she must provide a rationale for why she relies on one study over another. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Vigil v. Director, OWCP*, 8 BLR 1-99, 1-100-01 (1985).

[10] The administrative law judge found Dr. Cordasco's opinion that Claimant is totally disabled inadequately documented and gave it "minimal weight." Decision and Order at 19; Claimant's Exhibit 1.

opinion is not persuasive as she correctly noted Dr. Zaldivar stated Claimant can engage in "all the work that a 74 year old could do," but did not specifically discuss whether Claimant can perform heavy exertional labor as required by his usual coal mine employment. Decision and Order at 19, *quoting* Employer's Exhibit 4; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). However, because the administrative law judge's crediting of Dr. Habre's opinion was influenced by her weighing of the blood gas study evidence, we vacate it. Thus we vacate the administrative law judge's determination that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20. As we vacate the administrative law judge's finding that Claimant established a totally disabling respiratory or pulmonary impairment, we also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309.

On remand, the administrative law judge must reconsider whether Claimant established total disability based on the blood gas study and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(ii), (iv); *see also Rafferty*, 9 BLR at 1-232. She must address Dr. Zaldivar's opinion that the qualifying resting blood gas studies are either unreliable or invalid and explain the weight she accords it. She must then explain with a supporting rationale how she resolves all the conflicts in the blood gas study evidence. Based on her findings with regard to the blood gas study evidence, the administrative law judge must also reconsider whether Dr. Habre's opinion is sufficiently reasoned to establish that Claimant is totally disabled.

If Claimant establishes total disability on remand and invokes the Section 411(c)(4) presumption, the administrative law judge may reinstate the award of benefits.[11] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305, 725.309. If Claimant is unable to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In rendering her findings of fact and credibility determinations, the administrative law judge must comply with the APA.[12]

[11] We affirm, as unchallenged, the administrative law judge's finding that Employer is unable to rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-33.

[12] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this claim for the administrative law judge to consider Dr. Zaldivar's supposed invalidation of the qualifying blood gas studies from March 24, 2016 and November 2, 2018. Because the administrative law judge's decision is supported by substantial evidence, I would affirm the award of benefits.

First, Dr. Zaldivar's criticism of Dr. Habre's qualifying blood gas study from March 24, 2016 is, by his own admission, speculative. According to Dr. Zaldivar, because Dr. Habre heard wheezing in Claimant's lungs and Claimant was being treated with an oral steroid taper, "it appears" his disabling hypoxia reflected on the testing was due to an acute bronchospasm. Director's Exhibit 29. Beyond stating that the steroid, methylprednisolone, was "presumably for breathing problems," Dr. Zaldivar points to nothing in Claimant's medical records to support his conclusion that Claimant was being treated for an active bronchospasm around the time of Dr. Habre's testing. *Id.*; *see*

issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Director's Exhibit 30.[13] In fact, he admits the "purpose [of the steroid taper] was not specified." Director's Exhibit 29. As Dr. Zaldivar's opinion is speculative, it cannot be credited to invalidate Dr. Habre's March 24, 2016 blood gas study. *See U.S. Steel Min. Co. v. Dir., Office of Workers' Comp. Programs*, 187 F.3d 384, 389 (4th Cir. 1999) (speculative opinion is not "reliable, probative, and substantial evidence" on which an administrative law judge can rely).

Second, even accepting Dr. Zaldivar's speculation that Claimant was actively being treated for a bronchospasm, his opinion that the bronchospasm caused Claimant's disabling hypoxia is deficient on its face to establish a breach of the regulatory quality standards. Under Appendix C to 20 C.F.R. Part 718, a blood gas study "must not be performed during or soon after an acute respiratory or cardiac illness," the purpose of which is to ensure the test results are "indicative of the miner's true condition." 62 Fed. Reg. 3338, 3346 (January 22, 1997). Dr. Zaldivar, however, specifically states that Claimant's alleged bronchospasm is, itself, "an exacerbation of [Claimant's chronic obstructive pulmonary disease (COPD)]." Director's Exhibit 29. Thus, notwithstanding Dr. Zaldivar's description of the bronchospasm as an "acute illness," he readily admits its cause, and that of the resulting "blood gases and breathing abnormalities," is Claimant's underlying chronic lung disease. *Id*. Moreover, he acknowledges that Claimant's bronchospasm was not a singular, isolated incident; rather, Claimant has been treated with inhalers for such COPD exacerbations since before 2014. Employer's Exhibit 4 at 6.

Because Dr. Zaldivar describes Claimant's bronchospasms as characteristic of his underlying COPD, his opinion does not establish that Dr. Habre's disabling blood gas study results are anything but "indicative" of Claimant's "true" chronic condition. 65 Fed. Reg. at 3346. Nor does he attempt to explain why a miner who suffers totally disabling exacerbations of his chronic lung disease is nevertheless able to perform his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1).

Finally, Dr. Zaldivar's criticism of Dr. Cordasco's qualifying blood gas study from November 2, 2018, conducted at Norton Community Hospital, is even more speculative than his opinion of Dr. Habre's testing. According to Dr. Zaldivar, the test is not reliable because he "has become aware they were not icing the blood at Norton Community

[13] Claimant's treatment records indicate he was prescribed a Medrol dose pack for a COPD exacerbation the week before January 21, 2015. Director's Exhibit 30 at 68. Dr. Zaldivar did not discuss this particular treatment note. It also predates Dr. Habre's March 24, 2016 blood gas study by fourteen months and therefore does not support Dr. Zaldivar's opinion that Claimant's blood gas study was performed "during or soon after" bronchospasm-related oral steroid treatment.

Hospital after collecting it." Employer's Exhibit 4 at 5. Although not a regulatory requirement, *see* Appendix C to 20 C.F.R. Part 718, he posits that icing blood after collecting it is a "best recommend[ed] practice" because it "reduces oxygen consumption . . . which can cause a factitiously low partial pressure of arterial oxygen (PA02)." *Id*.

What is the basis for Dr. Zaldivar's "awareness" that Norton Community Hospital does not ice its blood? He offers only a vague assertion that "over the years, Norton Community Hospital has never iced the blood." Employer's Exhibit 4 at 5. Does he offer any proof for that vague assertion? Just that "over the year[s]," he has "found the result[s] of the blood gases from Norton Community Hospital to be much lower than those from Charleston Area Medical Center where all the standard procedures are followed[.]" *Id*. Is there any basis for Dr. Zaldivar to specifically conclude Claimant's blood was not iced or that a lack of icing caused artificially low values? He says no, because "we do not know what the platelet count or the white count was in the blood . . . when it was collected, [so] there is not even any reasonable way to try to adjust for such [oxygen] consumption." *Id*.

In other words, Dr. Zaldivar offers a completely unsubstantiated claim that Norton Community Hospital does not ice blood after collecting it and that Claimant's values may be artificially low because of it. In his concluding paragraph, he provides yet another unsubstantiated assessment that "if the blood gases . . . are, in fact, accurate," an acute event, which he does not attempt to identify, "must have happened" to Claimant in the nearly twenty months since Dr. Zaldivar examined him. Employer's Exhibit 4 at 7. "Pure speculation" as that offered by Dr. Zaldivar, however, is not evidence "upon which [the administrative law judge could] base a finding" that Claimant's November 2, 2018 blood gas study is unreliable or invalid. *U.S. Steel Min. Co.*, 187 F.3d at 391. "The only other possibility for such low blood gases," according to Dr. Zaldivar, is that they were caused by deteriorating cardiac function or an inflammatory lung disease that is not visible radiographically. Employer's Exhibit 4 at 7. This statement, however, relates to the *cause* of the impairment reflected on the blood gas study, not whether an impairment exists or whether the study reflects valid and reliable results. *See* 20 C.F.R. §718.204(c).

Because Dr. Zaldivar's criticisms of the qualifying March 24, 2016 and November 2, 2018 blood gas studies do not constitute substantial evidence for invalidating their results, I would affirm the administrative law judge's crediting of those studies and her overall finding that Claimant established total disability based on a preponderance of the blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

I would also affirm her crediting of Dr. Habre's total disability opinion over Dr. Zaldivar's contrary opinion. As she permissibly found, Dr. Habre's opinion is "well-

reasoned and well-documented" due to his reliance on the objective medical evidence, whereas Dr. Zaldivar offered only "vague" statements about Claimant's impairment and did not clearly address whether he could return to his usual coal mine work. Decision and Order at 19; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (administrative law judge has the discretion to determine the persuasiveness of medical opinions); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000).

I, therefore, would affirm the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption, established a change in an applicable condition of entitlement, and is entitled to an award of benefits.[14] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309.

GREG J. BUZZARD
Administrative Appeals Judge

[14] As the majority indicates, Employer does not challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-33.