U.S. Department of Labor

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

BRB No. 17-0372 BLA

CLYDE FANNIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESCAR RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 04/16/2018
	)	
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 of Monica Markley, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (13-BLA-05202) of Administrative Law Judge Monica Markley 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 January 11, 2012.[1]

After crediting claimant with 22.57 years of qualifying coal mine employment,[2] the administrative law judge found that claimant suffers from 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) presumption that he is totally disabled due to pneumoconiosis,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

---

[1] Claimant's previous claim, filed on August 6, 1993, was finally denied by the district director on May 30, 1996, because claimant failed to establish that his pneumoconiosis arose out of his coal mine employment. Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Because it is unchallenged on appeal, we affirm the administrative law judge's finding of 22.57 years of qualifying coal mine employment. *See Skrack v. Island Creek*

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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

Section 718.204(b)(2)(i)

The record contains two new pulmonary function studies: a March 7, 2012 study associated with Dr. Mettu's Department of Labor-sponsored evaluation, and a December 18, 2015 study associated with Dr. Fino's examination. Director's Exhibit 11; Employer's Exhibit 1. Although both of the studies produced qualifying results,[5] the administrative law judge found that only the 2012 pulmonary function study was valid. Decision and Order at 14. Nonetheless, because the sole valid pulmonary function study was qualifying, the administrative law judge found that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge erred in finding that the qualifying March 7, 2012 pulmonary function study is valid. Drs. Mettu, Gaziano, Fino, and Castle reviewed the study.[6] Dr. Mettu marked on the report form that claimant's effort and cooperation during the study were "good." Decision and Order at 12. The report also contains "Technician Notes" indicating that claimant "demonstrated good effort and understanding during the forced vital capacity test." *Id.* Dr. Gaziano reviewed the 2012 study, and indicated that the "[v]ents are acceptable." *Id.*

Coal Co., 6 BLR 1-710, 1-711 (1983).

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[6] The administrative law judge accurately noted that Drs. Mettu, Gaziano, Fino, and Castle are all Board-certified pulmonologists. Decision and Order at 13.

Drs. Fino and Castle, however, questioned the validity of the study. During an April 11, 2016 deposition, Dr. Fino testified:

> [L]ooking at the tracings, I do not believe that [claimant] gave a maximum effort.
>
> ***
>
> I looked at the flow volume loops and there's just – the flow volume loops really look at the speed of the air that is coming out, and I just see that it's slower than what it should be, and, therefore, that does not meet the validation criteria that DOL uses, as does the American Thoracic Society, for what it is a valid study.

Employer's Exhibit 9 at 19.

Although Dr. Castle noted that claimant's 2012 pulmonary function study "show[ed] significant variability in effort particularly . . . in the flow volume loops," he indicated that "[t]he data was reproducible." Employer's Exhibit 7 at 13. He noted, however, that since 1992 claimant "has either been unable to perform valid pulmonary function studies for medical reasons or has been unable to demonstrate reproducible and valid results." *Id.* at 18.

In evaluating the conflicting evidence regarding the validity of the March 7, 2012 pulmonary function study, the administrative law judge noted that Dr. Mettu "explained why the results were valid and he was able to observe [c]laimant's performance and effort in person, and his findings are supported by the technician's notes." Decision and Order at 13. The administrative law judge found that "[Dr. Mettu's] observations in combination with his thorough explanations establish that his opinion is well-reasoned and entitled to significant weight." *Id.* at 14.

Conversely, the administrative law judge found that, while the opinions of Drs. Fino and Castle "contain much general information about pulmonary function tests and performance of these tests, . . . neither doctor adequately explained the connection between this general information and [c]laimant's results." Decision and Order at 14. The administrative law judge therefore found that the opinions of Drs. Fino and Castle were not well reasoned. *Id.* Consequently, the administrative law judge found that the March 7, 2012 qualifying pulmonary function study was valid. *Id.*

Employer contends that the administrative law judge erred in her consideration of Dr. Mettu's opinion. We agree. The administrative law judge credited Dr. Mettu's opinion that the 2012 pulmonary function study was valid because he was "able to observe

[c]laimant's performance and effort in person," and because "he explained why the results were valid." Decision and Order at 13. The administrative law judge, however, failed to provide support for her finding that Dr. Mettu was present during the administration of the 2012 pulmonary function study.[7] Moreover, the administrative law judge failed to provide support for her statement that Dr. Mettu provided a "thorough explanation" for validating the results of the 2012 study. Consequently, the administrative law judge's analysis does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also argues that the administrative law judge erred in her consideration of Dr. Fino's invalidation of the 2012 study.[8] The administrative law judge found that Dr. Fino provided only general information about pulmonary function studies "without adequately explain[ing] the connection between this general information and [c]laimant's results." Decision and Order at 14. Dr. Fino, however, explained why he questioned the results of claimant's 2012 pulmonary function study, explaining that the flow volume loops revealed less than a maximal effort. Employer's Exhibit 1. The administrative law judge erred in not addressing this aspect of Dr. Fino's opinion. *See Wojtowicz*, 12 BLR at 1-165.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration. On remand, in reconsidering whether the new March 7, 2012 pulmonary function study is valid, and sufficient to support a finding of total disability, the administrative law judge

[7] The report indicates that a technician administered the 2012 pulmonary function study. Director's Exhibit 11. While this does not foreclose Dr. Mettu from also being present during the administration of the study, the administrative law judge did not provide an explanation for her determination that he was in attendance.

[8] Because employer does not challenge the administrative law judge's determination that Dr. Castle's invalidation of the 2012 study was not well reasoned, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

should reconsider all of the relevant evidence and provide explanations for her findings.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Section 718.204(b)(2)(iv)

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[10] the administrative law judge considered the medical opinions of Drs. Mettu, Fino, and Castle. After identifying claimant's usual coal mine employment as a cutting machine operator and foreman, Dr. Mettu opined that claimant suffers from a moderate pulmonary impairment that renders him totally disabled. Director's Exhibit 11 at 27, 30. Dr. Fino opined that claimant is not disabled from a respiratory standpoint, attributing the abnormalities revealed on claimant's pulmonary function studies to a lack of good effort. Employer's Exhibit 1 at 11. Dr. Castle stated that it was "not possible for [him] to accurately assess the extent of any total respiratory impairment that [claimant] may have because of the lack of contemporary valid pulmonary function studies." Employer's Exhibit 7 at 19.

The administrative law judge credited Dr. Mettu's opinion that claimant is totally disabled from a pulmonary standpoint because it was supported by the results of claimant's qualifying March 7, 2012 pulmonary function study. Decision and Order at 16-17, 18. Conversely, the administrative law judge discredited Dr. Fino's opinion because the physician's opinion was based on his belief that all of claimant's qualifying pulmonary function studies were invalid, contrary to the administrative law judge's finding that the qualifying March 7, 2012 pulmonary function study was valid. *Id*. at 17-18. The administrative law judge discredited Dr. Castle's opinion because she found that the doctor "provided contradictory diagnoses about whether [c]laimant was totally disabled . . . ."[11]

[9] In addressing the validity of the March 7, 2012 pulmonary function study on remand, the administrative law judge should address the significance of Dr. Gaziano's validation of the study. Director's Exhibit 11.

[10] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 14-15.

[11] Although Dr. Castle indicated that the lack of contemporary valid pulmonary function studies precluding him from assessing the extent of any pulmonary impairment, the doctor diagnosed a "restrictive problem" due to elevation of the left diaphragm. Employer's Exhibit 7 at 19. The administrative law judge noted that Dr. Castle "opined that [c]laimant was not disabled due to pulmonary or respiratory impairment, but . . . also stated that [c]laimant was disabled due to a non-occupational medical issue." Decision and Order at 17. The administrative law judge noted that Dr. Castle did not explain how he reached these opinions. *Id.*

Id. at 17. The administrative law judge therefore found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that the administrative law judge erred in crediting Dr. Mettu's opinion over the opinions of Drs. Fino and Castle. Because we have vacated the administrative law judge's findings as to the pulmonary function study evidence, and the administrative law judge's analysis of the pulmonary function studies affected her weighing of the medical opinions, we also vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We instruct the administrative law judge to reconsider on remand whether the medical opinion evidence establishes total disability after she has reconsidered the pulmonary function study evidence.

On remand, the administrative law judge must reconsider whether the new pulmonary function study evidence and medical opinion evidence establishes that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv). Should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all of the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In light of our decision to vacate the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and her determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

In addressing whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis, the administrative law judge discredited the opinions of Drs. Fino and Castle in part based upon their belief that claimant's pulmonary function studies were invalid, and based upon their failure to diagnose a disabling pulmonary impairment, contrary to her own determinations. Decision and Order at 30-31. Because we have vacated the administrative law judge's finding that the evidence established the existence of a totally disabling pulmonary impairment, we

decline to address, at this time, employer's contention that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.

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