U.S. Department of Labor

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

BRB No. 18-0427 BLA

FREDDIE MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	DATE ISSUED: 08/30/2019
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, DC, for employer/carrier.

Jeffrey S. Goldberg (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2015-BLA-05181) of Administrative Law Judge Peter B. Silvain, Jr., denying benefits on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on September 24, 2013.

The administrative law judge initially credited claimant with 17.44 years of coal mine employment,[1] all of which he found occurred underground or in substantially similar conditions. The administrative law judge, however, found that claimant failed to establish he is totally disabled. He therefore found that claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, the Director contends the administrative law judge erred in finding that claimant did not establish total disability. Claimant responds in support of the Director's contention. Employer/carrier (employer) responds, asserting that the Director lacks standing to appeal the denial of benefits to the Board. Employer further responds in support of the administrative law judge's denial of benefits. Employer also contends that the administrative law judge erred in crediting claimant with at least fifteen years of coal mine employment. In a reply brief, the Director urges the Board to reject employer's argument that she lacks standing.

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 into the Act

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

We initially reject employer's assertion that the Director lacks standing to challenge the denial of benefits. The Act provides that the Director is a party to any Black Lung proceeding before the Board. 30 U.S.C. §932(k) ("The Secretary [represented by the Director] shall be a party in any proceeding relative to a claim for benefit" under the Act); *see also* 20 C.F.R. §§725.360(a)(5), 802.201(a). Moreover, the Director also has standing to ensure the proper enforcement and lawful administration of the Black Lung program.[3] *Gibas v. Saginaw Mining Co.,* 748 F.2d 1112, 1114 n.2 (6th Cir.1984).

Length of Coal Mine Employment

In its response brief, employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of coal mine employment.[4] Employer's Response Brief at 18 n.1. Consequently, employer argues that, even if claimant establishes that he is totally disabled on remand, he is still not entitled to the Section 411(c)(4) rebuttable presumption.

Claimant bears the burden of proof to establish the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR

[3] The regulations specifically provide that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefit payments have been made by the Black Lung Disability Trust Fund (Trust Fund). *See* 20 C.F.R. §725.602(b); *See also Director, OWCP v. E. Coal Corp.*, 561 F.2d 632, 647-48 (6th Cir. 1977). Claimant received interim benefits from the Trust Fund following a Proposed Decision and Order issued on September 25, 2014. Director's Exhibit 30.

[4] Employer's argument in its response brief is in support of another method by which the administrative law judge may find claimant not entitled to the Section 411(c)(4) presumption. Employer's Response Brief at 18 n.1. Therefore, this argument is properly before the Board. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

1-21, 1-27 (2011).

In calculating the length of claimant's coal mine employment, the administrative law judge considered claimant's Social Security Administrative (SSA) earnings statement and testimony. Decision and Order at 4-8. The administrative law judge noted that claimant's SSA earnings statement reflects that claimant received income from Blue Grass Augers in 1970 and 1971, from Beaver Creek Consolidated Coal in 1972, and from National Mines Company from 1973 to 1988. *Id*.; Director's Exhibit 7.

For claimant's coal mine employment prior to 1978, the administrative law judge permissibly credited him for each quarter in which he had earnings from coal mine operators that exceeded $50.00 as reflected in the SSA earnings statement.[5] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (administrative law judge may apply the *Tackett* method unless the beginning and ending dates of the miner's coal mine employment reveal "the miner was not employed by a coal mining company for a full calendar quarter"); Decision and Order at 6. Using this method, the administrative law judge found that claimant's coal mine employment earnings exceeded $50.00 for twenty-eight quarters, or 7.0 years.[6] *Id.* We thus affirm the administrative law judge's finding that claimant had 7.0 years of coal mine employment before 1978. *Muncy*, 25 BLR at 1-27; Decision and Order at 6

We also reject employer's argument that the administrative law judge erred in calculating claimant's post-1977 coal mine employment. Employer's Brief at 10-11. The administrative law judge permissibly applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[7] Decision and Order at 6-7. Using the formula, the administrative

[5] The Board found this method of calculation reasonable and consistent with Social Security Administration regulations. *Combs v. Director, OWCP*, 2 BLR 1-904, 1-906 (1980).

[6] In *Shepherd*, the Sixth Circuit stated, "as quarterly income approaches th[e] floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406 (6th Cir. 2019). Here, claimant earned at least $282.00 in each quarter credited by the administrative law judge. Director's Exhibit 7.

[7] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income

law judge credited claimant with 10.0 years of coal mine employment with employer from 1978 to 1987, and 0.44 of a year of coal mine employment in 1988, for an additional 10.44 years of coal mine employment. *Id*. at 7.

Employer contends that the administrative law judge erred in crediting claimant with a full year of coal mine employment in 1978, without considering that he had employment with K&S Mine Repair Service in the same year. Employer's Brief at 18-19 n.1; Director's Exhibit 7. However, even excluding all of claimant's employment in 1978, the administrative law judge permissibly credited claimant with more than fifteen years of coal mine employment, rendering any error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because it is based upon a reasonable method of calculation, we affirm the administrative law judge's determination that claimant established more than fifteen years of coal mine employment. *Muncy*, 25 BLR at 1-27. Because employer does not challenge the administrative law judge's finding that claimant's coal mine employment took place underground or in substantially similar conditions, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8. We therefore affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment.

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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See 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).

The Director contends the administrative law judge erred in his consideration of the blood gas studies.[8] The record contains two blood gas studies conducted on October 2,

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from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics.

[8] Because it is unchallenged on appeal, we affirm the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R.

2013 and February 18, 2014.

Dr. Littner conducted the October 2, 2013 blood gas study as part of claimant's Department of Labor (DOL)-sponsored pulmonary evaluation.[9] The study produced non-qualifying values at rest,[10] but qualifying values during exercise.[11] Director's Exhibit 10. Dr. Gaziano[12] reviewed the study and found it technically acceptable. Director's Exhibit 10 at 22.

Dr. Vuskovich[13] also reviewed the October 2, 2013 blood gas study. He opined that claimant had metabolic acidosis at the time of the study, which he compensated for by "vigorously hyperventilating." Employer's Exhibit 3 at 11, 16. Dr. Vuskovich noted that "[r]esting-exercise [arterial blood gas] . . . results are not valid if a subject is hyperventilating when their resting [arterial blood gas] sample is drawn." *Id.* at 16. Dr. Vuskovich also explained that because claimant was in a state of metabolic acidosis, his blood gas study results "were not valid to determine if coalmine dust exposure and clinical coal workers' pneumoconiosis degraded his pulmonary oxygen transfer . . . ." *Id.* at 11.

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§718.204(b)(2)(i), (iii). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[9] Dr. Littner is Board-Certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 10 at 38.

[10] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[11] Dr. Littner opined that the exercise portion of claimant's October 2, 2013 blood gas study revealed "a significant exercise induced reduction in his PaO2 and also in his pH indicating [claimant] achieved anaerobiosis during the relative modest exercise he underwent." Director's Exhibit 10 at 34. Dr. Littner opined that claimant is totally disabled based upon the exercise blood gas study results. Director's Exhibits 10 at 35; 11 at 2.

[12] Dr. Gaziano is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 10 at 24.

[13] Dr. Vuskovich is Board-certified in Occupational Medicine. Employer's Exhibit 3 at 27.

Dr. Vuskovich further observed that claimant's exercise study, especially its PaO2 result, was an "outlier" that did not fit the results of any of the pulmonary function studies.[14] *Id.*

In considering the validity of the October 2, 2013 blood gas study, the administrative law judge noted that Dr. Gaziano provided no explanation or discussion in support of his validation. Decision and Order at 24. The administrative law judge further noted there was no evidence contradicting Dr. Vuskovich's opinion that claimant was "vigorously hyperventilating" during the study or that such hyperventilation invalidates the results of a blood gas study. *Id.* at 25. He therefore found the October 2, 2013 blood gas study invalid. *Id.*

Dr. Rosenberg conducted the February 18, 2014 blood gas study, which produced non-qualifying values both at rest and during exercise. Director's Exhibit 12. The administrative law judge noted that Drs. Vuskovich and Littner each questioned the validity of the February 18, 2014 blood gas study. *Id.* However, he found that "[r]egardless of [its] validity," the February 18, 2014 blood gas study produced non-qualifying values. *Id.* He therefore found that the blood gas studies did not establish total disability. *Id.*

The Director contends the administrative law judge's analysis of Dr. Vuskovich's review of the October 2, 2013 blood gas study results is "incomplete." Director's Brief at 8. We disagree. The administrative law judge, in his role as fact-finder, evaluates the credibility of the evidence of record, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The administrative law judge accurately found no direct evidence in the record contradicting Dr. Vuskovich's opinion that claimant was hyperventilating during the October 2, 2013 blood gas study, rendering the study invalid. Decision and Order at 24-25. Because Dr. Vuskovich's opinion regarding the validity of the blood gas study was found to be credible, the administrative law judge rationally concluded that the results of the October 2, 2013 blood gas study are not reliable. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002) (whether a physician's opinion is sufficiently reasoned is essentially a credibility matter); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is the role of the administrative law judge to make credibility determinations); Decision and Order at 25. The Director's statements regarding the administrative law judge's consideration of the validity of the October 2, 2013 blood gas study amount to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp*

[14] Dr. Vuskovich also suggested it was "likely" the blood gas analyzer used during the October 2, 2013 blood gas study "was unstable and not accurate." Employer's Exhibit 3 at 16.

Coal of Utah, Inc., 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's credibility determination, we affirm his finding that the October 2, 2013 blood gas study is invalid. We therefore affirm the administrative law judge's finding that the blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii).

Because no party challenges the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), (iv), these findings are also affirmed. *Skrack*, 6 BLR at 1-711. In light of our affirmance of the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the evidence does not establish total disability.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). When an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c).

In this case, claimant's October 2, 2013 blood gas study was conducted as part of Dr. Littner's DOL-sponsored pulmonary evaluation. As discussed, *supra*, the administrative law judge credited Dr. Vuskovich's opinion that the results of the study were not reliable due to claimant's hyperventilation. Therefore, the district director must schedule claimant for further examination and testing consistent with this opinion. 20 C.F.R. §725.406(c).

Consequently, although we affirm the administrative law judge's findings, based upon the current evidentiary record, that claimant failed to establish total disability, we vacate the denial of benefits and remand this case to the district director to "schedule [claimant] for further examination and testing." 20 C.F.R. §725.406(c); *Hodges*, 18 BLR at 1-93.

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 district director for further development of the evidence.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

RYAN GILLIGAN
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's finding claimant established at least fifteen years of qualifying coal mine employment. I respectfully dissent, however, from its decision to affirm his determination Dr. Vuskovich properly invalidated the October 2, 2013 blood gas study. In adopting Dr. Vuskovich's postulation the miner "vigorously" hyperventilated during an examination the doctor did not attend, the administrative law judge did not consider significant conflicting evidence and failed to adequately determine whether the physician's hypothesis was adequately reasoned.

First, the administrative law judge failed to reconcile facially incompatible facts. His sole basis for accepting Dr. Vuskovich's conjecture was "there is no medical evidence in the record contradicting [his] opinion that the [c]laimant was vigorously hyperventilating, or that [arterial blood gas] results are not valid if a subject was hyperventilating when the sample was taken." Decision and Order at 25. Neither statement is accurate: Dr. Littner, and his technician who administered the study, found no indication

of hyperventilation; Dr. Gaziano independently verified the study's validity. Director's Exhibit 10 at 19-22. Uncritically accepting Dr. Vuskovich's supposition leaves similarly unresolved the basic question why an administering technician would take a sample from an obviously hyperventilating subject. The failure to reconcile these material facts is particularly troubling given no indication of the underlying chronic conditions Dr. Vuskovich asserts caused the hyperventilation -- diabetes and heart disease -- anywhere in the record.[15] It is true, as the majority recognizes, that administrative law judges are free to determine the credibility of experts, and that the technical validation of a blood gas study does not automatically entitle it to greater weight. But that does not mean an administrative law judge can overlook significant evidence leaving material factual disputes unresolved. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (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"); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (administrative law judge's findings must comport with the requirements of the Administrative Procedure Act).

Second, the administrative law judge erred in accepting Dr. Vuskovich's conclusion without fully addressing its underlying reasoning. I agree with the Director that Dr. Vuskovich relied, in part, on claimant's normal pulmonary function study results to support his speculation that claimant's undocumented hyperventilation invalidated the October 2, 2013 blood gas study. Employer's Exhibit 3 at 15. That reliance undermines his opinion. Because pulmonary function and blood gas studies measure different types of impairment, a contemporaneous normal pulmonary function study does not call into question the validity of a qualifying arterial blood gas study. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984). Based upon the administrative law judge's failure to address these fundamental issues, I would vacate his finding that the blood gas studies did not establish total disability and remand the case for reconsideration.

JONATHAN ROLFE
Administrative Appeals Judge

[15] Indeed, even Dr. Vuskovich acknowledged Dr. Rosenberg interpreted claimant's February 18, 2014 electrocardiogram as normal, with no changes suggestive of congestive heart failure or any other form of heart disease. Employer's Exhibit 3 at 14.