U.S. Department of Labor

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

BRB No. 15-0083 BLA

CARL J. ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TANOMA MINING COMPANY	)	
	)	DATE ISSUED: 12/03/2015
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-BLA-5105) of Administrative Law Judge Richard A. Morgan denying benefits 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 20, 2013.

The administrative law judge credited claimant with "at least 29.41 years" of coal mine employment,[1] twenty-seven years of which "were underground or in conditions substantially similar thereto." Decision and Order at 3. Additionally, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2). The administrative law judge further found, however, that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption[2] and, in the alternative, could not affirmatively establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

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[1] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305.

[3] Claimant does not challenge the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant's pulmonary function studies and blood gas studies were non-qualifying,[4] and that there was no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii). Before addressing whether the medical opinions established total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined the exertional requirements of claimant's usual coal mine work as a chief electrician. Noting claimant's testimony that he was required to "crawl up to 4,000 to 5,000 feet and lift up to 50 to 100 pounds up to three times per day," the administrative law judge found that claimant's job "required heavy labor." Decision and Order at 4, 20.

The administrative law judge then considered the medical opinions of Drs. Knight, Begley, Cohen, Zlupko, and Fino. Dr. Knight, who examined claimant on behalf of the Department of Labor, diagnosed moderate obstruction based on claimant's pulmonary function study results, and mild hypoxia based on his blood gas study results. Director's Exhibit 12. Noting that claimant's blood oxygen level increased with exercise, and that his moderate obstruction showed "response to bronchodilators," Dr. Knight stated that he "would not arrive at an opinion of total respiratory disability in this case." *Id*. at 4.

Dr. Begley examined claimant and noted that claimant's pulmonary function studies revealed moderate pulmonary emphysema and obstructive lung disease, and that his blood gas studies revealed resting arterial hypoxemia. Claimant's Exhibit 1 at 2. Dr. Begley opined that claimant "suffers from a pulmonary impairment . . . based upon his abnormal pulmonary function studies [and] his resting arterial blood gases." *Id*. Dr. Begley concluded that "[t]his degree of pulmonary impairment" would "preclude [claimant] from [performing] his previous employment in the coal mining industry which would require moderate to heavy exertion." *Id*.

[4] A "qualifying" pulmonary function or 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, Appendices B and C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

Dr. Cohen examined claimant and diagnosed a "moderate obstructive defect [on pulmonary function study] which improves to mild impairment post[-]bronchodilator . . . ." Claimant's Exhibit 2 at 6. Further, Dr. Cohen reported that claimant has a "mild diffusion impairment," and that "no gas exchange abnormalities were detected." *Id.* Dr. Cohen did not specifically address whether claimant is totally disabled.

Dr. Zlupko examined claimant and reported that claimant's pulmonary function study showed a "moderate reduction in his FEV1/FVC ratio" and an elevated residual volume, and that his diffusion capacity was normal. Employer's Exhibit 2 at 2. Dr. Zlupko opined that claimant's pulmonary impairment is "quite mild" and concluded that he did "not feel that [claimant's] pulmonary function, alone, would preclude him from performing his previous work as a chief electrician in the mines, doing only light labor duty."[5] *Id.*

Dr. Fino examined claimant and reviewed the medical evidence of record. Employer's Exhibit 1. Based on the testing he administered, Dr. Fino reported a moderate obstructive impairment on pulmonary function study with no response to bronchodilator, a mild reduction in diffusion capacity, and normal blood gases. Noting that the pulmonary function study conducted by Dr. Knight revealed a response to bronchodilators, Dr. Fino opined that overall, "a mild respiratory impairment [is] present." Employer's Exhibit 1 (Deposition Exhibit 2 at 9). Initially, in his medical report, Dr. Fino concluded that from a respiratory standpoint, claimant is not totally disabled because "his job was primarily light labor." *Id.* Later, when deposed, Dr. Fino was informed that claimant had to crawl up to 4,000 feet daily as part of his job as chief electrician, and was asked whether that information would change his opinion on whether claimant is totally disabled. Dr. Fino responded, "Yes. 4,000 feet a day is almost a mile he's crawling. So I would change my opinion on that . . . ." Employer's Exhibit 1 at 19.

The administrative law judge found that because claimant's pulmonary function studies and blood gas studies were non-qualifying, Dr. Knight's opinion that claimant is not totally disabled was "well-documented and reasoned." Decision and Order at 21. Turning to Dr. Begley's opinion, the administrative law judge noted that Dr. Begley "diagnosed total disability on the basis of 'abnormal' [pulmonary function studies] and [blood gas studies]." *Id.* The administrative law judge, however, noted that "Dr. Begley's diagnostic testing produced 'non-qualifying' results," and that "the [pulmonary

[5] Earlier in his report, Dr. Zlupko stated that claimant "had a variety of jobs, with some requiring significant heavy labor, but his last job classification as a chief electrician, primarily involved light labor and supervision." Employer's Exhibit 2 at 1.

function studies] and [blood gas studies] as a whole are 'non-qualifying.'" *Id.* For those reasons, the administrative law judge gave less weight to Dr. Begley's opinion.

After noting that Dr. Cohen did not specifically address claimant's ability to perform his usual coal mine work, the administrative law judge weighed Dr. Zlupko's opinion that claimant is not totally disabled from performing light labor. Finding that Dr. Zlupko did not understand that claimant's job duties required "a high exertion level," the administrative law judge discounted Dr. Zlupko's opinion. Decision and Order at 21.

Finally, the administrative law judge found that Dr. Fino based his initial opinion that claimant is not totally disabled on an inaccurate understanding of the exertional requirements of claimant's job as a chief electrician. The administrative law judge noted that once Dr. Fino was informed that claimant had to crawl a considerable distance, he "opined that claimant would be disabled if he were required to crawl 4,000 feet per day." *Id.* The administrative law judge further noted that in this case, "[c]laimant has established that his last coal mine employment involved crawling 4,000 feet per day." *Id.* The administrative law judge found that, "as a result . . . Dr. Fino's opinion that claimant [is] not totally disabled [was] poorly documented and reasoned," and the administrative law judge "discredit[ed] it fully." *Id.*

In conclusion, the administrative law judge found that "[g]iven that I credit Dr. Knight's opinion, give less weight to the opinions of Drs. Begley and Zlupko, and . . . discredit Dr. Fino fully," claimant failed to establish total disability based on the medical opinion evidence.

Claimant contends that the administrative law judge erred by failing to explain the weight he accorded Dr. Fino's opinion that claimant is totally disabled because he lacks the respiratory capacity to crawl 4,000 feet per day, as required by his job as a chief electrician. Claimant's Brief at 3-4. Claimant's contention has merit.

As the administrative law judge found, Dr. Fino's written report that claimant is not totally disabled was based on an inaccurate understanding of the exertional requirements of claimant's usual coal mine work. Therefore, the administrative law judge reasonably discounted Dr. Fino's opinion that claimant is not totally disabled. *See Gonzales v. Director*, OWCP, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989). As the administrative law judge further noted, however, when, during his deposition, Dr. Fino was asked to consider that claimant had to crawl 4,000 feet per day, he stated that under those facts he would find claimant totally disabled. Employer's Exhibit 1 at 19. In light of the administrative law judge's finding that claimant was, in fact, required to crawl 4,000 to 5,000 feet per day as a chief electrician, the administrative law judge did not explain why Dr. Fino's alternative opinion does not support a finding of total disability,

or indicate the weight he accorded Dr. Fino's alternative opinion. Consequently, the administrative law judge's decision does not comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . .". 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration of Dr. Fino's opinion.

On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge should take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, the sophistication and bases of their diagnoses, and must explain his findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Wojtowicz*, 12 BLR at 1-165. In reconsidering the medical opinions, the administrative law judge should consider whether each of the physicians understood the exertional requirements of claimant's usual coal mine work. *See Gonzales*, 869 F.2d at 779, 12 BLR at 2-197; *Killman*, 415 F.3d at 721-22, 23 BLR at 2-259; *Cornett*, 227 F.3d at 587, 22 BLR at 2-124. If the administrative law judge finds that the medical opinion evidence establishes total disability, he must weigh all of the relevant evidence together to determine whether claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

If the administrative law judge finds that claimant is totally disabled, he must determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) and, if so, whether employer has rebutted that presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. If claimant fails to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-112 (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

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge