U.S. Department of Labor

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

BRB No. 17-0302 BLA

WINT GOUGE, JR. (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MORRIS TRUCKING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/28/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart and Kelly G. Pawlowski (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05008) of Administrative Law Judge Carrie Bland 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 November 6, 2012.

The administrative law judge accepted employer's stipulation that claimant had eighteen years of qualifying coal mine employment,[1] and found that the evidence established that he suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends 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 contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

Invocation of the Section 411(c)(4) Presumption

The administrative law judge found that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),

[1] Claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction 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).

[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 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); *see* 20 C.F.R. §718.305.

(iv).[3] Decision and Order at 11-13. Employer argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and that this error affected her overall weighing of the evidence at 20 C.F.R. §718.204(b)(2).[4]

Summary of the Medical Opinion Evidence

The administrative law judge considered the medical opinions of Drs. Rasmussen, Zaldivar, and Fino. Dr. Rasmussen conducted the Department of Labor-sponsored pulmonary evaluation on December 14, 2012. He noted that claimant's last job as a "mobile equipment operator" required operating excavators and dozers, entering a plant at times to help clean up and make repairs, "considerable stair climbing," and the "heavy lifting of various pieces of equipment." Director's Exhibit 13. Dr. Rasmussen noted that claimant also "shoveled to clean up." *Id.* He thus characterized claimant's last coal mine work as requiring "considerable heavy manual labor." *Id.* Dr. Rasmussen opined that claimant did not retain the pulmonary capacity to perform "any significant gainful employment," and "clearly did not retain the pulmonary capacity to return to his regular coal mine job."[5] *Id.*

Dr. Zaldivar examined claimant on September 4, 2013. He noted that claimant's most recent coal mine employment was that of a "heavy equipment operator." Employer's Exhibit 1. Dr. Zaldivar noted that claimant reported "that when greasing or

[3] The administrative law judge found that the arterial blood gas study evidence was "in equipoise," and therefore did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11-12. Because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge also found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 12.

[4] The administrative law judge found that all of the pulmonary function "tests submitted for this claim since 2005 produced qualifying values." Decision and Order at 11. Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Dr. Rasmussen noted that claimant had profound reduction in ventilatory capacity, a reduced diffusing capacity, and a very marked impairment in oxygen transfer and hypoxia during very light exercise. Director's Exhibit 13. Dr. Rasmussen stated that these findings "clearly confirm[ed] claimant's inability to perform any significant physical activity or work." *Id.*

oiling he had to carry sixty pounds worth of oil because that is what five gallons weighed." *Id.* Dr. Zaldivar also reviewed the medical evidence of record, noting that Dr. Rasmussen indicated that claimant's job as a mobile equipment operator required "heavy lifting." *Id.* Dr. Zaldivar provided the following assessment of claimant's ability to perform his last coal mine employment:

> From a pulmonary standpoint, as of the time of my examination, [claimant] was capable of performing his job as a heavy equipment operator, but not performing heavy manual labor, which would be difficult for him to do considering the hypoxemia during exercise. Therefore, he should be able to perform his last usual coal mining work, as he described it to me and Dr. Rasmussen.

Employer's Exhibit 1 at 6-7.

Dr. Fino reviewed the medical evidence. In a report dated February 20, 2014, he opined that, from a respiratory standpoint, claimant was "disabled from returning to his last job or a job requiring similar effort." Employer's Exhibit 2. Dr. Fino also prepared a supplemental report dated June 19, 2014, wherein he responded to a request that he "comment specifically on the claimant's ability to perform his duties as [claimant] described them in his claim application." Employer's Exhibit 3. Based on his reading of one section of the handwritten application, Dr. Fino assumed that claimant's duties were limited to sitting for 10-12 hours a day, with no lifting. He revised his opinion based on these limited parameters:

> [Claimant] has a mild obstructive defect. The question was whether or not claimant's impairment was sufficient to prevent him from driving a truck – which would require him sitting for 10-12 hours per day with no lifting. He would be able to do that. He is not disabled from that activity.

Id. Neither Dr. Zaldivar nor Dr. Fino specifically addressed the qualifying pulmonary function tests in rendering their opinion that claimant retained the capacity to perform his last coal mine employment.

The Administrative Law Judge's Finding

After stating that "the record establishes that [c]laimant's past work required heavy exertion," the administrative law judge found that Dr. Rasmussen's opinion that claimant suffered from a totally disabling pulmonary impairment was "the only well-reasoned and supported medical opinion of record . . . ." Decision and Order at 13-14. She therefore found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 14.

Discussion

Employer argues that the administrative law judge erred in not considering the entirety of the evidence regarding the exertional requirements of claimant's usual coal mine work. Employer's Brief at 15. We agree.

As employer correctly maintains, claimant, as part of the claim application process, completed Form CM-913, a "Description of Coal Mine Work and Other Employment," wherein he indicated that his coal mine work as an equipment operator required him to sit for ten to twelve hours, and to stand for one hour, per day.[6] Director's Exhibit 4. Moreover, contrary to the descriptions of the exertional requirements listed by Drs. Rasmussen and Zaldivar, claimant indicated on this form that his job as an equipment operator required no lifting. *Id.* As the administrative law judge failed to address relevant evidence regarding the exertional requirements of claimant's coal mine employment contained in the record, resolve the conflicts in this evidence, and provide a rationale for her findings that comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), we must remand this case to the administrative law judge for her reconsideration of the exertional requirement of claimant's usual coal mine employment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the administrative law judge's determination regarding the exertional requirements of claimant's job duties affected her weighing of the medical opinion evidence on the issue of total respiratory disability, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), and her finding that claimant invoked the Section 411(c)(4) presumption.

On remand, the administrative law judge must consider all of the relevant evidence and determine the exertional requirements of claimant's usual coal mine employment, then compare those requirements with the physicians' assessments, and determine whether the evidence establishes total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).[7] *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

[6] Claimant did not complete the sections of Form CM-913 requesting information regarding how often and how much weight he was required to lift and carry. Director's Exhibit 4. He did indicate, however, that he "hauled stuff out of [the] prep plant." *Id.* at 1.

[7] Notably, notwithstanding the administrative law judge's finding with respect to the exertional requirements of claimant's usual coal mine employment, Dr. Rasmussen opined that claimant "does not retain the pulmonary capacity to perform any significant gainful employment . . . ." Director's Exhibit 13.

When considering whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Furthermore, we note that the administrative law judge found that all of the pulmonary function studies "submitted for this claim since 2005 produced qualifying values" for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11. As such, the pulmonary function study evidence can only lose force in the face of contrary probative evidence that credibly establishes that a miner is not totally disabled by a respiratory or pulmonary impairment. *See Lane*, 105 F.3d at 172-73, 21 BLR at 2-45-46. Therefore, in weighing the contrary opinions of Drs. Fino and Zaldivar, the administrative law judge should address whether the physicians adequately explained why claimant is not totally disabled in light of the qualifying pulmonary function studies of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Moreover, the administrative law judge must finally weigh 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).[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).

Rebuttal of the Section 411(c)(4) Presumption

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

[8] Employer argues that the administrative law judge erred in failing to consider that claimant was "still working as a truck driver and equipment operator" when he performed pulmonary function studies on August 31, 2005, March 1, 2007, June 24, 2008, and May 4, 2009. Employer's Brief at 16. We note that a miner's continued coal mine employment does not preclude a finding of total disability. *See* 30 U.S.C. §902(f)(1)(B); *Marsella v. Starvaggi Indus., Inc.*, 2 BLR 1-286, 1-289 (1979).

have either legal or clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or 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). The administrative law judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that claimant did not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zaldivar and Fino.[10] Both physicians opined that claimant suffered from an obstructive respiratory impairment due solely to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 1, 2. The administrative law judge discounted both opinions because she found that they did not explain "why coal mine dust could not have been a contributing or aggravating factor" to claimant's disabling pulmonary impairment. Decision and Order at 16.

Employer accurately notes that the administrative law judge provided no discussion of the rationales provided by Drs. Zaldivar and Fino for eliminating claimant's coal mine dust exposure as a significant contributing factor to his lung disease. Employer's Brief at 21. Consequently, the administrative law judge's analysis does not comply with the APA, which 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); *see Wojtowicz*, 12 BLR at 1-165. We, therefore, must vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis,[11] and instruct the administrative law judge to

[9] "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). "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 reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] The administrative law judge also considered Dr. Rasmussen's opinion that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to both smoking and coal mine dust exposure. Director's Exhibit 13 at 10 (unpaginated).

[11] In light of this holding, we also vacate the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or

reconsider that issue on remand. 20 C.F.R. §718.305(d)(1)(i)(A). The administrative law judge must consider the opinions of Drs. Zaldivar and Fino that claimant did not have legal pneumoconiosis along with the contrary opinion of Dr. Rasmussen in determining whether employer has met its burden of proof.[12] *See* 30 U.S.C. §923(b). On remand, should the administrative law judge find that employer has established that claimant did not suffer from legal pneumoconiosis, she should address whether employer has also established that claimant did not suffer from clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(B).

In summary, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant will have invoked the Section 411(c)(4) presumption that claimant was totally disabled due to pneumoconiosis. In that case, the administrative law judge must reconsider whether employer has rebutted that presumption by establishing that claimant had neither legal nor clinical pneumoconiosis, or 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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting). If the administrative law judge finds, however, that the evidence does not establish total disability, an essential element of entitlement, she must deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[12] We reject employer's argument that the administrative law judge may not rely on Dr. Rasmussen's opinion because, according to employer, Dr. Rasmussen misunderstood the extent of claimant's coal mine dust exposure. Employer contends that Dr. Rasmussen relied on a history of thirty years of underground coal mine employment, and argues that the record does not support the administrative law judge's finding that claimant had more than fifteen years of underground coal mine employment. Employer's Brief 13-14, 17-18. Employer, however, stipulated to eighteen years of qualifying coal mine employment, which means it stipulated that claimant was "regularly exposed" to coal mine dust for those eighteen years, regardless of whether the employment was underground or at a surface mine. *See* 20 C.F.R. §718.305(b)(2). Employer is bound by its stipulation. *Richardson v. Director, OWCP*, 94 F.3d 164, 167, 21 BLR 2-373, 2-378-79 (4th Cir. 1996). Further, the only evidence of record specifically addressing claimant's subsequent aboveground work from 1987 to 2004 is that he was exposed to coal dust, road dust, and rock dust in each of those jobs. Claimant's Exhibit 7 at 9-14.

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge