U.S. Department of Labor

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

BRB No. 16-0581 BLA

MILTON CONLEY, JR. Claimant-Respondent v. ICG KNOTT COUNTY, LLC and AMERICAN INTERNATIONAL SOUTH c/o CHARTIS Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/18/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-5749) of Administrative Law Judge William J. King rendered 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 miner's claim filed on February 6, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with thirty-three years of qualifying[2] coal mine employment and found that the evidence established 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 rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F. R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge's finding of total respiratory disability is not supported by substantial evidence and does not comport with the requirements of the Administrative Procedure Act (APA).[3] Neither claimant, nor the

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen 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); *see* 20 C.F.R. §718.305.

[2] The administrative law judge accepted the parties' stipulation of thirty-three years of coal mine employment, and found that claimant's working conditions were substantially similar to those in an underground mine. Decision and Order at 3, 15; Hearing Tr. at 5, 11-19.

[3] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, 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), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.[4]

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.[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

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In this case, the administrative law judge considered the results of six pulmonary function studies,[6] including three qualifying[7] and three non-qualifying studies, together

[4] Because employer does not challenge the administrative law judge's finding that claimant established thirty-three years of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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.*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[6] The pulmonary function studies were performed on November 28, 2011, February 22, 2012, May 23, 2012, February 21, 2013, December 10, 2013 and April 20, 2015. Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibits 3, 7.

with the evidence relevant to the validity of those studies. Decision and Order at 6-7, 16-17. Finding that only one of the three qualifying pulmonary function studies produced valid results, while all three non-qualifying studies were valid, the administrative law judge concluded that claimant did not establish total respiratory disability at 20 C.F.R §718.204(b)(2)(i). Decision and Order at 17.

Pursuant to 20 C.F.R §718.204(b)(2)(ii), the administrative law judge considered the results of five blood gas studies,[8] initially noting that two studies produced qualifying results, and three produced non-qualifying results. Decision and Order at 8, 17-18. The administrative law judge also considered the evidence relevant to the reliability of the test results, and found that of the two qualifying blood gas studies, only the September 22, 2014 study is valid and weighs in favor of total disability.[9] Decision and Order at 17-18.

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[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

[8] The administrative law judge considered five blood gas studies performed on December 6, 2011, May 22, 2012, December 13, 2012, December 10, 2013 and September 22, 2014. Director's Exhibits 12, 13; Claimant's Exhibits 5, 6; Employer's Exhibit 3. The administrative law judge noted that the record also contains a sixth pulmonary function study, dated February 22, 2012, which was performed by Dr. Alam as part of the Department of Labor-sponsored complete pulmonary evaluation. Decision and Order at 8; Director's Exhibit 12. The administrative law judge further noted, however, that after Dr. Mettu questioned the validity of that study, Dr. Alam administered a repeat blood gas study on May 22, 2012. Decision and Order at 8, 17-18. Based on this sequence of events, the administrative law judge found that, for the purpose of the evidentiary limitations, the May 22, 2012 blood gas study was substituted for the February 22, 2012 study. He also found, based on the questions raised by Drs. Mettu and Vuskovich, that the February study was invalid. *See* 20 C.F.R. §§725.406(a), (b), 725.414; Decision and Order at 18. For these reasons, the administrative law judge disregarded the results of the February 22, 2012 study.

