U.S. Department of Labor

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

BRB No. 17-0631 BLA

DENNIS A. BALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G & A COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 08/28/2018
	)	
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 Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Dennis A. Ball, Cedar Bluff, Virginia.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2014-BLA-05110) of Administrative Law Judge Tracy A. Daly 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 January 15, 2013.

The administrative law judge credited claimant with twenty-two years of qualifying coal mine employment but found that the evidence did not establish the existence of 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 could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

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[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Combs is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because claimant's testimony establishes that a portion of his above ground work was carried out at an underground mine site, that work constitutes qualifying employment for purposes of the fifteen-year presumption. *See Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979); Decision and Order at 5-7.

On appeal, claimant generally challenges the denial of benefits. Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, contending that the administrative law judge erred in weighing the evidence in finding that total disability was not established at 20 C.F.R. §718.204(b)(2) overall.

In an appeal filed by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Total Disability

A miner is considered 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). A claimant may establish total disability based on pulmonary function testing, arterial 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of

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

the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge correctly found that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i), as there are no qualifying[4] pulmonary function studies of record. Decision and Order at 16 n.19, 20. As substantial evidence supports this finding, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered four arterial blood gas studies dated March 19, 2013, July 30, 2013, April 21, 2015, and March 29, 2016. Director's Exhibit 12; Claimant's Exhibits 6, 7; Employer's Exhibit 1. The March 19, 2013 arterial blood gas study, administered by Dr. Forehand, produced qualifying values at rest, but non-qualifying values with exercise. Director's Exhibit 12. The July 30, 2013 arterial blood gas study, administered by Dr. Rosenberg, produced non-qualifying values both at rest and with exercise. Employer's Exhibit 1. The April 21, 2015 arterial blood gas study administered by Dr. Forehand produced qualifying values at rest, but non-qualifying values with exercise. Claimant's Exhibit 6. Finally, the March 29, 2016 arterial blood gas study, also administered by Dr. Forehand, produced qualifying values both at rest and with exercise. Claimant's Exhibit 7.

The administrative law judge permissibly accorded the greatest weight to the March 29, 2016 arterial blood gas study as it is the most recent test of record and, therefore, a "more accurate representation of [c]laimant's current pulmonary condition." Decision and Order at 20; *see Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (Table), 20 BLR 2-67, 2-72 (4th Cir. 1996), *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-148 (6th Cir. 1988) (An administrative law judge may credit evidence that better reflects the miner's respiratory or pulmonary status at the time of the hearing.); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992) (It is rational to give greater weight to more recent evidence if it shows that the miner's condition has progressed or worsened.). Noting that the most recent study was supported by the qualifying resting values from the March 2013 and April 2015 studies, the administrative law judge found that the "preponderant weight" of the arterial blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R.

[4] 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. 20 C.F.R. §718.204(b)(2)(i), (ii).

§718.204(b)(2)(ii). Decision and Order at 20. As this finding is supported by substantial evidence, it is affirmed. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

Next, the administrative law judge accurately found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 20. We therefore affirm the finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R §718.204(b)(2)(iv), the administrative law judge considered the medical opinion of Dr. Forehand[5] that claimant is totally disabled, and the opinion of Dr. Rosenberg[6] that claimant has a mild obstructive impairment, but is not totally disabled from a pulmonary perspective. Decision and Order at 14-17, 22-23; Director's Exhibit 12; Claimant's Exhibit 6; Employer's Exhibit 1.

The administrative law judge found that Dr. Forehand's March 19, 2013 report is well-documented to the extent he based his opinion on "objective medical testing," including the qualifying results of the March 19, 2013 resting blood gas study. Decision and Order at 22. The administrative law judge further found, however, that Dr. Forehand failed to demonstrate an understanding of the physical demands of claimant's last coal mining job. Decision and Order at 22; Director's Exhibit 12. Thus, the administrative law judge concluded that Dr. Forehand's March 19, 2013 opinion "does not establish [c]laimant is totally disabled to such a degree that he cannot return to his former coal mine employment."[7] Decision and Order at 22.

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[5] In a report dated March 19, 2013, Dr. Forehand opined that claimant is "totally and permanently disabled" from a respiratory standpoint. Director's Exhibit 12. Dr. Forehand also provided a report dated April 21, 2015 in which he diagnosed coal workers' pneumoconiosis "with respiratory impairmet [sic]," but did not address whether the impairment was totally disabling. Claimant's Exhibit 6 at 2.

[6] In a report dated August 6, 2013, Dr. Rosenberg opined that claimant "has mild airflow obstruction which reverses essentially to normal after bronchodilators" and has "no restriction, with reduced but preserved oxygenation in association with exercise." Employer's Exhibit 1 at 3. He further opined "from a pulmonary perspective [claimant] is not considered disabled from performing his previous coal mine job or other similarly arduous types of labor." *Id*.

[7] The administrative law judge noted that in his April 21, 2015 report diagnosing a respiratory impairment, Dr. Forehand recorded that claimant worked as a mechanic cleaning belts, maintaining equipment and entering into underground coal mines to retrieve equipment for repair and maintenance. As with Dr. Forehand's March 19, 2013 opinion,

Upon review of the administrative law judge's findings, we decline to affirm his determination discrediting Dr. Forehand's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Forehand relied on the results of claimant's March 19, 2013 qualifying resting blood gas study to conclude that claimant "has insufficient gas exchange capacity . . . to return to [his] last coal mining job" rendering him "totally and permanently disabled." Director's Exhibit 12. Here, claimant's valid, qualifying resting blood gas study is evidence of total respiratory disability under the regulations. 20 C.F.R. §718.204(b)(2). Moreover, Dr. Forehand was aware that claimant's job was as a "mechanic *laborer*."[8] Director's Exhibit 12 (emphasis added). An administrative law judge may discredit a physician who has an inadequate understanding of claimant's exertional requirements. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). It is not clear, however, that the administrative law judge considered all of the relevant evidence in determining that Dr. Forehand's failure to identify the specific exertional requirements of claimant's job undermined his opinion that claimant is totally disabled. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (The administrative law judge must consider all relevant evidence, render findings on all material issues of fact or law, and set forth the rationale underlying her findings.); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also 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);[9] Decision and Order at 22. We therefore vacate the administrative law judge's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv)[10] and, consequently, vacate his

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the administrative law judge relied, in part, on his conclusion that Dr. Forehand "failed to demonstrate that he has any understanding of the exertional requirements of [c]laimant's coal mine employment" to find that his opinion lacked sufficient documentation and reasoning to assist claimant in establishing total disability. Decision and Order at 22-23; Claimant's Exhibit 6.

[8] The Medical History and Examination form completed by Dr. Forehand on March 19, 2013 specified the miner's last coal mine employment job title. Director's Exhibit 12.

[9] By noting this reference we do not suggest that the administrative law judge is compelled to draw such a conclusion.

[10] The administrative law judge properly found that as Dr. Rosenberg did not diagnose a totally disabling respiratory impairment, his opinion does not assist claimant in

related finding that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2) overall.

We further hold that in weighing all of the evidence together that is relevant to the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge erred in finding that claimant's qualifying arterial blood gas studies "do not . . . outweigh [c]laimant's non-qualifying pulmonary function studies and Dr. Rosenberg's medical opinion that [c]laimant does not suffer from a totally disabling respiratory or pulmonary impairment." Decision and Order at 23.

The administrative law judge noted that in opining that claimant's mild obstructive impairment was not disabling, "Dr. Rosenberg failed to consider all of [c]laimant's exertional requirements as it relates to the distance or frequency of [c]laimant's lifting and carrying, or the amount of time [c]laimant had to stand, walk, or crawl." Decision and Order at 23. In light of this determination, the administrative law judge has not adequately explained in accordance with the APA, his conclusion that "Dr. Rosenberg's opinion supports a finding that [c]laimant is not totally disabled due to a respiratory or pulmonary impairment" and outweighs the qualifying blood gas studies. Decision and Order at 23; *see Wojtowicz*, 12 BLR at 1-165. Further, as the Director correctly asserts, the administrative law judge erred in failing to consider that "Dr. Rosenberg's opinion of no disability pre-dated the March 29, 2016 arterial blood gas study that the [administrative law judge] found most credible" in finding total disability established at 20 C.F.R. §718.204(b)(2)(ii). Director's Brief at 1. Nor has the administrative law judge explained how the non-qualifying pulmonary function studies, which assess a different type of impairment, necessarily outweigh the qualifying arterial blood gas studies. *See Wojtowicz*, 12 BLR at 1-165; *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

It is well established that the administrative law judge must consider all of the evidence of record, determine whether the record contains contrary, probative evidence and, if so, must assign this evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Lane*, 105 F.3d at 171, 21 BLR at 2-42; *Fields*, 10 BLR at 1-21; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. Here, the administrative law judge has not adequately explained how either Dr. Rosenberg's August 6, 2013 opinion or the non-qualifying pulmonary function studies constitute contrary probative evidence sufficient to rebut the qualifying arterial blood gas

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meeting his burden of proof pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23.

studies at 20 C.F.R. §718.204(b)(2). *See Lane*, 105 F.3d at 171, 21 BLR at 2-42; *Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge is instructed to determine the exertional requirements of claimant's usual coal mine work and then consider them in conjunction with the medical opinions assessing disability.[11] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996). He must fully explain the reasons for his credibility determinations in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. After reconsidering whether the medical opinion evidence establishes that the miner is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh any contrary probative evidence against his finding of total disability as established by 20 C.F.R. §718.204(b)(2)(ii) 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* 20 C.F.R. §718.204(b)(2); *Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198. The administrative law judge must explain the bases for all of his findings of fact and credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-162.

If the administrative law judge determines that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will be entitled to invocation of the Section 411(c)(4) presumption in light of the finding that claimant has twenty-two years of qualifying coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(2). The administrative law judge must then, on remand, determine whether employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii).

Alternatively, if the administrative law judge finds that claimant cannot establish a totally disabling respiratory impairment, the administrative law judge may reinstate the

[11] On his "Description of Coal Mine Work and Other Employment" form the miner described the physical requirements of the job as: sitting for .5 hours per day, standing for seven hours per day, crawling 30 feet for .5 hours per day, lifting fifty pounds six times per day, lifting fifteen pounds ten times per day, lifting twenty-five pounds seven times per day, carrying fifty pounds for ten feet six times per day, carrying fifteen pounds thirty feet ten times per day, and carrying twenty-five pounds for twenty-five feet seven times per day. Director's Exhibit 4.

denial of benefits as total disability is an essential element of entitlement under 20 C.F.R. Part 718.[12] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[12] Because the administrative law judge accurately noted that the record contains no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 20 C.F.R. §§718.202(a)(3), 718.304; Decision and Order at 18.