U.S. Department of Labor

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

BRB No. 19-0510 BLA

LECIL CORDELL Claimant-Petitioner v. JIM WALTER RESOURCES, INCORPORATED - WALTER ENERGY, INCORPORATED/ WARRIOR MET COAL, LLC, self-insured, c/o HEALTHMART CASUALTY CLAIM Employer/Carrier-Respondent 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 Denying Benefits of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

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

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

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

BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Angela F. Donaldson's Decision and Order Denying Benefits (2018-BLA-06094) rendered on a claim filed on February 24, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted the parties' stipulation that Claimant has at least twenty-seven years and three months of qualifying coal mine employment, but she found the evidence does not establish total disability. 20 C.F.R. §718.204(b)(2). She therefore found Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] or establish entitlement to benefits under 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018). Accordingly, the administrative law judge denied benefits.

On appeal, Claimant argues the administrative law judge erred in finding he is not totally disabled. Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefit 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 evidence, and in accordance with applicable law.[2] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement, but failure to establish any of these elements

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that 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.

[2] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because Claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

precludes an award of benefits.[3] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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).

Claimant contends the administrative law judge erred in finding he did not establish total disability based on the medical opinion evidence.[4] Claimant's Brief at 7-9. We agree.

The administrative law judge considered three medical opinions as to whether Claimant is totally disabled from performing his usual coal mine employment.[5] Dr. Barney conducted the Department of Labor (DOL) complete pulmonary evaluation on July 25, 2017. Director's Exhibit 24. He noted Claimant worked as a general laborer from June

[3] We affirm, as unchallenged, the administrative law judge's finding that Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis because there is no evidence he has complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16; s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the pulmonary function and blood gas studies are non-qualifying for total disability and that no evidence establishes Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack*, 6 BLR at 1-711.

[5] As the administrative law judge noted, Claimant testified that his last job while working for Employer was doing inside labor. Decision and Order at 3; Hearing Transcript at 11. He described sweeping the beltline, setting timbers, and "fooling with track." Hearing Transcript at 11. He indicated the timbers weighed between 25 pounds and 100 pounds and when a project required timbers, he would carry between twenty and forty timbers on a daily basis. *Id*. at 12. He also stated that he built brattices out of concrete blocks that weighed about 60 pounds each. *Id*. In addition to his position as a general inside laborer, he had to prepare paperwork for the foreman and fire boss at the end of his shift, which meant he had to walk the beltline which ranged from one to three miles. *Id*. at 13.

1988 to February 2000. *Id*. He indicated that the pulmonary function study was normal but the blood gas study showed Claimant has mild hypoxemia with exercise. *Id*. He opined that "[d]ue to his level of dyspnea and arterial hypoxemia [Claimant] would not be able to resume his work in coal mining as a general inside laborer, given the degree of physical stamina required for this work." Director's Exhibit 31.

Dr. Goldstein examined Claimant at Employer's request on October 5, 2017, and obtained a pulmonary function test and blood gas study. Director's Exhibit 27. He opined Claimant's pulmonary function test showed a restrictive impairment and the blood gas study showed hypoxemia at rest and with exercise. *Id*. He stated Claimant "could probably not do the work of a general inside laborer." *Id*.

Dr. Zaldivar prepared a report on December 10, 2018, at Employer's request. Employer's Exhibit 1.[6] He reviewed the examination findings of Drs. Barney and Goldstein. *Id*. He stated "the records [Employer] sent to me shows [sic] that the breathing tests revealed a FEVl above 2 liters, which certainly allowed for sufficient ventilation for heavy manual labor if needed." *Id*. at 3. He described the blood gas studies as "not disabling" and explained "the blood gases that were measured as normal by Dr. Goldstein after exercise indicate that there is not any damage to the oxygen exchange in units in the lungs." *Id*. Dr. Zaldivar concluded that while "the ventilatory studies are abnormal, they are not disabling" and thus "[f]rom the pulmonary standpoint, Mr. Cordell is capable of performing even heavy labor." *Id*.

The administrative law judge rejected Drs. Barney's and Goldstein's opinions as not well-reasoned and assigned controlling weight to Dr. Zaldivar's opinion.[7] Decision and Order at 18-20. She found Dr. Barney's opinion "contradictory to the underlying objective medical data." *Id*. at 18. She stated he was "clear that Claimant's respiratory or pulmonary impairment was simple pneumoconiosis based on [his] x-ray and arterial blood gas studies

[6] Dr. Zaldivar also noted he previously examined Claimant on September 28, 2016. Employer's Exhibit 1. There is no indication Claimant filed a prior claim for federal black lung benefits, so it is unclear why or whether Dr. Zaldivar previously examined Claimant, and the results of such examination are not in the record.

[7] Although Claimant generally asserts Dr. Goldstein's opinion supports a finding he is totally disabled, he does not identify any specific error in the administrative law judge's determination that Dr. Goldstein's opinion is "indecisive" and not adequately reasoned. Decision and Order at 19; *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

and that this impairment alone rendered [him] totally disabled, although he also vaguely described Claimant's pneumoconiosis is only a 'moderate contributor' to his disability." *Id*. at 18-19. She noted he "repeatedly relied" on the blood gas results but "failed to provide an explanation why [they] were abnormal and show[ed] exercise arterial hypoxemia 'on more than one occasion.'" *Id*. at 19, *quoting* Director's Exhibit 31. She found Dr. Barney "failed to provide an explanation of how [Claimant's] exertional arterial hypoxemia contributed to [his] pneumoconiosis and, in turn to Claimant's alleged total disability, despite the fact that the arterial blood gas results were not qualifying." *Id*.

Contrary to the administrative law judge's analysis, a physician may conclude a miner is totally disabled even if the objective studies are non-qualifying, if the studies nonetheless demonstrate sufficient impairment to preclude the miner's usual coal mine work. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jim Walters Res., Inc. v. Allen*, 995 F.2d 1027, 1029 (11th Cir. 1993); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Furthermore, the administrative law judge's finding that Dr. Barney did not explain how hypoxemia contributed to Claimant's pneumoconiosis or his disability conflates the elements of entitlement. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present. The etiology of the impairment is addressed at 20 C.F.R. §718.204(c) or in consideration of whether the Section 411(c)(4) presumption can be rebutted, 20 C.F.R. §718.305.

Additionally, it is unclear whether the administrative law judge understood that Dr. Barney's reference to Claimant having hypoxemia "on more than one occasion" was made in his supplemental report after he reviewed Dr. Goldstein's blood gas study at DOL's request. Director's Exhibit 31. Because the administrative law judge failed to adequately explain why she found Dr. Barney's opinion not well-reasoned, we vacate her determination. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165.

Claimant also asserts "Dr. Zaldivar's opinions regarding disability are clearly tainted and based upon objective medical evidence that simply does not exist in this case." Claimant's Brief at 9. We agree, in part.

Dr. Zaldivar reviewed Dr. Barney's May 8, 2017 blood gas study and suggested that the values for the resting and exercise tests may have been "switched." Employer's Exhibit 1. However, he incorrectly stated the PO2 for the exercise test was 78 when it was actually recorded as 70.8. Director's Exhibit 24 at 18; Employer's Exhibit 1. Similarly, in considering Dr. Goldstein's blood gas study, Dr. Zaldivar described Claimant as having a pH of 7.35, PCO2 of 35, and PO2 of 80 with exercise, which he considered to be normal. Employer's Exhibit 1. However, Dr. Zaldivar relied on "Reference Ranges" listed on the

exercise test form rather than the actual values recorded for the pH, PCO2, and PO2.[8] Director's Exhibit 27 at 49. Claimant's actual values for the exercise test showed he had a pH of 7.382, PCO2 of 43.7, and PO2 72. *Id*. Because the administrative law judge did not address whether Dr. Zaldivar's reliance on inaccurate test values undermines the credibility of his opinion that Claimant is not totally disabled, we vacate her finding that Dr. Zaldivar's opinion is well-reasoned and documented.[9] *See Wojtowicz*, 12 BLR at 1-165.

As the administrative law judge committed errors which affected her weighing of the conflicting medical opinions of Drs. Barney and Zaldivar, we vacate her determination that Claimant did not establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Jones*, 386 F.3d at 992; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 20. We therefore vacate her finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

On remand, the administrative law judge must reconsider the medical opinions on total disability taking into consideration the exertional requirements of Claimant's usual coal mine employment. She must specifically address whether the rationales and underlying documentation Drs. Barney and Zaldivar provide are sufficient to support their conclusions. *See* 20 C.F.R. §718.204(b)(2)(iv); *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460. The administrative law judge must also consider whether Dr. Zaldivar relied on evidence that was not of record in rendering his opinion on total disability. *See Harris v.*

[8] Dr. Zaldivar described accurate values for the resting test. Director's Exhibit 27 at 49.

[9] Our dissenting colleague would not entertain this argument, suggesting Claimant waived his right to challenge the administrative law judge's endorsement of the clear factual errors contained in Dr. Zaldivar's report by not raising the precise inaccuracies in his post-hearing brief. We disagree. Waiver is a flexible rule that is "prudential and not jurisdictional." *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999). Although the Board generally will not consider issues on appeal not raised below, it has not applied the doctrine with the specificity required by our colleague. Claimant's post-hearing brief generally outlined the opinions of the physicians and urged the administrative law judge to credit Drs. Barney and Goldstein over Dr. Zaldivar. He reiterates that argument on appeal, specifically noting that, in finding Dr. Zaldivar's report well-documented, well-reasoned, and persuasive, the administrative law judge did not recognize it contains demonstrably "incorrect and inflated values." Claimant's Brief at 9. Recognition of the clear errors Claimant identifies on appeal is well within our scope of review under these circumstances. 20 C.F.R. §802.301(a) ("The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based.").

Old Ben Coal Co., 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). If the administrative law judge finds Claimant established total disability based on Dr. Barney's opinion, she must also consider whether Claimant is totally disabled based on a weighing of all the evidence together. *See Rafferty*, 9 BLR at 1-232. The administrative law judge must explain her credibility findings on remand in accordance with the Administrative Procedure Act.[10]

If the administrative law judge finds Claimant is totally disabled and thereby invokes the Section 411(c)(4) presumption, she must consider whether Employer has rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If Claimant is unable to establish total disability, the administrative law judge may reinstate her denial of benefits.

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

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 administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge (concurring and dissenting):

I concur in the majority opinion to vacate the administrative law judge's denial of benefits and remand this case for further consideration of whether Claimant may establish total disability and invoke the Section 411(c)(4) presumption. I also concur the administrative law judge erred in her consideration of Dr. Barney's opinion. However, as Employer correctly points out in its brief, Claimant did not raise any issues with respect to the adequacy of Dr. Zaldivar's opinion below. Employer accurately states, "The specific issues [Claimant] identified in Dr. Zaldivar's report, including an incorrect notation that he had previously evaluated the Claimant, and errors in his summary of the arterial blood gas evidence, were evident at the time of the hearing and briefs." Employer's Brief at 3. Claimant did not raise these issues to the administrative law judge at the hearing or in his post-hearing brief. *Id*. at 4. Claimant argued only in his post-hearing brief that Dr. Zaldivar's opinion was entitled to less weight. *Id*.

An appealing party is limited in the issues it may raise since the Board follows the well-established principle that issues not effectively presented to an administrative law judge, where ample opportunity to do so has been afforded, cannot be raised on appeal.[11]

[11] Exceptions to the general rule are where a pertinent statute has been overlooked below, *Walker v. Manufacturing Co. v. Dickerson, Inc.*, 560 F.2d 1189, 1187 n.2 (9th Cir.

See Taylor v. 3D Coal Co., 3 BLR 1-350 (1981). Claimant offers no explanation in this appeal why he did not raise the issues regarding Dr. Zaldivar's opinion before the administrative law judge and does not assert any exception that would excuse his failure to do so. Consequently the Board should not entertain Claimant's arguments regarding the documentation underlying Dr. Zaldivar's opinion in this appeal. *Id*.

Claimant also wrongly asserts the administrative law judge may not credit Dr. Zaldivar's opinion because it does not corroborate an examining physician's opinion. Claimant's Brief at 10-11. The administrative law judge may credit Dr. Zaldivar's opinion if she determines it is reasoned and documented. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004). In all other respects I concur with the majority holding.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

1977), or where there is a change of law while a case is pending on appeal and the new law might have materially altered the result. *Reilly v. Director, OWCP*, 7 BLR 1-139 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-456 (1983). Where an issue is raised for the first time on appeal, and supports the administrative law judge's Decision and Order, the Board will permit its consideration. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).