[9] The administrative law judge noted that the only other qualifying blood gas study in evidence, dated December 6, 2011, was called into question by Drs. Vuskovich and Fino, who opined that the sample likely represented venous rather than arterial blood. Decision and Order at 17; Employer's Exhibit 5. In light of Dr. Fino's explanation that the values could not represent the arterial blood gases of a living person, the

The administrative law judge further found, however, that although the September 22, 2014 qualifying blood gas study is the most recent study of record, it is only more recent by a "relatively short time" and, therefore, is outweighed by the remaining valid, non-qualifying blood gas studies.[10] Thus the administrative law judge concluded that claimant did not establish total respiratory disability through blood gas study evidence at 20 C.F.R §718.204(b)(2)(ii).[11]

The administrative law judge next considered the medical opinions of Drs. Alam, Fino and Rosenberg at 20 C.F.R §718.204(b)(2)(iv),[12] noting that all three physicians opined that claimant is not totally disabled by a respiratory impairment. Decision and Order at 19-20. The administrative law judge accorded "little probative weight" to the opinions of Drs. Alam and Fino, and found Dr. Rosenberg's opinion to be unpersuasive. Decision and Order at 19-20; Director's Exhibits 12, 13, 51; Employer's Exhibits 3, 4, 5, 10, 13. The administrative law judge correctly noted, however, that even if credited, the medical opinions do not weigh in favor of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

Finally, the administrative law judge weighed the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at

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administrative law judge found that the December 6, 2011 blood gas study was not an accurate measure of claimant's pulmonary impairment. *Id.*

[10] The administrative law judge stated that "the valid [blood gas study] evidence contains two non-qualifying studies and one qualifying study." Decision and Order at 18. As the administrative law judge did not specifically find any of the non-qualifying blood gas studies to be invalid, however, we cannot discern the basis for the administrative law judge's statement that two, rather than three, non-qualifying blood gas studies are valid. *See Wojtowicz*, 12 BLR at 1-165.

[11] As discussed *infra*, while employer does not challenge the administrative law judge's finding at 20 C.F.R §718.204(b)(2)(ii), employer asserts that errors in the administrative law judge's evaluation of the blood gas studies tainted his weighing of the evidence relevant to total disability, overall, at 20 C.F.R. §718.204(b)(2). Employer's Brief at 8.

[12] The administrative law judge also found that there is no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

20. The administrative law judge found that while the pulmonary function studies, blood gas studies and medical opinions, considered separately, do not support a finding of total disability, when considered as a whole the evidence established that claimant is totally disabled from performing his usual coal mine work requiring heavy manual labor. Decision and Order at 20.

Specifically, the administrative law judge found that claimant's September 22, 2014 valid, qualifying blood gas study was not undermined by the non-qualifying pulmonary function studies, which measure a different type of impairment. Decision and Order at 20-21. The administrative law judge also found that the September 22, 2014 blood gas study was not undermined by the medical opinions concluding that claimant is not disabled, as he previously found these opinions lacked probative value. Decision and Order at 21. By contrast, the administrative law judge found that claimant's credible testimony, that his breathing difficulties prevented him from performing simple activities of daily living, corroborated the September 22, 2014 qualifying blood gas study. *Id.* Thus, the administrative law judge concluded that claimant's testimony together with the September 22, 2014 qualifying blood gas study "persuasively establishes, by a preponderance of the evidence," that claimant is totally disabled from a respiratory impairment pursuant to 20 C.F.R. §718.204. *Id*. at 21. Finally, based on his findings that claimant established at least fifteen years of qualifying coal mine employment and total respiratory disability, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4).

Employer asserts that the administrative law judge erred in finding that claimant established, by a preponderance of the evidence, that he is totally disabled within the meaning of 20 C.F.R. §718.204(b)(2). Employer asserts that the administrative law judge failed to adequately weigh the September 22, 2014 qualifying blood gas study against the contrary probative evidence of record and explain his findings. Employer's Brief at 8. Employer also challenges the administrative law judge's finding that the September 22, 2014 blood gas study is valid. *Id.* at 11. Thus, employer argues, the administrative law judge's finding of total disability fails to comply with the APA. *Id.* at 9. Employer's contentions have merit.

In the absence of contrary probative evidence, an administrative law judge may rely on a single valid qualifying objective study to find total disability established. Further, an administrative law judge may find, within a proper exercise of his discretion, that contrary evidence, such as non-qualifying pulmonary function studies or medical opinions that do not diagnose total disability, are nonetheless not credible and, therefore, do not weigh against the evidence supportive of total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989);

Director, OWCP v Rowe, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Here, however, as employer asserts, in addition to the contrary pulmonary function study and medical opinion evidence, the record also contains three non-qualifying blood gas studies that were not found invalid by the administrative law judge. Employer's Brief at 8. Further, the administrative law judge concluded that the weight of the valid blood gas study evidence, overall, does not establish total respiratory disability.[13] Decision and Order at 18. Finally, the administrative law judge did not identify any other credible medical evidence that supported claimant's burden to establish total respiratory disability.[14] In light of these factors, we are unable to discern the administrative law judge's rationale for concluding that the September 22, 2014 blood gas study and claimant's testimony constitute a "preponderance of the evidence" and establish that claimant is totally disabled. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2). On remand the administrative law judge must consider all relevant evidence, and explain his findings. *See* 30 U.S.C. §923(b); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-10 (6th Cir. 2011); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-625, 2-638 (6th Cir. 2003); *Shedlock*, 9 BLR at 1-198.

We also agree with employer that, on remand, prior to weighing all of the evidence together at 20 C.F.R. §718.204(b)(2), the administrative law judge should first reconsider whether the September 22, 2014 qualifying blood gas study constitutes reliable evidence of total disability. Employer's Brief at 11.

Relevant to the reliability of the September 22, 2014 qualifying blood gas study, the administrative law judge considered Dr. Fino's opinion that the study "does not meet the Federal Black Lung Standards . . . for disability determination" because it is missing key information. Employer's Exhibit 13. Dr. Fino explained:

[13] As discussed above, the administrative law judge specifically declined to accord dispositive weight to the qualifying September 22, 2014 blood gas study, as the most recent study of record. Decision and Order at 18.

[14] While the administrative law judge initially noted that the objective evidence weighing in favor of disability also included a single qualifying pulmonary function study, the administrative law judge concluded that "the probative value of the qualifying [pulmonary function study] is lessened by credible medical evidence that the [c]laimant's condition showed improvement." Decision and Order at 20.

> For instance, blood gas studies should be done in the sitting position, and there is no mention whether [claimant] was sitting or lying down. Additionally, there is no mention as to why the blood gas [study] was performed. Furthermore, there is no mention as to whether [claimant] was acutely ill or in his normal state. Acute illness can lower the blood gas. For these reasons, [the September 22, 2014] blood gas [study] cannot be used to determine disability according to the Federal Black Lung standards.

Employer's Exhibit 13 at 4. The administrative law judge summarily rejected Dr. Fino's opinion, stating, "I do not believe the factors identified by Dr. Fino provide a sufficient reason to believe the [September 22, 2014 blood gas] study is not an accurate measure of the [c]laimant's pulmonary condition at the time it was taken." Decision and Order at 18.

As an initial matter, because the September 22, 2014 blood gas study is contained in claimant's treatment records,[15] the quality standards at 20 C.F.R. §718.105 and Appendix C do not strictly apply. 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); Employer's Brief at 11. However, the administrative law judge must still consider whether the blood gas study is sufficiently reliable to support a finding of total disability.[16] In accomplishing this task, the administrative law judge must evaluate the reasoning and credibility of the medical opinions as to the reliability of the testing, but cannot substitute his or her opinion for that of the medical experts. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Further, despite the inapplicability of the regulatory quality standards, a physician's opinion that

[15] Claimant also designated the September 22, 2014 blood gas study as evidence in its affirmative case under 20 C.F.R. §725.414.

[16] The Department of Labor's comments to the regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

certain indicia of reliability are missing from a test result may still constitute relevant evidence as to the probative value of that study.

