U.S. Department of Labor

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

BRB No. 16-0127 BLA

JOSHUA LEE HARMON Claimant-Petitioner v. COAL CARRIERS, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/27/2016 DECISION and ORDER

Appeal of the Decision and Order of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joshua Lee Harmon, Rock, West Virginia, *pro se*.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2013-BLA-05555) of Administrative Law Judge Pamela J. Lakes, rendered on a subsequent claim filed on March 27, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge accepted the parties' stipulation that claimant established twenty years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine. The administrative law judge found that the newly submitted evidence was insufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment and, thus, found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C §921(c)(4) (2012).[3] Based on the administrative law judge's finding that the newly submitted evidence, along with the prior claim evidence, failed to establish total disability, she also determined that claimant failed to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and entitlement under 20 C.F.R. Part 718. Accordingly, benefits were denied.

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

[2] Claimant has filed seven prior claims for benefits, each of which was denied. Decision and Order at 2; Director's Exhibits 1-7. Claimant filed his last prior claim for benefits on March 1, 2006, and it was denied by the district director because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 7. Claimant did not take any action on the denial until filing his current subsequent claim. Director's Exhibit 8.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

On appeal, claimant generally contends that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge 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).

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).

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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish one element, based on the newly submitted evidence, in order to obtain review of this subsequent claim on the merits. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Exhibit 7.

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

[4] Because claimant's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 10.

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. 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 to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) evidence that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three newly-submitted pulmonary function tests, conducted on June 8, 2012, March 6, 2013, and April 15, 2014. Decision and Order at 7-8. The administrative law judge found that the June 8, 2012 test was qualifying for total disability, while the March 6, 2013, and April 15, 2014 tests were non-qualifying. *Id.* at 8. The administrative law judge also noted that the record contains eight pulmonary function tests submitted in claimant's prior claims, from 1995 through 2006, that were non-qualifying. Decision and Order at 8; Director's Exhibits 1-7. The administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) because "the majority of claimant's pulmonary function tests (including the most recent ones) are non-qualifying." Decision and Order at 8.

A pulmonary function study is "qualifying" for total disability if it shows an FEV1 value that is equal to or less than those listed in Table B1 (Males), Appendix B, 20 C.F.R. Part 718, "for an individual of the miner's age, sex, and height," *and* also shows either: an FVC or an MVV value that is equal to or less than those listed in Tables B3 and B5 (Males) "for an individual of the miner's age, sex, and height;" or an FEV1/FVC ratio of less than 55 percent. 20 C.F.R. §718.204(b)(2)(i). An administrative law judge must determine a miner's "correct height" in order to properly evaluate whether pulmonary function studies are qualifying for total disability under the regulations. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-81 (4th Cir. 1995). If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height. *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983).

In this case, after finding that each of the three pulmonary function tests reported a different height for claimant (65 inches, 66.5 inches, and 66 inches), the administrative law judge permissibly relied on an average of the three heights, or 65.8 inches, in applying the table values at 20 C.F.R. Part 718, Appendix B. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas*, 6 BLR at 1-223; Decision and Order at 7-8. Claimant's average height of 65.8 inches, as determined by the administrative law judge, falls between the heights of 65.7 and 66.1 inches listed in the applicable tables. Applying the lower height of 65.7 inches and claimant's age of 62 at the time of the April 15, 2014 pulmonary function test, the administrative law judge accurately stated that the April 15, 2014 pulmonary function test is non-qualifying. The administrative law judge failed to address, however, that when the *higher* height of 66.1 inches is applied, the FEV1 and FVC values for the April 15, 2014 pulmonary function test are qualifying for total disability.[5] Because the administrative law judge has not explained her rationale for relying on the *lower* height of 65.7 inches, we vacate her finding that the April 15, 2014 pulmonary function study is non-qualifying.[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we vacate the

[5] The April 15, 2014 pulmonary function test was conducted when claimant was 62 years-old and showed an FEV1 of 1.43, an FVC 2.19, and an FEV1/FVC ratio of 65 percent. There was no MVV value recorded. Claimant's Exhibit 7. Under Appendix B, for a male who is 62 years-old and whose height is 65.7 inches, the FEV1 value must be less than 1.68 and the FVC less than 2.16 in order for the test to qualify for total disability. In contrast, for male who is 62 years-old and whose height is 66.1 inches, the FEV1 must be less than 1.72 and the FVC less than 2.20 in order for the test to be qualifying.

[6] We note that the Director, Office of Workers' Compensation Programs (the Director), has previously taken the position that, when a miner's height falls between two heights listed in the table, an administrative law judge should use the greater closest height to evaluate whether the results are qualifying. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84-85 n.6 (4th Cir. 1995) (noting that the Office of Workers' Compensation Programs Procedure Manual specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table); *Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995) (stating that the Director "reasonably, and probably correctly, argues . . . that pulmonary function studies for miners based on height, whose heights are between those listed, should be taken as the next higher height"). The administrative law judge has discretion on remand to ask the Director to explain his view as to whether the greater height should be applied.

administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[7]

Additionally, to the extent that the administrative law judge's findings with regard to the pulmonary function tests may have also influenced the weight she accorded the medical opinions,[8] we vacate her finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). We also instruct the administrative law judge to more fully explain her findings with regard to Dr. Zaldivar's opinion. Under that subsection, the administrative law judge observed that claimant was required to establish "a respiratory impairment that is totally disabling separate and *apart from other non-respiratory conditions*" and she determined that "claimant failed to make such a showing." Decision and Order at 10 (emphasis added). The administrative law judge explained:

> Dr. Zaldivar found that [c]laimant was not totally disabled from a pulmonary or respiratory standpoint based upon [c]laimant's normal diffusion capacity *with abnormal breathing tests*, meaning that [c]laimant's ability to exchange oxygen was not impaired. Consequently, Dr. Zaldivar concluded that [c]laimant's impairment was due to asthma and not coal dust exposure, which he explained impairs oxygen exchange. The clear weight of the medical evidence in this case, and specifically the medical evidence and the recent opinions interpreting the testing, shows that [c]laimant was able to return to his last or usual coal mine employment or comparable work as a truck driver . . .

Decision and Order at 10 (citations omitted) (emphasis added).[9]

[7] We affirm the administrative law judge's finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), as there are no qualifying blood gas studies in the record. Decision and Order at 8; Director's Exhibits 1-7, 18; Employer's Exhibit 1. Further, as there is no evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

[9] Dr. Zaldivar opined that the March 6, 2013 pulmonary function test showed "moderate restriction of vital capacity and mild irreversible obstruction." Employer's Exhibit 1.

The administrative law judge appears to conclude that claimant is not totally disabled by a respiratory or pulmonary impairment because he suffers from asthma. Contrary to the administrative law judge's analysis, the regulation at 20 C.F.R. §718.204 treats the issue of total disability and the issue of disability causation as distinct issues, with the inquiry into the presence of a totally disabling respiratory or pulmonary impairment governed by 20 C.F.R. §718.204(b), and the cause of the impairment governed by 20 C.F.R. §718.204(c). Dr. Zaldivar described that, "[a]s the lungs are damaged by repeated episodes of asthma which are called exacerbations, there is remodeling of the lungs with loss of airways and loss of function." Employer's Exhibit 1. Dr. Zaldivar also specifically stated that claimant's "lungs are damaged by the lifelong history of smoking and whether they will regain *any pulmonary function* as he takes asthma medications is undetermined at this time." *Id*. Because the administrative law judge has failed to properly analyze Dr. Zaldivar's opinion on the issue of total disability and explain the basis for her findings, we vacate the administrative law judge's determination that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *See Wojtowicz*, 12 BLR at 1-165 (1989); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (en banc). As the administrative law judge erred in finding that claimant does not have a totally disabling respiratory or pulmonary impairment, we vacate her finding that claimant is not entitled to the Section 411(c)(4) presumption. We therefore vacate the denial of benefits.

II. REMAND INSTRUCTIONS

On remand, the administrative law judge must reconsider the pulmonary function tests and identify the table height that she uses at Appendix B to determine whether the April 15, 2014 pulmonary function test is qualifying or non-qualifying for total disability and set forth the reason for her choice. Thereafter, the administrative law judge must determine whether claimant established total disability based on the pulmonary function tests pursuant to 20 C.F.R. §718.204(b)(2)(i), and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge must then weigh all of the evidence supportive of a finding of total disability with the contrary probative evidence and render a finding as to whether claimant has satisfied his burden of proving that he is totally disabled under 20 C.F.R. §718.204(b)(2). *See Defore*, 12 BLR at 1-28-29; *Shedlock*, 9 BLR at 1-198. In rendering her credibility findings on remand, the administrative law judge must set forth the rationale underlying her findings in accordance with the Administrative Procedure Act.[10]

[10] 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), as incorporated into the Act by 30 U.S.C. §932(a).

If claimant establishes that he suffers from a totally disabling respiratory or pulmonary impairment, claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. If the presumption is invoked, the administrative law judge must then address whether employer has established rebuttal. *Id.*; *see W.Va. CWP Fund v. Bender*, 782 F.3d 129, 25 BLR 2-689 (4th Cir. 2015). However, if claimant does not establish total disability on remand, the administrative law judge may reinstate the denial of benefits.[11]

[11] We affirm the administrative law judge's findings that the prior claim evidence does not establish total disability. Therefore, if claimant is unable to establish total disability on remand, based on the newly submitted evidence, entitlement is precluded under 20 C.F.R. Part 718, and it is not necessary for the administrative law judge to address whether claimant is able to establish a change in an applicable condition of entitlement under 20 C.F.R. §718.309, by proving the existence of pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, we affirm in part, and vacate in part, the administrative law judge's Decision and Order Denying Benefits, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring:

I agree with my colleagues decision to vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv), and to remand the case for further consideration. However, when considering the height to apply in assessing whether the FEV1, FVC and MVV values are qualifying, I would hold that, since there is no controlling case law or regulation on this issue, the administrative law judge has the discretion to use any reasonable method which is supported by substantial evidence.

RYAN GILLIGAN
Administrative Appeals Judge