BRB No. 13-0267 BLA

BONNIE CUPP o/b/o LELAND R. CUPP (Deceased) Claimant-Petitioner v. TRINITY COAL CORPORATION OF VIRGINIA and AMERICAN INTERNATIONAL SOUTH INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/31/2014 DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Bonnie Cupp, Evarts, Kentucky, *pro se*.

H. Brett Stonecipher (Fogle, Keller, Purdy, PLLC) Lexington, Kentucky, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2010-BLA-05264) of Administrative Law Judge Stephen M. Reilly, rendered on a miner's claim filed on April 2, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). The administrative law judge determined that the miner worked twenty-four years in underground coal mine employment and adjudicated the claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1), (4), but determined that the evidence was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(i)-(v). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in weighing the evidence regarding total disability. Employer filed a reply brief, disputing the Director's argument, and reiterating its contention that benefits were properly denied.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order for claimant to establish entitlement to benefits under 20 C.F.R. Part 718, in the miner's claim, claimant must prove that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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[1] The miner filed an application for benefits on April 2, 2009. Director's Exhibit 2. While the claim was pending, the miner died on November 29, 2012. Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate.

[2] This claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Relevant to this case, Congress enacted amendments to the Act, which apply to claims such as this one, filed after January 1, 2005, that were pending on or after March 23, 2010. Amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes that the miner worked at least fifteen years in underground coal mine employment, or in conditions substantially similar to those of an underground mine, and that the miner suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

A miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by: pulmonary function studies showing values equal to, or less than, those in Appendix B; blood gas studies showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge weighed five pulmonary function studies dated March 30, 2009, May 15, 2009, September 15, 2009, February 5, 2010, and February 15, 2011. Employer's Exhibit 4; Director's Exhibits 12, 14; Claimant's Exhibits 3, 2. The March 30, 2009 pulmonary function study, administered at Stone Mountain Health Services, was obtained without the use of a bronchodilator and had non-qualifying values for total disability. Employer's Exhibit 4. The pulmonary function study conducted by Dr. Baker, at the request of the Department of Labor, on May 15, 2009, had a pre-bronchodilator test that was qualifying for total disability, while the post-bronchodilator test was non-qualifying. Director's Exhibit 12. The September 15, 2009 pulmonary function study, administered by Dr. Broudy, had non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 14. The February 5, 2010 pulmonary function study, conducted by Dr. Craven without the use of a bronchodilator, was qualifying for total disability. Claimant's Exhibit 3. The February 15, 2011 pulmonary function study, conducted by Dr. Craven without the use of a bronchodilator, was non-qualifying. Claimant's Exhibit 2.

In resolving the conflict in the pulmonary function study evidence, the administrative law judge stated:

> I note that Dr. Baker's [May 15, 2009] study and Dr. Craven's February 5, 2010 study meet the regulatory requirements for total disability pre-bronchodilator but do not qualify post-bronchodilator. Therefore, these two studies are non-qualifying. Dr. Broudy's September 15, 2009 study did not qualify. Finally, Dr. Craven's February 15, 2011 study did not meet the

> qualifying standards. I find that the weight of the pulmonary function tests does not support a finding of total disability.

Decision and Order at 6. The administrative law judge concluded that claimant failed to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the two arterial blood gas studies of record, dated May 15, 2009 and September 15, 2009, were non-qualifying for total disability. Decision and Order at 7, 13; Director's Exhibits 12, 14. In addition, because there was no evidence in the record that the miner had cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 13.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge also found that claimant failed to establish total disability, based on the medical opinion evidence. Specifically, the administrative law judge noted that Dr. Baker examined the miner on behalf of the Department of Labor on May 15, 2009, and opined that he was totally disabled from performing his usual coal mine work. The administrative law judge stated:

> Dr. Baker found that [the miner] was totally disabled based upon qualifying pre-bronchodilator values that he stated would represent [the miner's] pulmonary function during work ([Director's Exhibit 12]). There is nothing in the regulations to support this approach. Pulmonary function studies must be taken as a whole and Dr. Baker's disregard of the non-qualifying post-bronchodilator component of the study does not turn a non-qualifying study into a qualifying study.

Id. at 14. The administrative law judge concluded that Dr. Baker's opinion was entitled to little weight because Dr. Baker "did not discuss why he disregarded [the miner's] post-bronchodilator results and why [the miner's] pre-bronchodilator value would most accurately represent his true lung function."[3] *Id*.

Conversely, the administrative law judge gave weight to Dr. Westerfield's opinion, that the miner was not totally disabled, noting that: Dr. Westerfield disagreed with Dr. Baker's opinion that "pre-bronchodilator testing represented [the miner's] true

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[3] Dr. Baker noted that the miner's post-bronchodilator study was non-qualifying, but opined that if the miner "was indeed working in dust and exerting himself, the pre-bronchodilator value would more likely represent his true pulmonary function in his working environment." Director's Exhibit 12.

pulmonary function during work;" Dr. Westerfield had an accurate understanding of the physical demands of the miner's job as a fireboss; and that he based his opinion on "normal pulmonary function tests and arterial blood gas studies." *Id*. Relying on Dr. Westerfield's opinion, the administrative law judge determined that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iv).[4] Thus, because the administrative law judge found that claimant failed to establish total disability, a requisite element of entitlement, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), he denied benefits.

The Director asserts that the administrative law judge erred in his analysis of the pulmonary function study evidence because he "erroneously concluded that if the results of a pre-bronchodilator test were qualifying and the results of a corresponding post-bronchodilator test were non-qualifying, the study as a whole is non-qualifying." Director's Letter Brief at 1. We agree. The quality standards governing the administration of pulmonary function studies state that any report of a pulmonary function study must indicate "[w]hether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained." 20 C.F.R. §718.103(b)(8). Contrary to the administrative law judge's analysis, there is no regulatory provision that gives controlling weight to the post-bronchodilator results. Moreover, the comments to the regulations caution against reliance on post-bronchodilator results in determining total disability: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980). Because the administrative law judge mischaracterized the May 15, 2009 pulmonary function study, finding it non-qualifying for total disability based solely on the results of the post-bronchodilator values, and he did not properly weigh the qualifying portion of that test, we vacate the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[5]

[4] The record also contains the medical opinion of Dr. Broudy. The administrative law judge gave little weight to Dr. Broudy's opinion, that the miner was not totally disabled, because he found that Dr. Broudy did not consider the exertional requirements of the miner's job in reaching his conclusions. Decision and Order at 14; Director's Exhibit 14.

[5] The administrative law judge also erred in weighing the pulmonary function study evidence to the extent that he mischaracterized Dr. Craven's February 5, 2010 study as having non-qualifying post-bronchodilator values. Decision and Order at 6. The record reflects that the study was conducted without the use of a bronchodilator and was qualifying for total disability. Claimant's Exhibit 3. On remand, in re-weighing the evidence at C.F.R. §718.204(b)(2)(i), the administrative law judge must correctly

Additionally, to the extent that the administrative law judge's findings with respect to the pulmonary function study evidence affected his credibility determinations with regard to the weight he accorded the medical opinions on the issue of total disability, we vacate the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge must reconsider whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). In so doing, the administrative law judge must correctly characterize the evidence and determine whether the pulmonary function study evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge must also reweigh the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) and determine, based on his consideration of all the relevant evidence under 20 C.F.R. §718.204(b)(2)(1)(i)-(iv), whether claimant has satisfied her burden to prove that the miner had a totally disabling respiratory or pulmonary impairment.[6] *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). If the administrative law judge concludes that the miner was totally disabled and further finds that claimant is entitled to invocation of the amended Section 411(c)(4) presumption, the administrative law judge must then consider whether employer has established rebuttal of that presumption. *See Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8 (6th Cir. 2011). In rendering his credibility determinations on remand the administrative law judge must explain the basis for all of his findings of fact and conclusions of law in accordance with the Administrative

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characterize each of the pre- and post-bronchodilator results as either qualifying or non-qualifying.

[6] The administrative law judge found that the miner last worked as a "fire boss/belt boss," and determined, based on the miner's description of his duties, that his usual coal mine work constituted moderate manual labor. However, to the extent that claimant described lifting and carrying weights 40 to 50 pounds, 10-15 times per day, the administrative law judge may consult Appendix C of the *Dictionary of Occupational Titles* and consider whether claimant's job duties are consistent with "Heavy Work," which is defined as "[e]xerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." Employment and Training Administration, U.S. Dept. of Labor, *Dictionary of Occupational Titles*, Vol. II, Appendix C (4th ed. 1991).

Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the Decision and Order Denying Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge