U.S. Department of Labor

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

BRB No. 16-0543 BLA

WILLIE E. FIELDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC d/b/a TRINITY COAL MARKETING	)	DATE ISSUED: 08/07/2017
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-5156) of Administrative Law Judge Steven D. Bell, rendered on a subsequent claim filed on January 13, 2014,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant has forty years of coal mine employment, with ten years spent in underground mines and thirty years working on the surface in conditions that were substantially similar to underground mines. Because the administrative law judge determined that the evidence was insufficient to establish total disability, he found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] The administrative law judge also found that claimant was unable to establish entitlement to benefits under 20 C.F.R. Part 718 and denied benefits accordingly.

On appeal, claimant challenges the administrative law judge's finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion for Remand, asserting that the administrative law judge erred in weighing the medical opinion evidence as to the issue of total disability.[3]

[1] Claimant's initial claim for benefits, filed on August 23, 2000, was denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action until filing the current subsequent claim. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides that a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in underground mines, and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established forty years of coal mine employment, with ten

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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 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); *see 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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3.

The regulations provide that a miner will be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function studies; (ii) arterial blood-gas studies; (iii) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or (iv) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

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years spent in underground mines and thirty years working on the surface in conditions that were substantially similar to underground mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because the record reflects that claimant's last coal mine employment was in Kentucky, 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); Director's Exhibit 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four newly submitted pulmonary function studies. Decision and Order at 7. A study conducted by Dr. Habre on July 1, 2013, was qualifying for total disability,[5] before and after the use of a bronchodilator. Director's Exhibit 15. Studies conducted by Dr. Dahhan on September 17, 2013, and by Dr. Baker on March 29, 2014, were non-qualifying, before and after the use of a bronchodilator. Director's Exhibits 12, 13. A study conducted by Dr. Jarboe on July 24, 2014, had non-qualifying values, and no bronchodilator was administered. Employer's Exhibit 1. Giving greater weight to the more recent non-qualifying studies, the administrative law judge found that claimant did not establish total disability based on the pulmonary function study evidence. Decision and Order at 16-17.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that none of the four newly submitted blood-gas studies was qualifying for total disability. Decision and Order at 8, 17. Although not addressed by the administrative law judge, claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure.[6]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered four newly submitted medical opinions. Drs. Habre, Jarboe, and Baker each opined that claimant is totally disabled from a respiratory or pulmonary impairment, while Dr. Dahhan opined that claimant is not totally disabled. Decision and Order at 8-14, 17-19; Director's Exhibits 12, 15; Employer's Exhibit 1. The administrative law judge found that Dr. Habre's diagnosis of total disability was "unpersuasive" because it was based on "the only qualifying pulmonary function study of record to the exclusion of the more recent non-qualifying studies." Decision and Order at 17. The administrative law judge also found that Dr. Habre failed "to exhibit an understanding of the exertional requirements of [c]laimant's usual coal mine work." *Id.*; *see* Director's Exhibit 15.

[5] 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). A "qualifying" arterial 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).

[6] We affirm the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), as they are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

The administrative law judge also found that Dr. Jarboe did not adequately explain how the non-qualifying pulmonary function study results obtained supported his conclusion that claimant is totally disabled. Decision and Order at 18. The administrative law judge observed that "while Dr. Jarboe stated that claimant's usual coal mine work was 'operating the loader at the washer plant' he failed to evince any understanding of the exertional requirements of that job." *Id.*, *quoting* Employer's Exhibit 1. The administrative law judge concluded that Dr. Jarboe's opinion was "unreasoned" and therefore insufficient to support claimant's burden of proof. Decision and Order at 18.

Finally, the administrative law judge considered Dr. Baker's opinion and found it to be at odds with the regulatory criteria for establishing total disability by pulmonary function studies, "which require both a qualifying FEV1 value and a qualifying FVC, FEV1/FVC, or MVV value." Decision and Order at 18; *see* Director's Exhibit 12. The administrative law judge concluded that Dr. Baker's opinion was "unreasoned," because his "diagnostic criteria appear to be less stringent than those imposed by the regulations." Decision and Order at 18. The administrative law judge also stated that Dr. Baker "did not adequately explain why 'the FEV1 is the best indicator of one's ability to work'" and did not demonstrate an understanding of the exertional requirements of claimant's usual coal mine work. *Id*., *quoting* Director's Exhibit 12. Having found the opinions of Drs. Habre, Jarboe and Baker to be insufficient to establish that claimant is totally disabled, the administrative law judge did not specifically address the weight he accorded Dr. Dahhan's contrary opinion, that claimant is not totally disabled, as it did not support claimant's burden of proof. Decision and Order at 19. Thus, the administrative law judge concluded that claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Id*.

Claimant and the Director argue that the administrative law judge erred in rejecting the opinions of Drs. Habre, Jarboe, and Baker because they relied on non-qualifying pulmonary function studies in diagnosing that claimant is totally disabled. We agree. Contrary to the administrative law judge's analysis, claimant may establish total disability with reasoned medical opinion evidence, "where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying. *See Cornett Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Moreover, as noted by the Director, while the pulmonary function studies performed after Dr. Habre's examination were non-qualifying, they were interpreted by Drs. Jarboe and Baker as showing a disabling respiratory impairment. Interpreting the July 24, 2014 pulmonary function study, Dr. Jarboe stated that the claimant had a "severe ventilatory impairment," with "severe restrictive lung disease and perhaps some mild

airway obstruction based on a minimal reduction of the FEV1/FVC ratio." Employer's Exhibit 1. He opined that claimant was totally disabled from a pulmonary standpoint. *Id.* at 1. Dr. Baker specifically opined that claimant has a moderate obstructive defect, based the pre-bronchodilator and post-bronchodilator pulmonary function studies obtained on March 29, 2014. Director's Exhibit 12. Dr. Baker explained that claimant's reduced FEV1 values precluded claimant from performing the duties required of his last coal mine work. *Id*. Because Dr. Habre's diagnosis of total disability is corroborated by the opinions of Drs. Jarboe and Baker, the administrative law judge has failed to adequately explain why Dr. Habre's opinion is entitled to little weight. Additionally, we agree with claimant that to the extent the administrative law judge's decision suggests that reduced FEV1, FVC, or FEV1/FVC values, on their own, may not establish a disabling respiratory or pulmonary impairment, the administrative law judge has improperly substituted his opinion for that of the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Claimant and the Director also assert that the administrative law judge erred in giving less weight to the opinions of Drs. Habre, Jarboe, and Baker because they did not expressly describe the exertional requirements of claimant's usual coal mine work. We agree. In order to support a finding of total disability "a medical report only needs to describe either the severity of the impairment or the physical effects imposed by claimant's respiratory impairment sufficiently so that the administrative law judge can infer that claimant is totally disabled." *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-44, 1-50 (1985) (en banc), *citing Wright v. Director, OWCP*, 8 BLR 1-245 (1984); *see Cornett*, 227 F.3d at 578, 22 BLR at 2-124. We are unable to affirm the administrative law judge's finding that the opinions of Drs. Habre, Jarboe and Baker are insufficient to satisfy claimant's burden of proof, based on the administrative law judge's stated rationale. The administrative law judge has not adequately considered that each physician diagnosing total disability: identified a respiratory impairment; had general knowledge of claimant's work history; and specifically opined that claimant is totally disabled from returning to the jobs they identified in their respective reports. Director's Exhibits 12, 15; Employer's Exhibit 1; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002) (explaining that where a certain position, such as an underground repairman, has a "precise meaning in the context of coal mining," an administrative law judge may rationally conclude that doctors adequately understand the demands of that job).

Furthermore, we agree with the Director that the administrative law judge inaccurately characterized Dr. Habre's opinion as "not exhibit[ing] an understanding of the exertional requirements of [claimant's] usual coal mine work." Decision and Order at 17. Dr. Habre indicated in his report that he had reviewed claimant's employment history (Form CM-11 dated April 16, 2013), and he also specifically described that claimant

could not perform his last coal mine work or "other strenuous labor or mining related occupations." Director's Exhibit 15; *see* Director's Motion for Remand at 4.

For the foregoing reasons, we vacate the administrative law judge's determination that claimant failed to establish total disability. On remand, the administrative law judge must first make a specific finding as to claimant's usual coal mine work and the physical requirements associated with that work.[7] *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. The administrative law judge then must determine the degree of respiratory or pulmonary impairment identified by the physicians, resolve the conflict in the evidence on that issue,[8] and reach a conclusion as to whether claimant is totally disabled from performing his usual coal mine work. In determining the weight to accord the medical opinion evidence, the administrative law judge should address the physician's qualifications, the rationales and objective studies underlying their opinions and determine whether their conclusions are reasoned and documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge has discretion to draw inferences from the record, in considering whether claimant has satisfied his burden of proving that he is totally disabled. *Budash,* 13 BLR at 1-50. If the administrative law judge finds that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the evidence together, including the contrary evidence, to determine whether claimant has a totally disabling respiratory or pulmonary impairment. *See Shedlock*, 9 BLR at 1-198.

If the administrative law judge finds that claimant has established total disability, the administrative law judge must find that claimant has demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c), and that claimant has invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted the presumption by establishing that claimant does not have legal or clinical pneumoconiosis or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v.*

[7] The administrative law judge has not identified claimant's usual coal mine work for comparison with the physicians' opinions. Employer points out that claimant testified that he last worked as a "heavy equipment operator," which employer asserts is "primarily a sedentary job." Employer's Brief at 7, *citing* Hearing Transcript at 14.

[8] The administrative law judge should resolve the conflict in the record between Dr. Jarboe's diagnosis of a severe restrictive impairment, Dr. Baker's diagnosis of a moderate obstructive impairment, and Dr. Dahhan's diagnosis that claimant has a mild restrictive impairment and no obstructive impairment. Director's Exhibits 12, 13; Employer's Exhibit 1.

Tenn. Consol. Coal Co., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). However, if the administrative law judge finds that the evidence does not establish total disability, he must deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering his Decision and Order on remand, the administrative law judge is instructed to explain all of his findings in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Decision and Order Denying 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

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's findings with regard to Dr. Habre's opinion. The question of claimant's ability to perform his usual coal mine work is to be assessed at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988);

[9] 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 on the record." 5 U.S.C. §557(c)(3)(A).

Coffey v. Director, OWCP, 5 BLR 1-404, 1-407 (1982). Dr. Habre did not offer an impairment rating but relied on the only qualifying pulmonary function study of record to diagnose claimant with a totally disabling respiratory impairment. Director's Exhibit 15. Substantial evidence supports the administrative law judge's decision to find Dr. Habre's opinion "unpersuasive" as the physician "cited [c]laimant's 'significant decline in FEV1 and FVC' as supportive of his conclusion that [c]laimant [is] totally disabled, [but] more recent pulmonary function study evidence of record undermines the probative values of the qualifying values Dr. Habre obtained." Decision and Order at 17; *see Andruscavage v. Director, OWCP*, No. 93-3291 (3rd. Cir. Feb. 22, 1994) (unpub.).

However, I agree with the majority that the administrative law judge erred in his treatment of the opinions of Drs. Jarboe and Baker, based on current case law. Although the administrative law judge correctly found that Drs. Jarboe and Baker did not identify the exertional requirements of claimant's usual coal mine work, these physicians specifically identified an impairment rating associated with claimant's testing. An administrative law judge must compare a physician's impairment rating with the physical requirements of a miner's usual coal mine work to determine whether the physician's opinion establishes that the miner is totally disabled. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). In this case, because the administrative law judge did not identify claimant's usual coal mine work and consider whether claimant is totally disabled based on the impairment ratings diagnosed by Drs. Jarboe and Baker, I concur with the majority's decision to vacate the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Although I concur in the decision to remand this case for further consideration, I also write separately in order to point out the clear flaw in the current state of the law. Drs. Jarboe and Baker reported that claimant last work was operating a loader, but neither physician identified the physical demands of that work, nor did they state whether claimant had any specific physical limitations. Director's Exhibit 12; Employer's Exhibit 1. In determining whether a miner suffers from a totally disabling respiratory or pulmonary impairment, an administrative law judge may reasonably compare a physician's opinion, expressed in terms of physical limitations, with the exertional requirements of a miner's usual coal mine work. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. However, in factual situations such as those presented in this case, where a physician provides only an impairment rating and does not identify physical limitations, the administrative law judge is required, under current law, to make his own judgment call as to whether a miner is or was totally disabled. Thus, the administrative law judge is required to improperly act as a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). I am therefore compelled to remand this case for the administrative law judge to compare the impairment ratings diagnosed by

Drs. Jarboe and Baker with the exertional requirements of the miner's usual coal mine work and render findings on the issue of respiratory disability.

RYAN GILLIGAN
Administrative Appeals Judge