U.S. Department of Labor

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

BRB No. 19-0533 BLA

CLAUDE L. McCONNELL Claimant-Petitioner v. NINE MILE MINING, INCORPORATED and NEW HAMPSHIRE INSURANCE / AIG, SELF-INSURED THROUGH PITTSTON COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/23/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Claude L. McConnell, Wise, Virginia.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Jeffrey S. Goldberg (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, without the assistance of counsel,[1] Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2017-BLA-05191) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on January 14, 2014.

The administrative law judge found Claimant established 23.64 years of coal mine employment, including at least 16.64 years in underground coal mines. He determined Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found Claimant did not establish total disability, and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] or establish entitlement to benefits under 20 C.F.R. Part 718. Thus, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, conceding she failed to provide Claimant with a complete pulmonary evaluation and requesting remand to the district director.

As Claimant filed this appeal without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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) (2018); *see* 20 C.F.R. §718.305.

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).

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, 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).

We first affirm the administrative law judge's determination that Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 15. On the issue of total disability, the administrative law judge correctly found the sole blood gas study did not yield qualifying values.[4] Decision and Order at 9, 16-17; Director's Exhibit 14. Thus, we affirm his finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Additionally, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure, we also affirm his finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*. at16.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four pulmonary function studies, dated October 24, 2013; February 4, 2014; March 9, 2015; and July 12, 2017. Decision and Order at 6-9; Director's Exhibits 14, 25, 29; Claimant's Exhibit 3; Employer's Exhibit 4. All four studies produced qualifying pre-bronchodilator

[3] Claimant's most recent coal mine employment occurred in Virginia. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

values,[5] but none of the studies reported qualifying post-bronchodilator values.[6] Decision and Order at 7, 17. The administering technicians on all four studies reported good cooperation/effort and understanding. Decision and Order at 7, 17; Director's Exhibits 14, 25, 29; Claimant's Exhibit 3; Employer's Exhibit 4.

The administrative law judge noted Dr. Ranavaya reviewed Dr. Habre's February 4, 2014 study conducted in conjunction with Claimant's Department of Labor (DOL)-sponsored exam and indicated the study was acceptable. Decision and Order at 7, 17; Director's Exhibits 14, 16. Conversely, Dr. Rosenberg opined the study was invalid because the flow-volume shape and volume-time curves showed non-maximal effort. Decision and Order at 7, 17; Director's Exhibit 34. The district director asked Dr. Ranavaya to review Dr. Rosenberg's observations; he responded that Claimant made the requisite eight efforts and demonstrated acceptable variation between the results of the efforts. Decision and Order at 7-8; Director's Exhibits 16, 33, 35. Thus, Dr. Ranavaya reiterated his prior opinion that the February 4, 2014 study is valid. *Id*. Dr. Rosenberg responded, stating the spirometric curves showed Claimant's efforts were not maximal and complete, and produced invalid spirometric measurements. Decision and Order at 8; Employer's Exhibit 6. Dr. Fino similarly concluded Claimant's efforts on the February 4, 2014 study "clearly showed a lack of forceful exhalation, and this man never had plateauing of the volume-time curves." Decision and Order at 8; Employer's Exhibit 5.

The administrative law judge also considered challenges to the validity of the October 24, 2013, March 9, 2015, and July 12, 2017 pulmonary function studies. Decision and Order at 7-9. Dr. Rosenberg found the October 24, 2013 pulmonary function study

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] All of the pulmonary function studies reported pre- and post-bronchodilator values with the exception of the October 24, 2013 study by Dr. Almatari, which only reported pre-bronchodilator values. *See* Decision and Order at 7; Director's Exhibits 14, 25, 29; Claimant's Exhibit 3; Employer's Exhibit 4. The administrative law judge accurately noted this in his pulmonary function study summary chart but erroneously stated when discussing the pulmonary function studies that "[t]he fourth study by Dr. Desai [dated July 12, 2017] did not report any post-bronchodilator studies." Decision and Order at 7, 17; *see* Director's Exhibit 25; Claimant's Exhibit 3. Any error is harmless, however, as this did not affect the administrative law judge's pulmonary function study evidence determinations. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 17-18.

was invalid due to "incomplete efforts . . . based on the shape of the flow-volume and volume-time curves." Director's Exhibit 34; Employer's Exhibit 6. Concerning the March 19, 2015 study, Dr. Rosenberg stated "an absolute degree of obstruction can not [*sic*] be assessed because of incomplete efforts." Employer's Exhibit 4. Dr. Fino reviewed all of the pulmonary function studies and concluded Claimant did not give "maximum effort" on any of them. Employer's Exhibit 5. He observed they were "invalid because of a premature termination to exhalation and a lack of reproducibility in the expiratory tracings. There was also a lack of an abrupt onset to exhalation." *Id*.

The administrative law judge found that although all of the physicians agreed the variability between the individual studies did not exceed acceptable percentages, Drs. Rosenberg and Fino additionally opined the results were invalid because the tracings showed Claimant did not exert maximal and complete expiratory effort. Decision and Order at 17. The administrative law judge determined "Dr. Ranavaya's failure to address the specific irregularities in the test results cited by Drs. Rosenberg and Fino weakens his validity opinion and effectively leaves the opposing opinions uncontradicted." *Id*. at 18. He therefore determined "the weight of the evidence calls the validity of the pulmonary function test results into question" and concluded Claimant failed to establish total disability based on the pulmonary function study evidence. *Id*.

In evaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found Dr. Ajjarapu, who performed the DOL-sponsored exam, did not provide a reasoned opinion because the sole basis for her total disability diagnosis was the February 4, 2014 pulmonary function study, which he determined was invalid. Decision and Order at 18-19. He determined Dr. Rosenberg's opinion does not support a total disability finding because he observed the lack of valid pulmonary function studies prevented him from assessing this element. *Id*. at 19; Employer's Exhibit 6. The administrative law judge also noted Dr. Fino did not diagnose total disability on the basis that there is not valid, objective evidence to support such a determination. Decision and Order at 19; Employer's Exhibit 5. Consequently, he found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

The Director agrees with the administrative law judge that Dr. Ranavaya did not address Dr. Rosenberg's and Dr. Fino's invalidations of the February 4, 2014 pulmonary function study based on Claimant's less than maximal effort and exhalation as evident on the study tracings. Director's Brief at 2. The Director therefore contends the administrative law judge's finding that the February 4, 2014 study is invalid means she did not provide Claimant with a complete pulmonary evaluation. Employer disagrees, arguing because Dr. Ranavaya "specifically reviewed and countered the opinions of Drs.

Rosenberg and Fino[,]" Claimant received the evaluation he is entitled to under the Act.[7] Employer's Brief at 9-10. We agree with the Director's position.

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*, 18 BLR at 1-89-90. The district director "shall schedule the miner for further examination and testing" when a test is not administered, is not in substantial compliance with the quality standards set forth at 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. 20 C.F.R. §725.406(c). Where deficiencies in a pulmonary function test report 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). Relatedly, "If the administrative law judge concludes that . . . any part [of the complete pulmonary evaluation] fails to comply with the applicable quality standards . . . the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing." 20 C.F.R. §725.456(e).

As the Director asserts, Dr. Ranavaya failed to address Dr. Rosenberg's observation that the February 4, 2014 tracings showed less than maximal effort despite being asked to do so.[8] *See* Director's Brief at 3, attachment (August 5, 2015 letter from claims examiner to Dr. Ranavaya); Director's Exhibits 33, 35. This failure permitted the administrative law

[7] Employer avers: "Dr. Ranavaya ended his analysis when he determined that the variability between the efforts was acceptable and valid. Had it been unacceptable in Dr. Ranavaya's opinion, presumably Dr. Ranavaya would have taken his analysis further by addressing the claimant's effort and exhalation based on the test tracings." Employer's Brief at 10.

[8] The Director notes the claims examiner's August 5, 2015 letter to Dr. Ranavaya was "inadvertently omitted from the record, although two other letters to the doctor asking for a response to the August 2015 letter were included." Director's Brief at 1 n.2; *see* Director's Exhibits 32-33. The Director attached the letter to its brief.

judge to accept Dr. Rosenberg's validity opinion as unrebutted; therefore, the Director did not provide Claimant with the complete pulmonary examination required by law.[9]

Given the Director's concession that the DOL failed to provide Claimant with a complete pulmonary evaluation as the Act requires, we grant the Director's request to remand this case. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129 (2009) (en banc); Director's Brief at 2-3. The district director must offer Claimant a new pulmonary function study, and Employer shall be given an opportunity to have its experts review and comment concerning any additional test that is conducted.

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 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

[9] Therefore, contrary to Employer's assertion, this is not a situation where the DOL-sponsored exam results are outweighed by conflicting evidence. *See* Employer's Brief at 10.