Here, as employer asserts, in failing to explain his basis for disagreement with Dr. Fino's opinion that the September 22, 2014 blood gas study results are unreliable, the administrative law judge erroneously substituted his opinion for that of the medical expert. *See Marcum*, 11 BLR at 1-24; Employer's Brief at 8, 10-11. While the administrative law judge ultimately concluded that the blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), we are unable to conclude that the administrative law judge's error was harmless. As set forth above, the administrative law judge ultimately relied on the September 22, 2014 study to find total disability established. Decision and Order at 20-21. Thus, on remand the administrative law judge must reconsider the evidence relevant to the reliability of the September 22, 2014 blood gas study and explain his findings. *See Wojtowicz*, 12 BLR at 1-165.

The administrative law judge's conclusion regarding the reliability of the September 22, 2014 test also formed the basis for his conclusion that the medical opinions, while not supportive of a finding of total disability, did not constitute contrary probative evidence that could undermine the September 22, 2014 qualifying blood gas study. Specifically, the administrative law judge accorded less weight to Dr. Alam's opinion because "Dr. Alam does not discuss the September 22, 2014 [blood gas study] even though his report antedates that study." Decision and Order at 21. The administrative law judge also gave little weight to Dr. Fino's opinion because "it is based on rejecting the results of the September 22, 2014 [blood gas study], a piece of objective medical evidence I have granted full probative weight." Decision and Order at 20. Finally, the administrative law judge found that Dr. Rosenberg did not adequately consider the significance of the qualifying September 22, 2014 blood gas study results.[17]

[17] Referencing the September 22, 2014 blood gas study, Dr. Rosenberg opined that "[w]hile some decreased oxygen levels have been measured at times, when [claimant] was evaluated by myself [on December 10, 2013], normal gas exchange was found." Employer's Exhibit 10. The administrative law judge found that Dr. Rosenberg's analysis of the September 22, 2014 qualifying blood gas study "ignores the fact that pneumoconiosis can be a progressive disease" and, thus "the fact that an earlier test produced non-qualifying values is not necessarily probative of the validity of later results." Decision and Order at 18, *see Id.* at 21. The administrative law judge concluded that Dr. Rosenberg's "cursory disregard for the September 22, 2014 blood gas study . . . as the most recent" undermined the persuasiveness of his opinion. *Id.* at 19.

Decision and Order at 18. Thus, on remand, after reconsidering the September 22, 2014 blood gas study, the administrative law judge should reconsider the medical opinions.[18]

In sum, on remand, following his reconsideration of the September 22, 2014 blood gas study and the medical opinions, respectively, the administrative law judge should reconsider all of the evidence relevant to the issue of total disability, pursuant to 20 C.F.R. §718.204(b)(2), and explain his findings in accordance with the APA.[19]

As we have vacated the administrative law judge's finding that claimant established total respiratory disability, we must also vacate his findings that claimant invoked the Section 411(c)(4) presumption. If, on remand, the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). In that case, because we have affirmed, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, the administrative law judge may reinstate the award of benefits. If the administrative law judge finds, however, that the evidence does not establish that claimant is totally disabled, an essential element of entitlement, he must deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[18] On remand, in evaluating the medical opinions in light of the other evidence of record, the administrative law judge must render consistent findings. As discussed *supra* the administrative law judge found that Dr. Rosenberg failed to adequately consider that the September 22, 2014 blood gas study is the most recent study of record, and thus may be more probative. Decision and Order at 18, 19, 21. We note, however, that this finding appears inconsistent with the administrative law judge's determination at 20 C.F.R. §718.204(b)(2)(ii), that the September 22, 2014 blood gas study is not sufficiently more recent than the other blood gas studies to warrant according it greater probative value. *Id.* at 18-19. As the administrative law judge has not explained this apparent contradiction, his evaluation of Dr. Rosenberg's medical opinion fails to comport with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[19] On remand, the administrative law judge must also be mindful that in a living miner's claim, lay testimony is insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence indicating a respiratory or pulmonary impairment. 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987).

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge