U.S. Department of Labor

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

BRB No. 15-0090 BLA

DANNY RAY HUDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY, L.P.	)	DATE ISSUED: 01/29/2016
	)	
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 on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-05252) of Administrative Law Judge Kenneth A. Krantz, rendered on a claim filed on March 26, 2007, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)

(the Act). This case is before the Board for the third time.[1] In a Decision and Order Awarding Living Miner's Benefits dated March 25, 2009, the administrative law judge determined that claimant satisfied his burden of proof to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718. In consideration of employer's appeal, the Board vacated the award because the administrative law judge did not properly consider whether a pulmonary function study obtained by Dr. Alam on March 10, 2008 was in substantial compliance with the quality standards under the regulations, and because he "conflated the issues of disability and disability causation." *Hudson v. Golden Oak Mining Co.*, BRB No. 09-0521 BLA, slip op. at 2 (Apr. 14, 2010) (unpub.). The Board remanded the case for further consideration of claimant's entitlement, instructing the administrative law judge to address whether claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] In his Decision and Order on Remand, dated June 24, 2011, the administrative law judge found that the March 10, 2008 pulmonary function study was invalid, but that claimant established total disability by a preponderance of the pulmonary function study evidence and the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(i),(iv). The administrative law judge found that claimant was entitled to the Section 411(c)(4) presumption and employer did not rebut the presumption. Accordingly, benefits were awarded.

Employer appealed and the Board vacated the administrative law judge's award of benefits because he failed to provide the parties an opportunity to submit additional evidence relevant to the change in law occasioned by the reinstatement of Section 411(c)(4). *Hudson v. Golden Oak Mining Co.*, BRB No. 11-0672 BLA, slip op. at 5-6 (July 17, 2012) (unpub.). On remand, the administrative law judge reopened the record and admitted additional evidence submitted by the parties. Thereafter, on November 18, 2014, the administrative law judge issued his Decision and Order on Remand, which is the subject of the current appeal. Based on the filing date of the claim, and his

[1] We incorporate the procedural history of the case as set forth in the Board's prior decisions, *Hudson v. Golden Oak Mining Co.*, BRB No. 09-0521 BLA (Apr. 14, 2010) (unpub.), and *Hudson v. Golden Oak Mining Co.*, BRB No. 11-0672 BLA (July 17, 2012) (unpub.).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis, if he 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 also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

determinations that claimant established at least fifteen years of underground coal mine employment[3] and a totally disabling respiratory or pulmonary impairment, the administrative law judge again found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). The administrative law judge further determined that employer failed to rebut that presumption. Accordingly, benefits were again awarded.

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.[4] Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.

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.[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).

Employer contends that the administrative law judge erred in finding invocation of the presumption established. Employer specifically challenges the administrative law judge's finding that claimant established total disability based on the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), and the medical opinion

[3] The administrative law judge specifically stated: "I credit [c]laimant with at least 16 years of underground coal mine employment" and "I find that [c]laimant has at least the 15 years necessary to invoke the presumption, and the evidence supports a finding of at least 20 years, all of which was underground." 2014 Decision and Order on Remand at 16.

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment for invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] The record contains four pulmonary function studies with qualifying[7] values, dated February 9, 2007, April 20, 2007, May 24, 2007, March 10, 2008, and one pulmonary function study with non-qualifying values, dated June 6, 2013. Director's Exhibits 29, 12, 10; Claimant's Exhibit 2; Employer's Exhibits 2, 3. The administrative law judge excluded the April 20, 2007, March 10, 2008, and June 6, 2013 studies from consideration because he found that they were invalid.[8] With regard to the two remaining qualifying pulmonary function studies, the administrative law judge stated that employer did not dispute the validity of the studies "on the grounds that they did not comply with the regulation requirements," but relied on the opinions of Drs. Jarboe and Rosenberg, who asserted that the results of each study were invalid because claimant "did not give enough effort." 2014 Decision and Order on Remand at 18.

[6] The administrative law judge found that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as there was no evidence that he has complicated pneumoconiosis. He also found that claimant was unable to establish total disability because the blood gas study evidence was non-qualifying pursuant to 20 C.F.R. §718.204(b)(2)(ii), and there is no evidence of cor pulmonale with right-sided congestive heart failure by which claimant may establish total disability at 20 C.F.R. §718.204(b)(2)(iii). 2014 Decision and Order on Remand at 16-18.

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[8] The administrative law judge excluded the qualifying April 20, 2007 pulmonary function study, obtained by Dr. Dahhan, because Dr. Dahhan indicated that the study was "invalid due to more than 5% variation in the results, and no party has argued to the contrary." 2014 Decision and Order on Remand at 17. The administrative law judge also excluded the qualifying March 10, 2008 study, obtained by Dr. Alam, on the grounds that it did not comply with 20 C.F.R. §718.103(b), as it "was not accompanied by three tracings, and it failed to address cooperation and comprehension." *Id.* In addition, the administrative law judge found that the non-qualifying June 6, 2013 study was invalid because Dr. Jarboe, the administering physician, stated that claimant "could not perform the lung volumes," gave "poor and inconsistent effort on spirometric testing," and "the spirogram both before and after [broncho-]dilators is not valid." *Id.*, *quoting* Employer's Exhibit 3 at 3.

In a supplemental report dated August 25, 2013, Dr. Jarboe acknowledged that each of the five pulmonary function studies of record met the criteria "for appropriate labeling, etc." under 20 C.F.R. §718.103,[9] but he opined that they were not a "valid measure[] of [claimant's] breathing capacity." Employer's Exhibit 4. With regard to the qualifying February 9, 2007 study obtained by Dr. Roatsey, Dr. Jarboe stated:

> This study is clearly not valid as the flow volume and time volume curves show inconsistent and suboptimal effort. Each of the flow volume curves shows wavy lines indicating that the claimant failed to maintain maximum expiratory force throughout the expiratory maneuver. The report summary indicates that 8 tests were performed, 2 were acceptable and none were [sic] reproducible.

Employer's Exhibit 4 at 2. With regard to the qualifying May 24, 2007 study obtained by Dr. Alam, Dr. Jarboe stated:

> On the pre-[broncho]dilator study, the claimant gave very inconsistent effort. The flow volume loops on the pre-[broncho]dilator study are quite small, making it impossible to determine whether the curves are entirely smooth or not. Thus, it cannot be determined with reasonable certainty whether there may have been some intermittent obstruction of the mouthpiece, etc. Inspection of the time volume curves shows that the claimant failed to initiate the expiratory maneuver with the blast of air that indicates maximum effort. Finally, the flow volume curves from the post-[broncho]dilator study are not displayed. On the MVV maneuver both pre[-] and post[-broncho]dilator, the study is not valid because the claimant failed to achieve adequate volume with each breath. I do not feel that this study shows maximum effort and thus cannot be considered valid . . . . Further evidence that the spirogram performed under the direction of Dr.

[9] The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of 20 C.F.R. Part 718. Section 718.103 states, in relevant part, that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part." 20 C.F.R. §718.103(c). Among other provisions, Appendix B contains specific requirements relating to maximal effort during the entire forced expiration, full inspiration preceding the forced expiration, absence of obstruction, satisfactory start of expiration, and the contour of the volume-time tracing. *See* 20 C.F.R. Part 718, Appendix B.

> Alam does not represent the claimant's maximum effort is the marked difference in the pre-[broncho]dilator forced vital capacity (2.49 L – 56%) and that recorded approximately 3-1/2 months earlier of 2.92 L (76%).

Employer's Exhibit 4 at 3.

Dr. Rosenberg also opined that the February 9, 2007 study was "invalid based on the shape of the flow-volume and volume-time curves" and that "the efforts were clearly incomplete." Employer's Exhibit 6 at 2. He also invalidated the May 24, 2007 study for similar reasons:

> [W]hile the two best spirometric values for FVC and FEV1 revealed a variation of 60cc or less and thus met the validity criteria on that count, variation must be less than 150cc to be valid. However, inadequate inspiratory efforts were obvious based on the shape of the flow-volume curves. In regards to this, the most recent update for determining validity of spirometry (Miller) outlines the importance of using the flow-volume curves to assess whether or not complete efforts have been provided during test performance. If complete efforts are not evident on inspection of the curves, including deep inspiration prior to expiration, then the study cannot be considered valid. Obviously, despite Dr. Mettu's opinion that the spirometry is valid, he obviously did not address this issue completely since inspection of [claimant's] flow-volume curves reveals incomplete efforts, and thus, the study is invalid.

Employer's Exhibit 6 at 2-3.[10]

In determining the weight to accord the pulmonary function study evidence, the administrative law judge stated:

> Despite the assertion by Drs. Jarboe and Rosenberg that the 02/09/07 and 05/24/07 [pulmonary function studies] are invalid, *the tests are in compliance with the requirements of [20 C.F.R.] §718.103.* Dr. Jarboe stated the [pulmonary function studies] he evaluated meet the Department of Labor requirements. He disputes the [Department of Labor] criteria. The impressions that [c]laimant did not give adequate effort are

[10] Dr. Rosenberg refers to Dr. Mettu's completion of a Department of Labor form indicating that he had reviewed the tracings of the May 24, 2007 study, and that the "[v]ents are acceptable." Director's Exhibit 11.

> contradicted by the technicians who actually administered the tests. The 02/09/07 test states [c]laimant gave good effort and cooperation. The technician who administered the 05/24/07 [pulmonary function study] wrote the patient cooperated well and gave a good effort.

2014 Decision and Order on Remand at 18 (citations omitted) (emphasis added). The administrative law judge gave more "weight to the first-hand observations of technicians who administered the studies than to [the] physicians who reviewed the tracings," and concluded that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer asserts that the administrative law judge's reliance on the technicians' comments regarding claimant's cooperation constitutes legal error under *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885, 16 BLR 2-129, 2-135 (7th Cir. 1992). Employer's argument has merit, in part. In *Brinkley*, the United States Court of Appeals for the Seventh Circuit vacated an administrative law judge's reliance on technicians' notations of good cooperation to find three pulmonary function studies were valid when there was contrary evidence in the record indicating that the tracings did not meet "recognized medical standards for reproducibility." *Brinkley*, 972 F.2d at 885, 16 BLR at 2-135. The court specifically held that while it was "rational for the administrative law judge to assume that the technicians were qualified to do their jobs," he erred in assuming they were equally qualified "to assess the validity of the tests without evidence in the record to support that assumption," noting, "[t]heir notations of good cooperation do not amount to substantial evidence that they succeeded in producing a valid test in the face of competent opinions that the results show the contrary." *Id.* The court emphasized that "the interpretation of tracings" is what matters in determining the validity of a pulmonary function study. *Id*. Because there was no objective medical evidence submitted in *Brinkley* to contradict the invalidation reports by the physicians, the court vacated the administrative law judge's finding that the miner was totally disabled and remanded the case for further consideration. *Id*.

The facts of this case are distinguished from *Brinkley*, somewhat, in that the invalidation reports by employer's physicians are not uncontradicted. Dr. Alam, Board-certified in Pulmonary and Critical Care Medicine, reviewed the tracings from the May 24, 2007 pulmonary function study and stated that the spirometry data was "acceptable and reproducible" and further noted that claimant "cooperated well and gave good effort." Director's Exhibit 10. Dr. Mettu also indicated that the tracings from the May 24, 2007 pulmonary function study were acceptable. Director's Exhibit 11. With respect to the February 9, 2007 pulmonary function study, there is a typed notation of "good effort" and "coop[eration]" on the spirometry report which includes the signature of the

technician "K.Cox CRT" as well as Dr. Roatsey, a Board-certified osteopathic and family physician. Director's Exhibit 29 at 11.

The administrative law judge, however, did not consider the statements by Drs. Alam and Mettu, nor the signature by Roatsey, and cited only to the technicians' comments as his basis for rejecting the opinions of Drs. Jarboe and Rosenberg. Because the administrative law judge did not provide a rational explanation for rejecting the invalidation reports of Drs. Jarboe and Rosenberg, we must vacate the administrative law judge's determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand this case for further consideration of whether claimant established total disability based on the pulmonary function study evidence. *See Brinkley*, 972 F.2d at 885, 16 BLR at 2-135; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In considering the medical opinion evidence, the administrative law judge credited Dr. Alam's opinion, that claimant is totally disabled from a respiratory or pulmonary impairment, over the contrary opinions of Drs. Jarboe and Rosenberg, noting that the latter physicians believed that the February 9, 2007 and May 24, 2007 pulmonary function studies were invalid, contrary to the administrative law judge's findings. 2014 Decision and Order on Remand at 19. Because the administrative law judge's findings with regard to the pulmonary function study evidence influenced his credibility determinations with regard to the medical opinions of record, we vacate his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] *See Wojtowicz*, 12 BLR at 1-165. As we vacate the administrative law judge's overall determination that claimant established a totally disabling respiratory or pulmonary

[11] Employer argues that the administrative law judge did not properly address whether Dr. Alam had an accurate understanding of the exertional requirements of claimant's usual coal mine employment, prior to crediting his opinion that claimant is totally disabled. The administrative law judge observed that Dr. Alam reviewed claimant's CM-911a Form, which listed claimant's job duties as fireboss, beltline examiner, rock dusting, shoveling belt, shuttle car driver and section boss. 2014 Decision and Order on Remand at 6. Dr. Alam noted on his report that claimant walked four to five miles per shift, built and hung curtains, and "rock dusted." Director's Exhibit 10-12. On remand, if the administrative law judge determines that the qualifying May 24, 2007 pulmonary function study obtained by Dr. Alam is valid, he must identify the exertional requirements of claimant's usual coal mine work and determine whether Dr. Alam's opinion is sufficient to establish total disability in light of those exertional requirements. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

impairment, we must also vacate his determination that claimant invoked the presumption at Section 411(c)(4).[12] 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

On remand, the administrative law judge should properly identify all of the evidence of record relevant to the validity of the February 9, 2007 and May 24, 2007 pulmonary function studies. Taking into consider the qualifications of the physicians and the bases for their medical conclusions, the administrative law judge should reach a determination as to the validity of each study and explain the basis for his findings in accordance with the Administrative Procedure Act.[13] The administrative law judge must render specific findings as to whether claimant established total disability pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). If claimant establishes total disability, the administrative law judge may reinstate his finding that claimant invoked the Section 411(c)(4) presumption. As necessary, the administrative law judge may reconsider whether employer established rebuttal of the presumption.

[12] Because we vacate the administrative law judge's finding of invocation, it is not necessary that we address employer's specific arguments pertaining to the administrative law judge's findings on rebuttal. We note, however, that the administrative law judge's rejection of employer's physicians relevant to rebuttal were also influenced by his findings with regard to the pulmonary function study evidence and should be reconsidered on remand, as necessary. 2014 Decision and Order on Remand at 22.

[13] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge