U.S. Department of Labor

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

BRB No. 15-0211 BLA

WADE P. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DICKENSON RUSSELL COAL COMPANY	)	
	)	DATE ISSUED: 02/26/2016
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-6146) of Administrative Law Judge Daniel F. Solomon awarding 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 claim filed on September 13, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment,[2] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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).

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

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[1] 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) (2012); *see* 20 C.F.R. §718.305.

[2] Claimant's last coal mine employment was in Virginia. Hearing Transcript at 13. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because employer does not challenge the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge focused upon four pulmonary function studies conducted on November 5, 2011, April 18, 2012, October 17, 2012, and March 20, 2013.[4] The November 5, 2011 pulmonary function study, which was conducted as part of Dr. Gallai's Department of Labor (DOL)-sponsored medical evaluation, produced qualifying[5] values both before and after the administration of a bronchodilator. Director's Exhibit 13. The April 18, 2012 pulmonary function study administered by Dr. Fino also produced qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 20. Although the October 17, 2012 pulmonary function study administered by Dr. Klayton produced qualifying values before the administration of a bronchodilator, it produced non-qualifying values thereafter. Claimant's Exhibit 3. Finally, the March 20, 2013 pulmonary function study administered by Dr. Castle produced qualifying values both before and after the administration of a bronchodilator. Employer's Exhibit 4.

In addressing the conflicting pulmonary function study evidence, the administrative law judge noted that Dr. Castle invalidated the results of the March 20, 2013 pulmonary function study that he administered. Decision and Order at 4. The administrative law judge also accorded less weight to the October 17, 2012 pulmonary function study administered by Dr. Klayton because it was taken at a time when claimant was taking Prednisone and undergoing oxygen therapy. *Id.* "[A]ssuming that the only valid testing was performed by Drs. Gallai and Fino," the administrative law judge found that "a preponderance of [the] testing [was] qualifying." *Id.* The administrative law judge, therefore, found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

[4] The administrative law judge found that these four pulmonary function studies were more probative than six earlier pulmonary function studies contained in claimant's treatment records (July 28, 2010, October 15, 2010, November 11, 2010, December 9, 2010, April 27, 2011, and June 2, 2011). Decision and Order at 4; Director's Exhibits 15, 20. Although the pulmonary function studies conducted on July 28, 2010, December 9, 2010, April 27, 2011, and June 2, 2011 produced qualifying values, the record reflects that Dr. Castle opined that these studies were either invalid or could not be validated because of inadequate tracings. Employer's Exhibit 4.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Employer argues that the "results of all but the November 11, 2010 [pulmonary function study] and the October 17, 2012 [pulmonary function study] by Dr. Klayton were invalid due to insufficient effort." Employer's Brief at 5. Employer specifically argues that the administrative law judge erred in relying upon the results of the qualifying pulmonary function study administered by Dr. Fino on April 18, 2012. We agree. Dr. Fino invalidated the results of his own study due to "a premature termination to exhalation and a lack of reproducibility in the expiratory tracings." Director's Exhibit 20 at 6. Dr. Fino noted that there "was also a lack of an abrupt onset to exhalation." *Id.* Although the administrative law judge acknowledged that Dr. Fino "determined that his own testing was invalid," he noted that "the [DOL] determined otherwise." Decision and Order at 4. However, contrary to the administrative law judge's characterization of the evidence, the record does not indicate that any physician, on behalf of the DOL or otherwise, validated the results of the April 18, 2012 pulmonary function study. The administrative law judge, therefore, erred in determining that the results of the April 18, 2012 pulmonary function study were valid.

However, even if the administrative law judge were to exclude the results of the qualifying April 18, 2012 pulmonary function study, the administrative law judge permissibly relied upon the results of the pulmonary function study conducted by Dr. Gallai on November 5, 2011, a study that produced qualifying values both before and after the administration of a bronchodilator.[6] Consequently, under the facts of this case, the administrative law judge's mischaracterization of the evidence regarding the validity of Dr. Fino's April 18, 2012 pulmonary function study constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer's reliance upon the results of the pulmonary function studies conducted on November 11, 2010 and October 17, 2012 is misplaced. Although the November 11, 2010 pulmonary function study produced non-qualifying values both before and after the administration of a bronchodilator, the administrative law judge reasonably relied upon the more recent evidence (the November 5, 2011 pulmonary function study), which he found more accurately reflects claimant's current condition.[7] *See Cooley v. Island Creek*

[6] Dr. Ranavaya validated the results of the November 5, 2011 pulmonary function study. Director's Exhibit 13. Dr. Castle also reviewed the results of the study and opined that it "generally appears to be valid." Employer's Exhibit 4 at 9.

[7] Although not considered by the administrative law judge, the miner's treatment records include the results of pulmonary function studies conducted on September 13, 2013 and April 22, 2014. These two most recent pulmonary function studies of record produced qualifying values. Claimant's Exhibit 5 at 13, 15.

Coal Co., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 4. The administrative law judge accorded less weight to the October 17, 2012 pulmonary function study administered by Dr. Klayton because it was taken at a time when claimant was taking Prednisone and undergoing oxygen therapy. Decision and Order at 4. Since employer has not challenged the administrative law judge's basis for according less weight to the October 17, 2012 pulmonary function study, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

We agree, however, with employer that the administrative law judge erred in not weighing all of the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2).[8] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). We, therefore, vacate the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Because we have vacated the administrative law judge's finding that the evidence established total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by

[8] Citing *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997), the administrative law judge indicated that a miner could establish total disability "upon a mere showing of evidence that satisfies any one of the four alternative methods." Decision and Order at 3. However, in *Lane*, the Fourth Circuit clarified that this principle only applied "[i]n the absence of contrary probative evidence." *Id.* In this case, the record contains contrary evidence in the form of arterial blood gas studies and medical opinions. *See* Director's Exhibit 20; Claimant's Exhibit 3; Employer's Exhibit 4.

[9] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 5.

The administrative law judge properly found that, because employer stipulated to the existence of clinical pneumoconiosis, Hearing Transcript at 15, employer cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Employer, however, asserts that the administrative law judge erred in failing to find that it rebutted the Section 411(c)(4) presumption, by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer specifically contends that the opinions of Drs. Fino and Castle are sufficient to establish this second means of rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted Dr. Fino's opinion, that claimant's pulmonary impairment did not arise out of his coal mine employment, because Dr. Fino did not diagnose claimant with clinical pneumoconiosis. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

The administrative law judge found that Dr. Castle's opinion was also insufficient to establish rebuttal because the doctor did not diagnose claimant with clinical pneumoconiosis. Decision and Order at 5. However, contrary to the administrative law judge's characterization, Dr. Castle acknowledged that claimant has "pathological evidence of minimal coal workers' pneumoconiosis." Employer's Exhibit 6 at 36. Thus, the administrative law judge erred in discounting Dr. Castle's opinion on this basis.

The administrative law judge also found that Dr. Castle's opinion was insufficient to establish rebuttal because he failed to account for claimant's nineteen years and six months of coal dust exposure. Decision and Order at 5. Dr. Castle, however, found that claimant's pulmonary impairment was entirely due to bronchial asthma, and was not in any way related to his "19 to 20 years of coal mine dust exposure." Employer's Exhibit 6 at 36. The administrative law judge failed to provide an adequate explanation for why he found that Dr. Castle's opinion was insufficient to establish that no part of claimant's respiratory or pulmonary total disability was caused by his clinical pneumoconiosis. 5

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reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's determination that employer failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii).

In summary, if the administrative law judge, on remand, finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption, and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge, on remand, finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption, and the administrative law judge must reconsider whether employer can establish rebuttal by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). In so doing, the administrative law judge should take into consideration the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order awarding 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

JONATHAN ROLFE
Administrative Appeals Judge