U.S. Department of Labor

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

BRB No. 20-0037 BLA

MARY JUNE BOREN (o/b/o BURL R. BOREN)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 10/21/2020
Employer-Respondent	)	
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 of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2017-BLA-05546) rendered on a Miner's claim filed on

August 18, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited the Miner with twenty years of qualifying surface coal mine employment based on the parties' stipulation and Claimant's testimony, but found the evidence did not establish a totally disabling respiratory or pulmonary impairment. He therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718, and denied benefits.[3]

On appeal, Claimant challenges the administrative law judge's finding she failed to establish the Miner was totally disabled and thus failed to invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response 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 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).

[1] Claimant is the widow of the Miner, who died on January 20, 2018. Employer's Exhibit 11. She is pursuing the Miner's claim on his behalf. *See* Hearing Transcript at 6.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established twenty years of qualifying surface coal mine employment and that there is no evidence of complicated pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the Miner's coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 10.

Total Disability

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented 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.[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). 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 considered Dr. Istanbouly's Department of Labor (DOL)-sponsored medical report, wherein he opined the Miner was totally disabled based on his history of "frequent respiratory infections and frequent attacks of wheezing with chronic bronchitis," respiratory symptoms, and the pulmonary function study values.[6] Decision and Order at 22; *see* Director's Exhibits 15, 24. The administrative law judge discredited Dr. Istanbouly's opinion because he found it was not well-documented or well-reasoned. Decision and Order at 22. Consequently, he found the medical opinion evidence did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues the administrative law judge erred by misstating and mischaracterizing Dr. Istanbouly's opinion. Claimant's Brief at 5-7. We agree.

In his initial report, Dr. Istanbouly opined the Miner's pulmonary function study showed a "moderately severe" obstructive defect and that based on his medical history, symptoms, and "[his] performance [on the pulmonary function study] he is considered totally disabled due to his underlying pulmonary disease despite the fact that he tested *above* [the] disability standard [sic]." Director's Exhibit 15 at 3-4 (emphasis added). He

[5] The administrative law judge found the pulmonary function studies did not establish total disability, and none of the arterial blood gas studies of record are qualifying. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 21. We affirm these findings as unchallenged. *See Skrack*, 6 BLR at 1-711.

[6] The administrative law judge also considered the opinions of Dr. Selby who concluded the Miner was not totally disabled and Dr. Zaldivar who concluded the Miner was totally disabled. Decision and Order at 22-24; *see* Director's Exhibit 22; Employer's Exhibits 3, 5-8.

considered the requirements of each of the Miner's coal mining jobs, and noted that the Miner complained he was unable to do any physical work due to his shortness of breath and that he could only walk half of a block before becoming dyspneic. *Id.* at 3, 6-8.

The DOL subsequently requested Dr. Istanbouly provide a supplemental report in light of Employer's submission of Dr. Selby's opinion that the Miner was not totally disabled and did not have pneumoconiosis. Director's Exhibit 23. The DOL also advised Dr. Istanbouly that the pulmonary function testing he conducted on September 25, 2014 was qualifying for total disability. *Id.* In his supplemental report, Dr. Istanbouly opined the Miner was totally disabled due to chronic obstructive pulmonary disease (COPD), correctly noting that "[h]is FEV1 before exercise as well as FEV1/FVC were *below* the disability limits set by Department of Labor." Director's Exhibit 24 at 3 (emphasis added). He opined the Miner could no longer perform his previous coal mine employment based on his "significant respiratory symptoms and lung disease, which was confirmed on the [pulmonary function study]." *Id.* at 4. He further stated his review of the Miner's treatment records between 2010 and 2014 reflect an "obvious" and "remarkable worsening of [the Miner's] physical capacity" based on his declining FEV1 value before bronchodilation. *Id.*

The administrative law judge gave no weight to Dr. Istanbouly's opinion, stating:

> Dr. Istanbouly did not adequately explain how the objective medical testing supported his conclusion that Miner was totally disabled. It is not clear why he claimed the test results were above disability standards, even though the September 25, 2014 tests produced qualifying results before the administration of bronchodilators. Furthermore, it is not clear if his opinion that Miner is totally disabled is based on his incorrect diagnosis of cor pulmonale . . . .

Decision and Order at 22.

The Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence in the record and set forth his "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." *See* 30 U.S.C. §923(b) (2018); 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the administrative law judge correctly observed Dr. Istanbouly initially misstated in his original report that the Miner's pulmonary function study results were above the disability standards, he failed to address Dr. Istanbouly's acknowledgment in his supplemental report that Miner's pulmonary function study results were below the disability standards and rendered the Miner unable to perform his usual coal mine work.

Decision and Order at 22; Director's Exhibits 15 at 4; 24 at 3. Consequently, he failed to consider all relevant evidence in compliance with the APA. *See* 30 U.S.C. §923(b); *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 22.

Further, Claimant asserts the administrative law judge mischaracterized Dr. Istanbouly's opinion regarding cor pulmonale. Claimant's Brief at 4-5. While she does not contest his finding that the Miner was not totally disabled due to cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii), she does allege error in his finding that Dr. Istanbouly may have relied on such a diagnosis to opine the Miner is totally disabled. *Id*. We agree.

In his supplemental report Dr. Istanbouly considered Dr. Selby's opinion that the Miner's electrocardiogram (EKG) indicated "potentially severe cardiac disease such as coronary artery disease" which was causing Miner's shortness of breath. Employer's Exhibit 3 at 4; Director's Exhibit 24 at 5. Refuting Dr. Selby, Dr. Istanbouly opined that the EKG indicated cor pulmonale caused by the Miner's COPD, and that the "myocardial [single-photon emission computerized tomography] SPECT stress test . . . rules out the possibility of underlying congestive heart failure or coronary artery disease." Director's Exhibit 24 at 5.

As Claimant asserts, Dr. Istanbouly did not opine the Miner was totally disabled due to cor pulmonale with right-sided congestive heart failure reflected on EKG, and in fact opined the Miner did not have congestive heart failure, a prerequisite for a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii). *See Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989) (holding that "a medical opinion diagnosing cor pulmonale but not right[-]sided congestive heart failure is insufficient to demonstrate total disability" under the regulation), *rev'd on other grounds*, 933 F.2d 510 (7th Cir. 1991); Decision and Order at 21-22. Rather, he opined the Miner was disabled based on his medical history of "frequent respiratory infections and frequent attacks of wheezing with chronic bronchitis," respiratory symptoms, and the results of his pulmonary function studies. We thus agree with Claimant's position that the administrative law judge erred in concluding it was "unclear" whether Dr. Istanbouly's total disability diagnosis was based on a misdiagnosis of cor pulmonale. We therefore vacate the administrative law judge's determination that Claimant did not establish total disability and remand the case for reconsideration of Dr. Istanbouly's opinion.

On remand, the administrative law judge must explain the weight he accords the medical opinions on total disability based on his consideration of all the relevant evidence, the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgements, and the sophistication of and bases for their conclusions. *See* 30 U.S.C. §923(b); *Wojtowicz*, 12 BLR at 1-165. If the

administrative law judge finds the medical opinions support a finding of total disability, he must weigh all of the relevant evidence together to determine whether the Miner was totally disabled and Claimant can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). The administrative law judge must explain the bases for his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the administrative law judge must consider whether Employer can rebut it. 20 C.F.R. §718.305(d)(1); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Alternatively, if the administrative law judge finds Claimant did not establish total disability, she will have failed to establish an essential element of entitlement. *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).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge