U.S. Department of Labor

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

BRB No. 19-0370 BLA

ELBERT SIZEMORE, JR. Claimant-Petitioner v. CHRISTINE TRUCKING and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/28/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Elbert Sizemore, Jr., London, Kentucky.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Peter B. Silvain Jr.'s Decision and Order Denying Benefits (2018-BLA-05175), rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a subsequent claim filed on July 30, 2015.[2]

The administrative law judge accepted the parties' stipulation to twenty-four years of surface coal mine employment and initially considered whether Claimant could invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Considering the newly submitted evidence, he determined Claimant did not establish total respiratory or pulmonary disability and, therefore, he could not establish invocation of the presumption or entitlement to benefits.[4] Accordingly, the administrative law judge denied benefits.

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

[2] Claimant filed his initial claim on May 11, 2010, which the district director denied for failure to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the present subsequent claim on July 30, 2015. Director's Exhibit 3.

[3] 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) (2012); 20 C.F.R. §718.305.

[4] Pursuant to 20 C.F.R. §725.309(d), if a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 16. The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any of the elements of entitlement. Director's Exhibit 1. Consequently, Claimant had to submit new evidence

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Neither Employer or its Carrier, nor the Director, Office of Workers' Compensation Programs, have filed a response brief in this appeal.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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 he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[7] pulmonary function studies, qualifying 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*

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establishing at least one element of entitlement to proceed with his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

[5] The record before the Board contains a Notice of Appeal filed by attorney Denise Hall Scarberry of Jones & Walters PLLC, Pikeville, Kentucky, on behalf of Cam Mining, Incorporated. Ms. Scarberry represented Employer and its Carrier (Employer) before the administrative law judge in this case. H.Tr. at 5. The Notice challenges Administrative Law Judge Joseph E. Kane's April 17, 2019 decision in *Miller v. Cam Mining, Inc.*, 2017-BLA-05815. This filing was associated with the present appeal in error. The record does not contain any pleadings submitted on behalf of Employer.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4; H.Tr. at 16.

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

& 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).

An administrative law judge must also determine the exertional requirements of a claimant's usual coal mine work and then consider them in conjunction with the medical opinions assessing disability. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The record reflects Claimant last worked as a coal truck driver. Director's Exhibits 4, 5. Claimant reported on his Description of Coal Mine Work or Other Employment form that he hauled coal from the load-out to the tipple and occasionally climbed up on the trailer to level the load of coal. Director's Exhibit 5. He further indicated he sat eight to twelve hours per day. *Id*. On the section of the form asking the extent to which Claimant had to crawl, lift, or carry, he indicated it "varied." *Id*. Claimant also described performing maintenance work on the truck on his days off and "oversee[ing] getting the truck fixed." *Id*. At a deposition taken on February 2, 2016, Claimant testified he maintained the truck but hired out major repair jobs. Director's Exhibit 20 at 11. Claimant testified at the hearing that he owned and operated the coal truck with one other employee, and hauled coal from eight to thirty-two miles in one direction. H.Tr. at 17, 24-25. Dr. Ajjarapu reported Claimant's work involved "sitting and driving a coal truck." Director's Exhibit 16. Dr. Dahhan indicated Claimant drove a coal truck approximately twelve to fourteen miles every forty-five minutes to an hour but did not load his own truck. Employer's Exhibits 1, 5 at 16. Dr. Jarboe reported Claimant drove a truck hauling coal from a tipple to a load-out. Employer's Exhibits 2, 7 at 11-12. He further indicated this work required Claimant to occasionally climb on the tarp covering the load to level the coal and perform mechanic work, but he did not load the truck. *Id*.

The administrative law judge found, "[b]ased on the Claimant's 'Description of Coal Mine Work and Other Employment' form and testimony that he had to climb up on the trailer and perform mechanic work but mainly dr[o]ve his truck, I find that his last job as a truck driver involved only light manual labor." Decision and Order at 19. We affirm this finding as it is rational and supported by substantial evidence. *See Cornett*, 227 F.3d at 587.

Regarding the medical evidence relevant to total disability, the administrative law judge first considered the five newly-submitted pulmonary function studies dated

September 2, 2015, June 20, 2016, July 12, 2017, May 4, 2017 and May 17, 2017.[8] Director's Exhibits 10, 13; Claimant's Exhibits 4, 5; Employer's Exhibit 7; Decision and Order at 7-8, 18-21. The September 2, 2015 test produced qualifying values[9] both before and after the administration of bronchodilators, while the June 20, 2016 test administered without bronchodilators also produced qualifying values. Director's Exhibits 10 at 12-13, 13; Claimant's Exhibit 4; Employer's Exhibit 8. The studies performed on May 4, 2017, and May 17, 2017, produced non-qualifying values before and after the administration of bronchodilators. Employer's Exhibits 1, 2. The most recent study, administered on July 12, 2017, without the use of bronchodilators, produced qualifying results. Claimant's Exhibit 5; Employer's Exhibit 9.

The administrative law judge observed that the May 4, 2017 and May 17, 2017 pulmonary function studies produced non-qualifying pre-and post-bronchodilator results and the pre-bronchodilator study administered on July 12, 2017 produced qualifying values overall. Decision and Order at 22. He accurately noted that "the four PFTs (before and after bronchodilators) administered [on May 4 and May 17, 2017] only two months prior [to the July 17, 2017 test] were non-qualifying." *Id.* While the administrative law judge found that these "three most recent PFTs . . . do not 'conclusively establish' [Claimant] is totally disabled," he then summarily concluded that "the [pulmonary function tests] *overall* are inconclusive" and "alone do not establish total disability," without weighing the

[8] The administrative law judge permissibly resolved the height discrepancy recorded on the pulmonary function studies by calculating Claimant's average reported height - 69.93 inches - and using the closest table height of 70.1 inches to assess the pulmonary function studies for total disability. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 18 n.36.

[9] The administrative law judge acted within his discretion in accepting the opinions of Dr. Ajjarapu, the administering physician, and Dr. Vuskovich that the post-bronchodilator MVV results on the September 2, 2015 study are invalid. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); Decision and Order at 18-19; Director's Exhibits 10, 13. However, he permissibly found Dr. Vuskovich did not adequately explain his view that the FEV1 and FVC values are also invalid because Claimant "did not put forth the effort required to generate valid FEV1 and FVC results," in contrast to the assessment of good effort by the technician who administered the test and Dr. Ajjarapu. Director's Exhibit 13; *see Schetroma v. Director, OWCP,* 18 BLR 1-19, 1-22 (1993); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 19. We therefore affirm the administrative law judge's determination that both the pre- and post-bronchodilator tests administered on September 2, 2015 are qualifying. Decision and Order at 19.

qualifying pulmonary function studies administered on June 20, 2016, less than a year before the May 2017 tests, or the September 2, 2015 tests conducted as part of the DOL-sponsored complete pulmonary evaluation. *Id*. (emphasis added). Thus, the administrative law judge failed to consider all of the relevant newly-submitted pulmonary function study evidence and, therefore, failed to satisfy the explanatory requirements of the Administrative Procedure Act[10] (APA) in finding that the pulmonary function study evidence "overall" is "inconclusive" and does not establish total disability. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Consequently, the administrative law judge's determination that the newly-submitted pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is vacated and we remand the case for reconsideration.

Because the administrative law judge's reweighing of the newly-submitted pulmonary function study evidence on remand could affect his weighing of the newly-submitted medical opinions, we also vacate his findings that the newly-submitted medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), that the weight of the evidence, like and unlike, failed to establish total disability at 20 C.F.R. §718.204(b)(2), and that Claimant has not demonstrated a change in an applicable condition of entitlement or invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309(d)(2), (3). We further vacate the administrative law judge's finding an award of benefits is precluded because Claimant did not establish an essential element of entitlement under 20 C.F.R. Part 718.[11] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.204.

[10] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "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).

[11] The administrative law judge correctly found that because there is no evidence of complicated pneumoconiosis, Claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Decision and Order at 17. Relevant to 20 C.F.R. §718.204(b)(2)(ii), the record contains newly submitted blood gas studies administered on September 2, 2015, May 4, 2017, and May 17, 2017, comprised of three resting tests and two exercise tests. Director's Exhibits 10, 13; Employer's Exhibits 1, 2. As all five tests produced non-qualifying values, the administrative law judge reasonably found the blood gas study evidence failed to establish a totally disabling impairment. Decision and Order at 22-23. Additionally, because the record contains no evidence that the miner suffered from cor pulmonale with right-sided congestive heart

On remand, the administrative law judge must first reconsider whether the newly submitted pulmonary function study evidence would establish total disability at 20 C.F.R. §718.204(b)(2)(i). He must weigh each newly submitted study and determine whether total disability would be established by a preponderance of this evidence. The administrative law judge is required to set forth his findings in detail, including the rationale underlying his findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). He must then reconsider his weighing of the newly submitted medical opinions and the entirety of the newly submitted evidence relevant to total disability based on his reconsideration of the newly submitted pulmonary function studies. If claimant establishes total disability on remand, he also establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(1). If the presumption is invoked on remand, the administrative law judge must consider if employer has rebutted it. If the administrative law judge finds claimant is not totally disabled, claimant 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).

failure, the administrative law judge determined correctly Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge