U.S. Department of Labor

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

BRB No. 19-0503 BLA

DONALD R. THORNTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY PLUS, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/09/2020
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying 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.

William M. Bush (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, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge Lystra A. Harris's Decision and Order Denying Benefits in a Subsequent Claim (2018-BLA-05470). This case involves a subsequent claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act) on July 18, 2016.[1]

The administrative law judge credited Claimant with 15.44 years of qualifying coal mine employment and found the new evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a). She therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[2] She further found Claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). Thus she found Claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Because Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, she also found he 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). Consequently, the administrative law judge denied benefits.

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[1] On March 21, 2011, the district director denied Claimant's prior claim, filed on July 29, 2010, because he failed to establish an element of entitlement. Director's Exhibit 1. Claimant took no further action until filing the current claim on July 18, 2016. Director's Exhibit 3.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless she finds "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. 209(c)(3).

[3] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal, the Director argues the administrative law judge erred in finding Claimant did not establish total disability. Claimant responds in support of the Director's contention. Employer and its Carrier did not file a response brief.[4]

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.[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).

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

To invoke the Section 411(c)(4) presumption, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 evidence supporting total disability against all contrary relevant evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *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). The Director challenges the administrative law judge's

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 15.44 years of qualifying coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and a change in applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-14, 30, 34. We also affirm, as unchallenged, the administrative law judge's finding that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25, 29, 30, 33, 34.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6; Hearing Transcript at 18.

finding that Claimant failed to establish total disability based on the blood gas studies and medical opinions.[6]

The record contains four blood gas studies dated November 3, 2016, September 22, 2017, September 6, 2018, and September 17, 2018. Director's Exhibits 15, 22; Claimant's Exhibits 1, 2. The November 3, 2016 study Dr. Habre conducted produced non-qualifying[7] values at rest and qualifying values with exercise. Director's Exhibit 15. The September 22, 2017 study Dr. Zaldivar conducted produced non-qualifying values both at rest and with exercise. Director's Exhibit 22. The September 6, 2018 study Dr. Green conducted produced non-qualifying values at rest and qualifying values with exercise. Claimant's Exhibit 2. Finally, the September 17, 2018 study Dr. Raj conducted produced non-qualifying values at rest. Claimant's Exhibit 1. Dr. Raj did not conduct an exercise blood gas study. *Id.*

The administrative law judge stated:

> Out of the seven blood gas studies administered, both before and after exercise, only the post-exercise studies done by Drs. Habre and Green are qualifying. Therefore, the preponderance of arterial blood gas study evidence fails to supports (sic) a finding that Claimant is totally disabled, and it fails to aid Claimant in his burden in establishing a change in condition in his subsequent claim.

Decision and Order at 18. Thus, she found Claimant did not establish total disability based on the blood gas studies.

We agree with the Director that the administrative law judge did not satisfy the explanatory requirements of the Administrative Procedure Act (APA)[8] as she failed to

[6] The administrative law judge found the new pulmonary function studies do not establish total disability, as none of the studies produced qualifying values. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17; Director's Exhibits 15, 22; Claimant's Exhibits 1, 2. Because the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure, she also found total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 18.

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

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

adequately explain how she resolved the conflict in the blood gas study evidence. Director's Brief at 6-7. While the non-qualifying study results outnumber the qualifying study results, the qualifying studies were performed at exercise. Given that the administrative law judge found Claimant's last coal mine job required heavy labor, and the fact that exercise studies may be probative of a miner's ability to perform that work, she did not adequately explain her reliance solely on the numerical superiority of the non-qualifying blood gas studies. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Additionally, she did not address what effect, if any, Dr. Raj's decision to not administer an exercise study had on her weighing of the blood gas study evidence. *Id.* We therefore vacate the administrative law judge's finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), and remand for her to reconsider the blood gas studies in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

The Director next urges the Board to vacate the administrative law judge's weighing of the medical opinions. Director's Brief at 8-9. The administrative law judge considered the opinions of Drs. Green, Habre, Raj, and Zaldivar. Drs. Green, Habre, and Raj opined Claimant is totally disabled, while Dr. Zaldivar opined he is not.[9] Director's Exhibits 15, 22; Claimant's Exhibits 1, 2.

The administrative law judge discredited Dr. Green's opinion that the significant hypoxemia demonstrated on Claimant's blood gas studies would prevent him from performing his usual coal mine work requiring heavy labor as contrary to her finding that the blood gas study evidence does not establish total disability. Decision and Order at 21; Claimant's Exhibit 2. Because we have vacated the administrative law judge's weighing of the blood gas study evidence, we also vacate her finding Dr. Green's opinion is contrary to her weighing of the blood gas study evidence. Further, the administrative law judge did not adequately explain why she discredited Dr. Green for not reviewing the other physicians' opinions. *See Addison*, 831 F.3d at 256-57; *Hicks*, 138 F.3d at 533; *Akers*, 131

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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).

[9] The administrative law judge discounted Dr. Zaldivar's opinion as based on an incorrect exertional requirement for Claimant's last coal mine job. Decision and Order at 22.

F.3d at 439-40; *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 21; Director's Brief at 9.

The administrative law judge also discredited the opinions of Drs. Habre and Raj based, in part, on their reliance on the blood gas study evidence. Decision and Order at 21. Because it is unclear how the administrative law judge's analysis of the blood gas studies affected her consideration of their medical opinions, we also vacate these credibility determinations. Thus, we vacate her finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the medical opinion evidence.

Remand Instructions

On remand, the administrative law judge must reconsider whether Claimant established total disability. She must initially reconsider the blood gas studies and provide an adequate rationale for how she resolves the conflict in the relevant evidence. She must also explain the weight she accords the conflicting medical opinions of Drs. Green, Habre, Raj, and Zaldivar on total disability based on her consideration of 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 Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. If the administrative law judge finds either the blood gas studies or medical opinions support a finding of total disability, she must weigh all of the relevant evidence together to determine whether Claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields*, 10 BLR at 1-21. The administrative law judge must explain the bases for her credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes Section 411(c)(4) presumption, the administrative law judge must reconsider 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 is not totally disabled, he 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 in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge