U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0363 BLA

EUGENE HANDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 04/27/2017
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joel F. Alexander, III and J. Bradley Ponder (Montgomery Ponder, LLC), Birmingham, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5803) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on February 7, 2011.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-nine and one-half years of underground coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) rebuttable presumption that he is totally disabled due to pneumoconiosis.[4] Finally, the administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation

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[1] Claimant's previous claim, filed on April 27, 2009, was finally denied by the district director on December 14, 2009 because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if the claimant establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989) (en banc).

[4] Because the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), she also found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Total Disability

Employer contends that the administrative law judge erred in finding that the relevant medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] The administrative law judge considered the relevant medical opinions of Drs. O'Reilly, Goldstein, and Fino.

Summary of the Medical Opinion Evidence

Dr. O'Reilly conducted the Department of Labor-sponsored pulmonary evaluation. In a report dated June 1, 2011, Dr. O'Reilly interpreted claimant's non-qualifying[7] March 24, 2011 pulmonary function study as revealing "obstruction," and claimant's non-qualifying March 24, 2011 blood gas study as "normal." Director's Exhibit 13. Based upon his evaluation, Dr. O'Reilly opined that claimant was "totally impaired from

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[5] Because employer does not challenge the administrative law judge's finding that claimant established twenty-nine and one-half years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm, as unchallenged on appeal, the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption. *Id.*

[6] The administrative law judge accurately found that all of the pulmonary function studies and blood gas studies are non-qualifying. Decision and Order at 7-9. The administrative law judge, therefore, found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *Id.* Moreover, because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

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

performing [his] last coal mine job." *Id.* In a supplemental report dated July 12, 2011, Dr. O'Reilly explained that:

> Although [claimant's] pulmonary function testing does not meet disability standards, his arterial blood gas reveals exertional hypoxemia consistent with his diagnosis of coal worker[s'] pneumoconiosis. I believe that [claimant] is 100% disabled from performing his last coal mine work due to his symptoms of exertional dyspnea and cough and his exertional hypoxemia.

Id.

Dr. Goldstein conducted an examination on December 22, 2011. In addition, Dr. Goldstein reviewed "past medical records," including the results of Dr. O'Reilly's March 24, 2011 blood gas study. Director's Exhibit 15. Dr. Goldstein noted that this study "showed a normal pO2 that dropped with exercise." *Id.* Dr. Goldstein noted that this result was "inappropriate and indicate[d] an abnormality." *Id.* Dr. Goldstein also conducted his own blood gas study on December 22, 2011, finding claimant's pO2 "was only in the 60's and [that claimant] could only walk 2½ minutes." *Id.* Dr. Goldstein indicated that claimant had a pulmonary impairment, and "it would be highly unusual for someone with minimal to no coal worker's pneumoconiosis to show this degree of hypoxia with worsening of his blood gases as evidenced by the studies from [March 24, 2011]." *Id.*

Dr. Fino reviewed the medical evidence, and by report dated December 28, 2012, opined that Dr. O'Reilly's blood gas study was "normal at rest and with exercise." Employer's Exhibit 1. Although Dr. Fino opined that Dr. Goldstein's exercise blood gas study revealed "minimal hypoxemia," he opined that neither of the blood gas studies "show[ed] the type of impairment that would prevent [claimant] from performing heavy and very heavy manual labor." *Id.* Dr. Fino further explained that:

> There is a drop in the pO2 levels between March of 2011 and December of 2011. Those decreases are significant; however, they cannot be attributed to coal mine dust since coal mine dust would not cause abnormalities in blood gases to occur so quickly.
>
> Taking all this information into consideration, I cannot disagree with Dr. Goldstein that there may be an obstructive type abnormality with some mild reduction in the pO2 values secondary to asthma and/or cigarette smoking. I would note that – regardless of the diagnosis – [claimant] is not

disabled. He retains the necessary pulmonary capacity to perform his last job in the mines.

Employer's Exhibit 1 at 2.

The Administrative Law Judge's Findings

In considering the conflicting medical opinion evidence, the administrative law judge initially noted that Dr. Goldstein did not render an opinion as to whether claimant's pulmonary impairment was disabling, and therefore accorded the doctor's opinion "no weight." Decision and Order at 12, n.6. The administrative law judge next addressed the opinions of Drs. O'Reilly and Fino. The administrative law judge found that Dr. O'Reilly's opinion was well-reasoned because it was supported by the doctor's medical observations, as well as his consideration of the exertional requirements of claimant's last coal mining job. Decision and Order at 12. The administrative law judge credited Dr. O'Reilly's opinion over that of Dr. Fino, because she found that his opinion was more consistent with the blood gas study results.[8] *Id.* at 12-13. The administrative law judge therefore found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 13. The administrative law judge also weighed the medical opinion evidence with the pulmonary function and blood gas study

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[8] The administrative law judge explained that:

> Dr. Fino concluded that the Claimant retains the capacity to perform coal mine employment based on the arterial blood gas study performed by Dr. Reilly, which yielded non-qualifying values. However, during this test, the Claimant's pO2 levels decreased with exercise. An impairment in alveolar gas exchange manifests primarily as a fall in arterial oxygen tension either at rest or at exercise. *See* [20 C.F.R.] §718.105(a). Dr. Fino's opinion that the arterial blood gas test performed by Dr. O'Reilly is normal does not address those test results. Dr. O'Reilly, on the other hand, opined that the Claimant has a totally disabling impairment based on that same arterial blood gas study. Dr. Fino also noted that both arterial blood gas studies indicated hypoxemia, but nevertheless concluded that the Claimant is not totally disabled. As noted, Dr. Fino's opinion does not correspond to the medical data from the arterial blood gas study. As such, I accord less weight to Dr. Fino's medical opinion.

Decision and Order at 12-13.

evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.*

Discussion

Employer argues that the administrative law judge failed to provide a proper basis for crediting Dr. O'Reilly's opinion that claimant suffers from a totally disabling pulmonary impairment over Dr. Fino's contrary opinion. Employer's Brief at 5-7. Drs. O'Reilly and Fino disagreed as to whether claimant suffered from a totally disabling pulmonary impairment based upon their respective assessments of the blood gas study evidence. While Dr. O'Reilly interpreted the non-qualifying March 24, 2011 blood gas study results as revealing exertional hypoxemia,[9] Dr. Fino characterized the results as normal.[10] Because the regulations recognize that an impairment in gas exchange manifests primarily as a fall in arterial oxygen tension either at rest or at exercise, the administrative law judge found that Dr. O'Reilly's assessment was more credible.

The administrative law judge erred in crediting Dr. O'Reilly's opinion solely for this reason. While a fall in arterial oxygen tension at rest or on exercise may be indicative of an impairment in gas exchange, the significance of that impairment remains a medical determination. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Employer's Exhibit 1. In this case, Dr. Fino interpreted the non-qualifying March 24, 2011 blood gas values as normal. Employer's Exhibit 1. The administrative law judge failed to provide a rational basis for rejecting Dr. Fino's assessment of the March 24, 2011 blood gas study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Marcum*, 11 BLR at 1-24.

The administrative law judge also failed to address the significance of the fact that Dr. Fino diagnosed hypoxemia, but based only on the lower pO2 values revealed by Dr. Goldstein's December 24, 2011 blood gas study. Dr. Fino interpreted the lower pO2 values from the December 24, 2011 blood gas study[11] as revealing "minimal" hypoxemia,

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[9] As noted, *supra*, Dr. O'Reilly initially characterized the results of the March 24, 2011 blood gas study as normal. Director's Exhibit 13. Dr. O'Reilly diagnosed "exertional dyspnea" in a supplemental report. *Id.*

[10] Contrary to the administrative law judge's characterization, Dr. Fino did not note that the March 24, 2011 blood gas study revealed hypoxemia. Decision and Order at 13; Employer's Exhibit 1.

[11] The March 24, 2011 blood gas study produce pO2 values of 83 at rest and 76 at exercise, while the December 22, 2011 blood gas study produced a pO2 value of 68 at both rest and exercise. Director's Exhibits 13, 15.

but opined that this degree of impairment would not prevent claimant from performing heavy and very heavy manual labor. Employer's Exhibit 1. Because the administrative law judge failed to provide a valid basis for crediting Dr. O'Reilly's opinion that claimant suffers from a totally disabling pulmonary impairment over Dr. Fino's contrary opinion, *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336, we vacate her finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration.[12]

On remand, when reconsidering whether claimant has satisfied his burden of establishing total disability, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[13] *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

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[12] In light of our decision to vacate the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we also vacate her finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[13] The administrative law judge is instructed to address whether the physicians had an accurate understanding of the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-123 (6th Cir. 2000). Although the administrative law judge found that Dr. O'Reilly had "an appreciation of the exertional requirements of [claimant's] last coal mining job," she did not explain the basis for her determination. Decision and Order at 12.

In summary, if the administrative law judge finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) on remand, claimant cannot invoke the Section 411(c)(4) presumption, and cannot establish entitlement under 20 C.F.R. Part 718. *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). However, if the administrative law judge, on remand, finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. In that case, in light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, *see supra* n.5*,* claimant will be entitled to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge