U.S. Department of Labor

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

BRB No. 15-0178 BLA

DONALD HEADRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 02/25/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision Awarding Benefits in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision Awarding Benefits in a Subsequent Claim (2011-BLA-06250) of Administrative Law Judge Lystra A. Harris, rendered on a miner's

subsequent claim[1] filed on July 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725, the administrative law judge credited claimant with twenty-seven (27) years of coal mine employment, finding that at least fifteen of those years were spent underground. The administrative law judge then found that the new evidence submitted in support of claimant's subsequent claim was sufficient to establish total respiratory disability pursuant 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] The administrative law judge weighed all of the evidence, old and new, and found that claimant established a total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, was entitled to invocation of 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).[3] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits, commencing in July 2010.

On appeal, employer contends that the administrative law judge erred in failing to consider all of the relevant pulmonary function study evidence of record in finding total respiratory disability established pursuant to 20 C.F.R. §718.204(b)(2). Employer further

[1] Claimant filed an initial claim for benefits on July 23, 2007, which was denied by the district director in a Proposed Decision and Order dated March 21, 2008. Director's Exhibit 1. The district director found that claimant did not establish that pneumoconiosis caused "a breathing impairment of sufficient degree to establish total disability within the meaning of the Act or the Regulations." *Id.* Claimant took no further action on this claim.

[2] The Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c).

[3] In 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which, in pertinent part, provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

contends that this error tainted the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), as well as her finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis.[4] In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a substantive response to employer's appeal.[5]

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.[6] 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).

Initially, the administrative law judge evaluated the newly submitted pulmonary function study evidence, finding that it established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered the three studies identified by the parties in their Evidence Summary Forms as pulmonary function study evidence, including the non-qualifying August 25, 2010 study administered by Dr. Barney, the non-qualifying February 4, 2011 study administered by Dr. Hawkins, and the qualifying July 7, 2011 study administered by Dr. Goldstein. Director's Exhibits 10, 11; Employer's Exhibit 1. Weighing these studies, the administrative law judge found that they established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), relying on the most recent study dated July 7, 2011 by Dr. Goldstein, which yielded qualifying values. Decision and Order at 9. The administrative law judge then considered the earlier pulmonary function study submitted in claimant's prior claim, dated September 24, 2007 and administered by Dr. Goldstein, which yielded non-

[4] In a reply brief, employer reiterates its challenge to the administrative law judge's weighing of the medical opinion evidence, arguing that the administrative law judge's failure to consider the March 8, 2012 pulmonary function study tainted her weighing of the remainder of the evidence.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least 15 years of qualifying coal mine employment pursuant to 30 U.S.C. §921(c)(4) (2012). 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 7, 15; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 4, 7.

qualifying results. Decision and Order at 13; Director's Exhibit 1. Noting that it is reasonable to accord greater weight to the more recent evidence, the administrative law judge found that the earlier evidence submitted in the prior claim did not disturb her finding that the pulmonary function evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 13. Accordingly, the administrative law judge found that the pulmonary function study evidence, as a whole, established total respiratory disability.

The administrative law judge further evaluated the newly submitted medical opinion evidence, finding that it established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In rendering this finding, the administrative law judge considered the medical opinions of Drs. Barney, Rollins, Goldstein and Fino. Of these physicians, Dr. Rollins,[7] Dr. Goldstein[8] and Dr. Fino[9] each opined that claimant was disabled from a respiratory standpoint which precluded his return to his usual coal mine employment. Claimant's Exhibit 2; Employer's Exhibits 1, 4. The fourth physician, Dr. Barney, did not provide a specific diagnosis regarding claimant's respiratory capacity to perform his usual coal mine employment, but only stated that claimant was retired at the

[7] Dr. Rollins, one of claimant's treating pulmonologists, submitted a letter to claimant's counsel dated March 1, 2012, stating that he has been treating claimant since September 8, 2011. Dr. Rollins provided a brief history of his treatment of claimant, including claimant's smoking history, work history, and the results of tests and examinations during this time. Based on his treatment of claimant, Dr. Rollins opined that claimant's lung disease is primarily due to his occupation as an underground coal miner and, from a pulmonary standpoint, claimant's respiratory function has "declined to a degree that he would no longer be able to work in any occupation that required even mild exertion." Claimant's Exhibit 2.

[8] Dr. Goldstein, based on a physical examination of claimant including objective testing, and a review of claimant's social and work histories, did not diagnose coal workers' pneumoconiosis (CWP), but rather diagnosed a pulmonary impairment in the form of chronic obstructive pulmonary disease (COPD), and opined that claimant is totally disabled from returning to his last coal mine job due to the COPD. Employer's Exhibit 1.

[9] Based on a review of medical records provided to him by employer, Employer's Exhibit 5, Dr. Fino opined that there was insufficient evidence to diagnose clinical or legal pneumoconiosis, but opined that there is a disabling respiratory impairment in the form of asthma. Dr. Fino further opined that, from a respiratory standpoint, "this man is disabled from returning to his last mining job or a job requiring similar effort." Employer's Exhibit 4.

time of his examination. Director's Exhibit 10.[10] The administrative law judge, therefore, found that the preponderance of the newly submitted medical opinion evidence established the existence of a totally disabling respiratory impairment.[11] Decision and Order at 12.

The administrative law judge further considered the only report submitted in conjunction with claimant's earlier claim and found that the November 9, 2007 report by Dr. Barney that claimant is "unable to perform prior job due to dyspnea and fatigue" supports her current finding that claimant established total respiratory disability. Accordingly, the administrative law judge found that the medical opinion evidence is sufficient to establish total respiratory disability. 20 C.F.R. §718.204(b)(iv).

On appeal, employer contends that the administrative law judge erred in finding that the pulmonary function study evidence established a totally disabling respiratory or pulmonary impairment. Specifically, employer contends that the administrative law judge failed to consider a pulmonary function study dated March 8, 2012, which yielded non-qualifying values. Employer's Brief at 4-6. Employer contends that this study, admitted into the record as part of Claimant's Exhibit 2, constitutes a treatment record under 20 C.F.R. §725.414(a)(4) and, therefore, should have been weighed with the other pulmonary function study evidence. Additionally, employer contends that consideration of this study "calls into question all of the medical opinion evidence" because "[n]one of the physicians who reviewed this case considered the non-qualifying pulmonary function study from Dr. Rollins' exam." Employer's Brief at 7. Employer's contentions have merit, in part.

While the administrative law judge is not required to accept evidence that she determines is not credible, she must consider and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). Although claimant did not identify the March 8, 2012 pulmonary function study as part of his affirmative pulmonary function study evidence, it was admitted into the record as part of

[10] Dr. Barney, based on a physical examination of claimant including objective testing, and a review of claimant's social and work histories, diagnosed pneumoconiosis and COPD. Additionally, in describing the degree of respiratory impairment, Dr. Barney stated that "[p]atient is retired … has dyspnea with minimal exertion and daily cough." Director's Exhibit 10.

[11] The administrative law judge further found, however, that the physicians do not agree on the cause of claimant's total respiratory disability. Decision and Order at 12.

Claimant's Exhibit 2.[12] Hearing Transcript (HT) at 36. However, when evaluating whether claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge considered only the studies identified by the parties as pulmonary function study evidence and did not discuss the March 8, 2012 pulmonary function study.

The evidentiary limitations regulations at 20 C.F.R. §725.414(a)(2), (3) permit each party to submit "the results of no more than two pulmonary function tests" in support of its affirmative case, and to submit rebuttal interpretations of the pulmonary function tests submitted by the opposing party. The regulations further provide that any pulmonary function test results "that appear in a medical report must each be admissible under [the evidentiary limitations contained in these paragraphs]." 20 C.F.R. §725.414(a)(2), (3). However, pursuant to 20 C.F.R. §725.414(a)(4), regardless of the aforementioned limitations, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Thus, the nature of the pulmonary function study evidence submitted, namely whether it is evidence submitted by a party in support of its affirmative case, or constitutes a medical treatment record, may be critical to how an administrative law judge considers the evidence. 20 C.F.R. §725.414(a)(2), (3), (4). As the administrative law judge has not discussed the March 8, 2012 pulmonary function study at any point in her consideration of the evidence, we vacate the administrative law judge's finding that the evidence is sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and we remand the case for the administrative law judge to determine the admissibility of the March 8, 2012 pulmonary function study and the weight to accord it.

On remand, the administrative law judge must initially consider whether the March 8, 2012 pulmonary function study is properly designated as a treatment record under 20 C.F.R. §725.414(a)(4), or whether it was part of Dr. Rollins's medical opinion which was prepared for the purpose of litigation.[13] 20 C.F.R. §725.414(a)(2), (4); *see*

[12] Claimant's Exhibit 2 contains a letter from Dr. Jason Rollins, as well as notes from claimant's three visits with Dr. Rollins and the results of the March 8, 2012 pulmonary function study.

[13] Dr. Rollins' March 1, 2012 letter identifies claimant as his "patient" and claimant's counsel described Claimant's Exhibit 2 as "a medical narrative summary from Dr. Rollins who is a treating doctor as well as medical records from Dr. Rollins attached to that." Claimant's Exhibit 2; Hearing Transcript at 36. However, Dr. Rollins' notes from March 8, 2012, the date of the pulmonary function study at-issue in this case, also state that "[claimant is] trying to get his black lung benefits – I wrote him a letter last week giving my opinion about this situation." Claimant's Exhibit 2.

Consolidation Coal Co. v. Williams, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006) (administrative law judge is granted broad discretion in resolving evidentiary issues); *see also Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); Claimant's Exhibit 2. If the administrative law judge finds that the study was part of Dr. Rollins's March 2012 medical opinion prepared for the purpose of litigation, the administrative law judge must then determine whether it is admissible pursuant to 20 C.F.R. §725.414(a)(2), or 20 C.F.R. §725.414(a)(4), or whether it violates the evidentiary limitations thereunder. If the administrative law judge determines that this study does not violate the evidentiary limitations under 20 C.F.R. §725.414(a)(2), or is a treatment record admissible under 20 C.F.R. §725.414(a)(4), the administrative law judge must consider this evidence in her evaluation of all the relevant evidence of record.[14] *See McCune*, 6 BLR at 1-988.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence was sufficient to establish the existence of total pulmonary disability, and remand the case for further consideration of all the relevant evidence. If, on remand, the administrative law judge finds that the evidence establishes total pulmonary or

[14] Contrary to employer's contention, the administrative law judge is not *required* to reject all medical opinions in this case solely for failing to consider the non-qualifying March 8, 2012 pulmonary function study. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Rather, 20 C.F.R. §718.204(b)(2)(iv) states that "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section … total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment…." 20 C.F.R. §718.204(b)(2)(iv). Therefore, it is the administrative law judge's duty to consider a medical opinion in light of the documentation underlying the opinion and determine whether such documentation is supportive of the physician's conclusions. *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985) (it is incumbent upon the administrative law judge to determine whether documentation underlying a physician's report logically supports his conclusion that the miner is, or is not, totally disabled by a respiratory or pulmonary impairment). However, the administrative law judge must also consider all relevant evidence to the contrary, in determining whether the medical opinion evidence establishes disability, 20 C.F.R. §718.204(a)(2) ("*In the absence of contrary probative evidence*,…."), and must determine whether a medical opinion which fails to take into account some probative information is nonetheless reliable and credible, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

respiratory disability, the administrative law judge should again find claimant entitled to the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4)(2012), and award benefits.[15]

Accordingly, the administrative law judge's Decision Awarding Benefits in a Subsequent Claim is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[15] Employer, in challenging the administrative law judge's award of benefits, did not challenge her finding that employer failed to present sufficient evidence to rebut the Section 411(c)(4) presumption. Consequently, we affirm the administrative law judge's finding that rebuttal of the presumption was not established. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).