U.S. Department of Labor

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

BRB No. 19-0463 BLA

RUSSELL D. HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 09/30/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	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.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-05597) 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 subsequent claim filed on October 24, 2013.[1]

The administrative law judge found Claimant established 31.74 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of total disability due to 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); 20 C.F.R. §725.309(c). The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in admitting Dr. Raj's September 12, 2017 pulmonary function study because Claimant did not designate it on his evidence summary form. Employer also contends the administrative law judge erred in finding Claimant established total disability necessary to invoke the Section 411(c)(4) presumption and a change in an applicable condition of entitlement. Employer further contends the administrative law judge erred in finding the presumption unrebutted. Claimant responds, urging affirmance of the award of benefits. The Director, Office of

[1] Claimant filed a prior claim for benefits on February 17, 2012, which the district director denied on September 13, 2012. Director's Exhibit 1.

[2] 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 coal mine employment 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 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(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). The district director denied Claimant's prior claim for failure to establish total disability. Director's Exhibit 1. Consequently, Claimant had to submit new evidence establishing he is totally disabled in order to receive a merits review of his subsequent claim. *See* 20 C.F.R. §725.309(c).

Workers' Compensation Programs, has declined to file a brief. Employer filed a reply brief, reiterating its arguments.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Evidentiary Challenge

At the hearing, Employer objected to the admission of Claimant's state workers' compensation claim records, contained at Director's Exhibit 9, and Dr. Raj's September 12, 2017 pulmonary function study, contained at Director's Exhibit 12, because the evidence was not designated by either party on their respective evidence summary forms. Hearing Transcript at 9, 12. The administrative law judge overruled Employer's objections, stating she would admit all of the Director's Exhibits and "to the extent any medical data is received into evidence that *exceeds the regulatory limitations for evidence*, [she would] consider the parties to be bound by their respective evidence summary forms [and] the designations outlined in such forms." *Id*. at 10, 12 (emphasis added).

In her Decision and Order, the administrative law judge did not mention Claimant's state claim evidence. In reviewing the pulmonary function study evidence for total disability, she found two conflicting pulmonary function studies the parties designated to be in equipoise. Decision and Order at 20-21. She noted "if Dr. Raj's pulmonary function test, which was not affirmatively offered by the parties, is also weighed, it would weigh in support of a finding that Claimant was totally disabled." *Id*. at 21. She concluded that because "this test was allowed into the record at hearing, it will be weighed with the other

[4] We affirm, as unchallenged, the administrative law judge's finding that Claimant established 31.74 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[5] 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); Decision and Order at 2 n.2; Director's Exhibit 6.

tests of record." *Id*. She then found Claimant established total disability by a preponderance of the pulmonary function study evidence. *Id*.

Employer argues the administrative law judge erred in admitting the September 12, 2017 pulmonary function study. We disagree.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *Consolidation Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer has failed to establish an abuse of discretion.

Contrary to Employer's argument, the administrative law judge's admission of the September 12, 2017 study does not contravene her ruling at the hearing. As noted, she indicated she would admit all of the Director's Exhibits, but would bind the parties to their evidence summary forms "to the extent" any of the medical evidence contained therein exceeds the evidentiary limitations. *See* 20 C.F.R. §725.455(b) (administrative law judge "shall receive into evidence . . . the evidence submitted to the Office of Administrative Law Judges [(OALJ)] by the district director" but "may entertain the objections of any party"). As one of only two pulmonary function studies Claimant submitted, the September 12, 2017 study was admissible as part of Claimant's affirmative case, does not exceed the evidentiary limitations, and therefore does not conflict with her ruling at the hearing. 20 C.F.R. §725.414(a)(2)(i) (Claimant may submit two pulmonary function studies as part of his or her affirmative case); *see Blake*, 24 BLR at 1-113; *Clark*, 12 BLR at 1-153.

Further, because the administrative law judge resolved this evidentiary matter at the hearing, we also reject Employer's reliance on *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc) for the proposition that she erred by failing to resolve it before issuing her Decision and Order. In *Preston*, the Board recognized that consistent with the principles of fairness and administrative efficiency, an administrative law judge "should" make his or her evidentiary rulings before issuing the decision and order so that the parties have the opportunity to respond to evidence admitted into the record. Nonetheless, an administrative law judge is not required to do so and in this case, she did render her evidentiary determination prior to issuing the Decision and Order.

We further reject Employer's allegation of a due process violation, as Employer was not deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998); *Preston*, 24 BLR

at1-63. Claimant submitted Dr. Raj's pulmonary function study before the district director and it was considered in the Proposed Decision and Order. Director's Exhibit 12. The administrative law judge also admitted it into the record at the hearing subject to the evidentiary limitations. Hearing Transcript at 12. Employer acknowledges that its medical experts, Drs. Basheda and McSharry, specifically considered Dr. Raj's September 12, 2017 study in rendering their opinions. Employer's Brief in Support of Petition for Review at 11; Employer's Exhibits 5, 6. Because Employer has not shown that it was deprived of the opportunity to respond to Claimant's evidence or mount a meaningful defense against his claim, we reject its argument under *Preston* and its due process challenge. *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807.

Finally, although Employer contends the administrative law judge acted inconsistently in failing to explain why none of the medical evidence from Claimant's state claim contained at Director's Exhibit 9 was admissible, it has not shown how it was prejudiced. Employer sought to have the state claim medical evidence contained at Director's Exhibit 9 excluded in its entirety and has not pointed to any evidence the administrative law judge relied on from that exhibit in rendering her findings on Claimant's entitlement to benefits. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Nor does Employer adequately address how the administrative law judge's lack of a specific explanation for excluding the state claim medical evidence somehow renders her admission of the September 12, 2017 study improper. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

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

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). 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). Employer challenges the

administrative law judge's finding that Claimant established total disability based on the pulmonary function study and medical opinion evidence.[6]

Pulmonary Function Study Evidence

The administrative law judge considered three pulmonary function studies. Decision and Order at 20. Dr. Nader's June 16, 2017 study had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values.[7] Director's Exhibit 16. Dr. Basheda's September 7, 2017 study was non-qualifying before and after a bronchodilator was administered. Director's Exhibit 19. Dr. Raj's September 12, 2017 study was qualifying before and after a bronchodilator was administered. Director's Exhibit 18.

The administrative law judge gave greatest weight to the pre-bronchodilator values to find the June 16, 2017 study qualifying, the September 7, 2017 study non-qualifying, and the September 12, 2017 study qualifying. *Id*. at 20-21. Considering all three studies together, she determined that the preponderance of the studies support a finding that Claimant is totally disabled. *Id*. at 21.

Employer contends the administrative law judge failed to adequately explain why she gave greater weight to the qualifying pre-bronchodilator results of the June 16, 2017 study over the non-qualifying post-bronchodilator results of that same study. Employer's Brief in Support of Petition for Review at 10. We disagree. The administrative law judge specifically cited *Grower v. Eastern Associated Coal Co.*, BRB No. 13-0586 BLA (July 29, 2014) (unpub.) as support for her determination. In *Grower*, the Board held that an administrative law judge can permissibly assign greater weight to the pre-bronchodilator values over the post-bronchodilator values based on the Department of Labor's recognition in the preamble to the revised regulations that post-bronchodilator results do not provide an adequate assessment of a miner's disability. *Grower*, BRB No. 13-0586 BLA, slip op. at 5; *see also* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174 (4th Cir 1997). Because the administrative law judge's reliance on pre-

[6] The administrative law judge found Claimant did not establish total disability based on the blood gas studies and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 22.

[7] 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).

bronchodilator values is consistent with the preamble and applicable law, we affirm it. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also contends the administrative law judge failed to resolve the conflict between Dr. Basheda's non-qualifying study and Dr. Raj's qualifying study, as the administration of those tests are in closest proximity to one another. We disagree.

The pulmonary function study evidence in this case spans a period of three months. The administrative law judge permissibly considered the three valid pulmonary function studies as a whole and found a preponderance of the studies, including the most recent study, qualifying for total disability. *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); Decision and Order at 21. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the pulmonary function studies support a finding that Claimant is totally disabled. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

Medical Opinion Evidence

The administrative law judge credited Dr. Nader's opinion that Claimant is totally disabled over the contrary opinions of Drs. Basheda and McSharry. She noted "Dr. Nader based his opinion on total disability off of an objective medical study," and found his opinion well-documented and well-reasoned. Decision and Order at 26; Director's Exhibit 16. She found Dr. Basheda "based his opinion off two objective medical studies, [but] there was no evidence that he reviewed Dr. Raj's September 12, 2017 pulmonary function test" in preparing his December 4, 2017 report. Decision and Order at 26; *see* Director's Exhibit 19. Because "Dr. Raj's pulmonary function test is a subsequent medical test that conflicted with Dr. Basheda's [test]," and is "probative as to the miner's condition," she found Dr. Basheda's opinion on total disability "not reasoned in light of the medical record." Decision and Order at 26.

The administrative law judge also discredited Dr. McSharry's opinion, noting he "reviewed Dr. Raj's pulmonary function tests before writing his medical opinion and offering his testimony, but he did not address it in his initial medical opinion." Decision and Order at 27; *see* Employer's Exhibits 1, 5. She found that while Dr. McSharry "did mention Dr. Raj's test in his deposition testimony, he erroneously assumed that Dr. Basheda's test was the last in the line, when Dr. Raj's test was actually the last test of record to be administered." Decision and Order at 27. She therefore found Dr. McSharry's opinion is "based on an erroneous review of the record" and entitled to little weight. *Id*.

We agree with Employer's assertion that the administrative law judge erred in finding "no evidence that [Dr. Basheda] reviewed Dr. Raj's September 12, 2017 pulmonary function test."[8] Employer's Brief in Support of Petition for Review at 10. Although the administrative law judge correctly noted that Dr. Basheda did not discuss the September 12, 2017 study in his initial report, he specifically reviewed that study during his deposition and compared its results with his own September 7, 2017 study. Employer's Exhibit 5 at 7, 17. The administrative law judge acknowledged as much when summarizing Dr. Basheda's opinion, but limited her analysis and credibility determination to his earlier written report. Decision and Order at 24, n. 41. Because the administrative law judge did not explain the weight she accorded Dr. Basheda's deposition testimony, we must vacate her finding that Dr. Basheda's opinion on total disability is not well-reasoned. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Because the administrative law judge's analysis of Dr. Bathseda's opinion is insufficient under the Administrative Procedure Act (APA),[9] we vacate her finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Wojtowicz*, 12 BLR at 1-165.

Because we vacate the administrative law judge's determination that Claimant is totally disabled, we also vacate her findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[10] We therefore vacate the award of benefits and remand the case for further consideration.

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[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. McSharry's opinion is less credible because he opined Claimant is not totally disabled based, in part, on his mistaken belief that Dr. Basheda's non-qualifying pulmonary function study is the most recent of record. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that 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).

[10] Because we have vacated the administrative law judge's findings that Claimant established total disability and invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's arguments that the administrative law judge erred in finding the presumption unrebutted. We note, however, that in considering Dr. Basheda's opinion on rebuttal, the administrative law judge repeated her earlier mistake by concluding

On remand, the administrative law judge must explain the weight she accords Dr. Basheda's opinion, including his deposition testimony, and determine whether Claimant has established total disability based on the medical opinions. *See Akers*, 131 F.3d at 441. If Claimant establishes total disability based on the medical opinion evidence, the administrative law judge must consider the contrary evidence and determine if he is totally disabled. 20 C.F.R. §718.204(b)(2). If Claimant establishes total disability and invokes the Section 411(c)(4) presumption, the administrative law judge must then determine whether Employer rebutted it. 20 C.F.R. §718.305. If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In rendering her credibility determinations on remand, the administrative law judge must explain her findings as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed in part, 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

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

"Dr. Basheda failed to take Dr. Raj's pulmonary function study into account when rendering his opinion." Decision and Order at 33.