U.S. Department of Labor

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

BRB No. 18-0198 BLA

WILLIAM T. ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	
	)	
and	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/29/2019
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham, & Halbert PLLC, Lexington, Kentucky, for employer.

Rita A. Roppolo (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05281) of Administrative Law Judge Richard A. Morgan, on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 4, 2014.[1]

The administrative law judge found that claimant established at least twenty-two years of coal mine employment, including at least fifteen years underground, and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

[1] This is claimant's third claim. Director's Exhibits 1, 2, 4. His most recent prior claim, filed on April 26, 2006, was denied by the district director on November 22, 2006 because he did not establish any element of entitlement. Director's Exhibit 2. Claimant did not take any further action until he filed his current claim. Director's Exhibit 4.

[2] When 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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3); *see White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, he had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4); *see White*, 23 BLR at 1-3.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an

On appeal, employer asserts the administrative law judge erred in finding claimant totally disabled and, therefore, erred in finding the Section 411(c)(4) presumption invoked. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that remand is required.[4]

The 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 into the Act 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 his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established based on qualifying[6] pulmonary function or 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 disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

The administrative law judge found that claimant established total disability based on the blood gas studies and medical opinions at 20 C.F.R. §718.204(b)(2)(ii), (iv), and

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underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-two years of coal mine employment, with at least fifteen years in an underground coal mine, and that employer failed to rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 34-45.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

when weighing the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2); Decision and Order at 11-23. We agree with employer that the administrative law judge erred in failing to consider all of the blood gas studies, and this error impacted his evaluation of the medical opinions. Employer's Brief at 4-7.

The administrative law judge considered five new arterial blood gas studies, all done at rest only.[8] Decision and Order at 13, 30; Director's Exhibit 13; Claimant's Exhibits 1-2; Employer's Exhibits 12, 19. Noting that "three of the five resting blood gas studies indicate qualifying values although the most recent blood gas test . . . is non-qualifying," the administrative law judge found "a preponderance" of the blood gas study evidence establishes total disability. Decision and Order at 30. As employer correctly asserts, however, the record contains a January 31, 2016 non-qualifying blood gas study that was not considered by the administrative law judge.[9] Employer's Brief at 5-6; Claimant's Exhibit 3. Moreover, as noted by the Director, the administrative law judge also failed to consider two additional studies: a non-qualifying study dated June 2, 2014 and a qualifying study dated February 24, 2016.[10] Director's Brief at 2 (unpaginated); Employer's Exhibit

[7] The administrative law judge found that because all of the pulmonary function studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability pursuant to pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), respectively. Decision and Order at 30. He further found there is no evidence in the record of complicated pneumoconiosis that could invoke presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 29.

[8] The studies dated December 2, 2014, May 12, 2016, and June 2, 2016 demonstrated qualifying values while the studies dated June 24, 2015 and August 18, 2016 are non-qualifying. Director's Exhibit 13; Claimant's Exhibits 1-2; Employer's Exhibits 12, 19.

[9] The January 31, 2016 blood gas study was admitted into evidence as part of claimant's treatment records, and was performed at rest during claimant's hospitalization for treatment of chronic obstructive pulmonary disease. Claimant's Exhibit 3. Claimant's pCO2 and pO2 were measured at 38.4 and 82.4, respectively. *Id*. Employer is correct that according to the table at Appendix C of 20 C.F.R. Part 718, this study is non-qualifying.

[10] The additional studies appear in Dr. Marzouk's treatment records. Claimant's Exhibit 3. The June 2, 2014 study was performed at rest only and reflected a pCO2 of 44.5 and a pO2 of 72.1. *Id*. The February 24, 2016 study, also done at rest only, produced a pCO2 of 38.2 and a pO2 of 52.4. *Id*. Applying the values in the table at Appendix C of 20 C.F.R. Part 718, the June 2, 2014 study is non-qualifying and the February 24, 2016 study is qualifying. While the administrative law judge noted these studies are contained in

8; Claimant's Exhibit 3. As consideration of these studies could alter the administrative law judge's finding that the preponderance of the blood gas study evidence supports total disability, the administrative law judge's failure to consider them requires remand. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 254-55 (4th Cir. 2016) (fact finder must consider a medically acceptable test in the record probative of an element of entitlement). Consequently, we vacate the administrative law judge's finding that the blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and remand the case to the administrative law judge for consideration of this evidence.

We further agree with employer that, on remand, prior to weighing the blood gas studies, the administrative law judge should reconsider Dr. Vuskovich's opinion regarding the validity of the May 12, 2016 qualifying study. Employer's Brief at 4-6. The administrative law judge observed that Dr. Vuskovich completed a form on which he indicated by checkmark that the study is not technically valid.[11] Decision and Order at 13; Employer's Exhibit 17 at 11. The administrative law judge noted Dr. Vuskovich "stated however that the resting [p]O2 result was within average range for his age and for the altitude at which it was measured," and the "results were typical results for a morbidly obese man." Decision and Order at 13 n.22; Employer's Exhibits 16, 17. But as employer asserts, the administrative law judge did not render a clear finding as to the probative value of Dr. Vuskovich's opinion regarding the validity of the May 12, 2016 study,[12] as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into

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claimant's treatment records, he did not consider them at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 12-13, 19, 30.

[11] As the Director, Office of Workers' Compensation Programs (the Director), notes, Dr. Vuskovich's validity assessments are intermingled. His May 12, 2016 validation form is attached to his narrative assessment of the June 2, 2016 study and is located at Employer's Exhibit 17 at 11, while his narrative assessment of the May 12, 2016 study is at Employer's Exhibit 16. Director's Brief at 2 (unpaginated).

[12] The Director argues that the administrative law judge adequately addressed Dr. Vuskovich's opinion regarding the validity of the May 12, 2016 study. Director's Brief at 2. In light of our determination to remand for consideration of all the blood gas studies of record, and in light of the possible confusion as to which study Dr. Vuskovich was invalidating, we hold that remand for the administrative law judge to render a clear finding is warranted.

the Act by 30 U.S.C. §932(a).[13] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Finally, there is merit to employer's argument that the administrative law judge's error in evaluating the blood gas study evidence impacted his evaluation of the opinions of Drs. Green and Silman at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Green and Silman that claimant is totally disabled with the medical opinion of Dr. Zaldivar that claimant is not totally disabled. He discredited Dr. Zaldivar's opinion as equivocal.[14] Decision and Order at 32-34. In contrast, he credited the opinions of Drs. Green and Silman, in part, because they are "documented by the qualifying arterial blood gas tests performed at the time of their examinations which represent a preponderance of the blood gas testing in the record." Decision and Order at 34; Director's Exhibit 13; Claimant's Exhibits 1-2.

Because we have vacated the administrative law judge's finding that the preponderance of the blood gas studies are qualifying, and that rationale formed one of the bases for his crediting of Drs. Green and Silman, we must vacate his finding that their medical opinions establish total disability and remand the case for further consideration.

We therefore vacate the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2), invoked the Section 411(c)(4)

[13] The Administrative Procedure Act provides 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[14] In finding Dr. Zaldivar's opinion equivocal, the administrative law judge noted that Dr. Zaldivar first reported that claimant's hypoxemia caused total pulmonary disability, but later testified that claimant does not have an intrinsic pulmonary impairment because his hypoxemia is related to obesity. Decision and Order at 34; Employer's Exhibits 11-12. The administrative law judge also found Dr. Zaldivar's comments on the cause of claimant's impairment "not relevant to the extent of the pulmonary disability, especially in light of the fact that he attributed some of the miner's pulmonary disability to his obesity and he determined his obesity was totally disabling." Decision and Order at 33. Finally, the administrative law judge determined Dr. Zaldivar did not consider claimant's need for supplemental oxygen. *Id*. We affirm the administrative law judge's discrediting of Dr. Zaldivar's opinion on total disability because it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

presumption of total disability due to pneumoconiosis, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

On remand, the administrative law judge must first reconsider whether the blood gas study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii), based on a weighing of all of the new blood gas studies of record, including those in claimant's treatment records.[15] In so doing, he must make a definitive finding regarding the validity of the May 12, 2016 study and explain his determination. *See Wojtowicz*, 12 BLR at 1-165. Furthermore, the administrative law judge must reconsider his weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

After reconsidering whether the blood gas study and medical opinion evidence establish total disability, the administrative law judge must weigh all the relevant new evidence together to determine whether claimant established total disability at 20 C.F.R. §718.204(b).[16] *See White*, 23 BLR at 1-3; *Rafferty*, 9 BLR at 1-232. The administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[15] The quality standards set forth at Appendix C and 20 C.F.R. §718.105 do not apply to blood gas studies in treatment records. *See* 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Nevertheless, the administrative law judge must still determine if these studies are sufficiently reliable to support a finding of total disability. 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[16] If claimant establishes total disability, he will also have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and invocation of the Section 411(c)(4) presumption, in which case the administrative law judge may reinstate his unchallenged finding that employer failed to rebut the presumption and the award of benefits. If claimant fails to establish total disability, an essential element of entitlement, an award of benefits is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge