U.S. Department of Labor

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

BRB No. 19-0114 BLA

HARM PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ASSOCIATED CONTRACTING, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/28/2020
	)	
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 Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05089) of Administrative Law Judge Steven D. Bell rendered on a subsequent claim filed on June 3, 2014, under the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1]

The administrative law judge found claimant established twenty-two years of qualifying coal mine employment and total respiratory disability, establishing a change in an applicable element of entitlement[2] and invoking the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012);[3] 20 C.F.R. §718.204(b)(2); Decision and Order at 2, 5-6, 15. He further determined employer failed to rebut the presumption and awarded benefits commencing the month the claim was filed. *Id*. at 21-22.

On appeal, employer contends the administrative law judge erred in finding total disability and in applying the Section 411(c)(4) presumption. Alternatively, employer

[1] Claimant's initial claim, filed March 13, 2007, was denied for failure to establish any element of entitlement. Decision and Order at 2, 3.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must be denied unless the administrative law judge finds that at least "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, the administrative law judge concluded claimant satisfies the requirements of 20 C.F.R. §725.309 because the evidence submitted with the subsequent claim establishes claimant is totally disabled. Decision and Order at 2, 5-6, 15; *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in when the evidence establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

challenges the administrative law judge's onset date for the commencement of benefits.[4] Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 – Total Disability

A claimant is totally disabled if a respiratory or pulmonary impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[6] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

The administrative law judge found claimant established total disability based on the pulmonary function studies of record.[7] The earliest studies, dated October 22, 2014,

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-two years of qualifying coal mine employment. Decision and Order at 5, 21; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 10.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] None of the arterial blood gas studies were qualifying, there is no evidence of cor pulmonale with right-sided congestive heart failure, and the administrative law judge found

and May 12, 2015, produced non-qualifying values. Decision and Order at 8; Director's Exhibits 13, 14; Employer's Exhibit 4. The February 26, 2016 study was also non-qualifying.[8] Decision and Order at 8, 14.

Conversely, the most recent pulmonary function study, dated February 23, 2017, produced qualifying pre-bronchodilator values; no post-bronchodilator study was performed. Decision and Order at 8, 14; Claimant's Exhibit 4. The administering physician Dr. Ajjarapu noted good effort, while a reviewing physician Dr. Vuskovich validated the qualifying FEV1 and FVC results but found the MVV results invalid. Claimant's Exhibit 4; Employer's Exhibit 8. The administrative law judge determined that, despite the invalid MVV values, the qualifying FEV1 and FVC values weighed in favor of finding disability. Decision and Order at 13-14. Moreover, given this test was obtained "a year later than the most recent non-qualifying test," the administrative law judge found it "more probative of claimant's current condition" than the older studies, establishing disability at Section 718.204(b)(2)(i). *Id.* at 14.

Employer contends the administrative law judge confused Dr. Vuskovich's opinion regarding the February 2017 study with his opinion of the February 2016 study. Employer asserts Dr. Vuskovich invalidated the FEV1, FVC, and MVV values, thereby precluding the 2017 study from establishing total disability. Employer's argument mischaracterizes the record.

As the administrative law judge explained, Dr. Vuskovich's initial report invalidated the February 23, 2017 study in its entirety. Decision and Order at 8; Claimant's Exhibit 4; Employer's Exhibit 6. But Dr. Vuskovich issued a supplemental report, opining the flow volume loops and volume time tracings demonstrated sufficient effort to validate the 2017 FEV1 and FVC results. Decision and Order at 8 n.53; Employer's Exhibit 8 at 2-3. As employer does not challenge Dr. Vuskovich's supplemental report, we affirm the

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the preponderance of the medical opinion evidence weighed against disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 13-15.

[8] The February 25, 2016 study produced a qualifying pre-bronchodilator MVV value, but a non-qualifying post-bronchodilator value. Employer's Exhibits 5, 7; *see* Decision and Order at 8, 14. The administering physician Dr. Jarboe found the study results valid based on good effort and understanding, while a reviewing physician Dr. Vuskovich validated the non-qualifying FEV1 and FVC results but invalidated the qualifying MVV results for insufficient effort. Employer's Exhibits 5, 7.

administrative law judge's decision to credit the February 2017 study as qualifying. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002) (explain).

We further affirm the administrative law judge's finding that the 2017 pulmonary function study established total disability under Section 718.204(b)(2)(i). Contrary to employer's contention, the administrative law judge permissibly determined the most recent study administered on February 23, 2017, one year later than the most recent non-qualifying study, is more probative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 623-624 (6th Cir. 1988); Decision and Order at 14; Employer's Brief at 7. Accordingly, it was rational for him to give the 2017 pulmonary function study more weight than the other pulmonary function studies and find it establishes total disability. *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992)) ("later evidence rule" permits crediting "more recent positive study results over earlier negative results"); 20 C.F.R. §718.204(b)(2)(i); *see generally Shedlock*, 9 BLR at 1-199.

After finding total disability under Section 718.204(b)(2)(i), an administrative law judge must weigh all evidence to determine whether the claimant has a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-195. In this case, the administrative law judge found the blood gas studies, performed in 2014 and 2015, do not establish total disability. Decision and Order at 9; *see* 20 C.F.R. §718.204(b)(2)(ii). In considering the medical opinions of Drs. Ajjarapu, Rosenberg, and Vuskovich, the administrative law judge properly addressed the explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). He also considered the objective tests on which they relied and determined whether their assessments regarding total respiratory or pulmonary disability were credibly documented. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, (6th Cir. 1989). The administrative law judge correctly found that none of the physicians addressed whether claimant is totally disabled based on the most recent and qualifying pulmonary function study. *See Napier*, 301 F.3d a 713-714; *Crisp*, 866 F.2d at 185; Decision and Order at 15. As the physicians' reliance on earlier pulmonary function studies detracted from any probative value their opinions might have about claimant's current condition, the administrative law judge rationally relied on the qualifying 2017 pulmonary function study, which is the most recent study and establishes claimant's total respiratory disability. *See Woodward*, 991 F.2d at 319; Decision and Order at 15.

We are unpersuaded by employer's challenge to the administrative law judge's finding. Employer's Brief at 8. To the extent employer relies on the non-qualifying blood gas study evidence to attack the administrative law judge's findings and conclusions, that

evidence does not undermine the pulmonary function study evidence because blood gas study evidence measures a different form of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-1041 (6th Cir. 1993). Nor is there merit in employer's assertion that because the medical opinion evidence fails to establish total disability under Section 718.204(b)(2)(iv),[9] the administrative law judge erred in finding total respiratory disability overall at Section 718.204(b). As stated above, the administrative law judge gave rational reasons for crediting the more recent pulmonary function study over the earlier opinions finding no total disability and the weight of the evidence is not solely reliant on one type of evidence out-numbering another. *See Shedlock*, 9 BLR at 1-199. Employer's contention constitutes a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We thus affirm the administrative law judge's findings that claimant established total disability at Section 718.204(b)(2)(i) and at Section 718.204(b) overall, as well as his finding that claimant established a change in a previously denied element of entitlement under 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In light of this affirmance, in conjunction with employer's stipulation to twenty-two years of qualifying coal mine employment, the administrative law judge properly found claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 16, 21. Because employer has not challenged the administrative law judge's determination that it did not establish rebuttal of the presumption,[10] we affirm the administrative law judge's finding and the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-604 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence

[9] Dr. Ajjarapu determined claimant was totally disabled, while Drs. Rosenberg and Vuskovich opined the contrary. Decision and Order at 15.

[10] Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method. Decision and Order at 19-21.

the month the claim was filed, unless evidence the administrative law judge credits establishes the claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Claimant filed this subsequent claim in June 2014. The administrative law judge found claimant was totally disabled when Dr. Ajjarapu examined him in October 2014 but concluded the record does not establish when claimant first became disabled. Consequently, he awarded benefits commencing June 2014. Decision and Order at 22.

Employer contends the administrative law judge's finding is in error. Employer maintains that the earliest possible date benefits can commence is February 23, 2017, because the earlier non-qualifying pulmonary function studies of October 2014, May 2015, and February 2016 establish claimant was not totally disabled when those studies were performed. Employer's Brief at 9-10.

We agree with employer that the administrative law judge did not properly consider the evidence relevant to the date for the commencement of benefits. First, he incorrectly found there is no valid evidence establishing claimant was not disabled at any time after he filed his claim or after Dr. Ajjarapu's October 2014 examination. *Id.* at 22. To the contrary, the record contains the pre-2017 valid but non-qualifying pulmonary function studies, as well as the 2014 and 2015 medical opinions of Drs. Rosenberg and Vuskovich that claimant was not totally disabled. Director's Exhibits 13, 17, 19; Employer's Exhibit 4. The administrative law judge found these opinions well-reasoned and documented. Decision and Order at 15; Director's Exhibits 17, 19; Employer's Exhibits 4, 5. In addition, he contradicted his own credibility determination by finding claimant was totally disabled at the time of Dr. Ajjarapu's examination. In addressing the medical opinion evidence on total disability, the administrative law judge found Dr. Ajjarapu's October 2014 opinion diagnosing a totally disabling respiratory impairment entitled to little weight because it is not well-reasoned and documented in light of the non-qualifying October 2014 pulmonary function study. Decision and Order at 15.

In light of the foregoing, we must vacate the administrative law judge's finding as to the date for the commencement of benefits and remand this case for reconsideration of this issue. *Rowe*, 710 F.2d at 255. On remand, the administrative law judge must address all evidence indicating claimant was not totally disabled after he filed his subsequent claim and determine a reasonable date for the commencement of benefits. *Edmiston*, 14 BLR at 1-69; *Lykins*, 12 BLR at 1-182-183.

Accordingly, the 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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge