U.S. Department of Labor

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

BRB No. 17-0522 BLA

JOHHNY G. RIGGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 07/23/2018
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikevillle, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-BLA-05432) of Administrative Law Judge Timothy J. McGrath denying 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 December 4, 2013.

After crediting claimant with twenty-one years of coal mine employment,[1] nineteen of which took place underground, the administrative law judge found that the evidence did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). In addition to finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge, therefore, denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Claimant also contends that the administrative law judge erred in finding that the evidence did not establish the existence of legal pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates his previous contentions.[3]

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, 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).

[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.

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's determination that claimant established twenty-one years of coal mine employment,

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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

Claimant argues that the administrative law judge erred in finding that the pulmonary function study evidence and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[4]

The record contains four pulmonary function studies conducted on January 23, 2014, May 13, 2014, October 7, 2014, and March 9, 2016. The January 23, 2014 pulmonary function study produced qualifying pre-bronchodilator values,[5] and included no post-bronchodilator results. Director's Exhibit 9. The May 13, 2014 pulmonary function study produced non-qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 11. The October 7, 2014 pulmonary function study produced non-qualifying values pre-bronchodilator results, and included no post-bronchodilator results. Claimant's Exhibit 2. Finally, the March 9, 2016 pulmonary function study produced qualifying values before the administration of a bronchodilator,

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nineteen of which were underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R.§718.204(b)(2)(ii), (iii), these findings are affirmed. *See Skrack*, 6 BLR at 1-711.

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

but non-qualifying values after the administration of a bronchodilator. Claimant's Exhibit 2.

In addressing the conflicting pulmonary function study evidence, the administrative law judge found that the only two qualifying pulmonary function studies of record, namely, the pre-bronchodilator studies conducted on January 23, 2014 and March 9, 2016 were invalid. Decision and Order at 17-18. He therefore found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* at 18.

Claimant argues that the administrative law judge erred in finding that the two qualifying pulmonary function studies were invalid. In considering claimant's January 23, 2014 pulmonary function study, the administrative law judge noted that Dr. Vuskovich, who is Board-certified in Occupational Medicine, concluded that the test was invalid because claimant prematurely terminated his expiratory efforts. Decision and Order at 17; Employer's Exhibit 3 at 6. The administrative law judge considered the report of Dr. Gaziano validating the January 23, 2014 pulmonary function study,[6] but permissibly accorded it less weight because Dr. Gaziano merely checked a box indicating that the study was valid without offering any explanation for his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 17; Director's Exhibit 9.

Claimant, however, argues that the administrative law judge erred in not addressing the significance of evidence contradicting Dr. Vuskovich's assessment of the effort that claimant provided during the January 23, 2014 pulmonary function study. We agree. Dr. Chavda,[7] the physician who conducted the Department of Labor sponsored pulmonary evaluation, participated in an April 18, 2016 deposition during which the following exchange took place:

[6] The record reflects that Dr. Gaziano is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 9.

[7] Dr. Chavda is Board-certified in Internal Medicine, Pulmonary Disease, and Sleep Medicine. Director's Exhibit 9.

> Q. And you're looking at [the January 23, 2014] pulmonary function test results right now. Is there anything there that would indicate he had a lack of effort in those pulmonary function test results?
>
> A. Looking at the graph and looking at his flow volume loop, I do not see that he had lack of any kind of effort.

Claimant's Exhibit 3 at 8-9.

When the administrative law judge summarized Dr. Chavda's deposition testimony, he noted that the doctor "did not see any lack of effort on [c]laimant's [January 23, 2014] pulmonary function study." Decision and Order at 8. However, the administrative law judge failed to discuss the weight he accorded Dr. Chavda's testimony when he considered the validity of the January 23, 2014 pulmonary function study. Because the administrative law judge failed to address relevant evidence regarding the validity of the qualifying pulmonary function study conducted on January 23, 2014, his analysis does not comport 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). Therefore, we must vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration.[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the administrative law judge's findings with regard to the pulmonary function study evidence affected his weighing of the medical opinion evidence on the issue of total respiratory disability, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9]

[8] We reject claimant's contention that the administrative law judge erred in not addressing Dr. Chavda's opinion regarding the validity of the March 9, 2016 pulmonary function study. Claimant's Brief at 20-22. Dr. Chavda testified that he did not personally see claimant on the day that claimant performed the March 9, 2016 study. Claimant's Exhibit 1 at 18-19. Moreover, although Dr. Chavda interpreted the results of the study, he did not comment upon the validity of the test. *Id.* at 19-20. The administrative law judge therefore permissibly relied upon Dr. Vuskovich's opinion that claimant failed to take a deep breath sufficient to generate valid pre-bronchodilator results during the March 9, 2016 study. Decision and Order at 18; Employer's Exhibit 3 at 13.

[9] Dr. Chavda noted that claimant's March 9, 2016 diffusing study revealed a "severely low" DLCO. Claimant's Exhibit 3 at 19-20. Based on this result, Dr. Chavda opined that claimant would not be able to perform "a strenuous job." *Id.* at 38. Depending on the administrative law judge's finding regarding the exertional requirements of claimant's usual coal mine employment, Dr. Chavda's assessment could support a finding

On remand, the administrative law judge must reconsider whether the pulmonary function study and medical opinion evidence establish that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Should the administrative law judge find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all of the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *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 the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[10] 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[11] 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

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that claimant is totally disabled. However, the administrative law judge found, without explanation, that Dr. Chavda's reliance on diffusion study results was not sufficient to establish the existence of a totally disabling respiratory impairment. Decision and Order at 19 n.7. The applicable regulation provides that a physician may base a reasoned medical judgment upon "medically acceptable clinical and laboratory diagnostic techniques . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991) (holding that an administrative law judge erred in discrediting a physician's diagnosis of total disability based on a diffusion capacity test merely because that test was not listed in the regulations). Thus, the administrative law judge erred to the extent that he discredited Dr. Chavda's disability assessment solely because diffusing studies are not listed in the regulations.

[10] We previously affirmed the administrative law judge's finding of nineteen years of underground coal mine employment. *See* p.3 n.4, *supra*. Therefore, claimant has established the necessary fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[11] We note that employer cannot rely upon the administrative law judge's finding that claimant did not carry his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) to relieve it of its burden to rebut the Section 411(c)(4) presumption with affirmative evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). If the administrative law judge finds that the evidence does not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), however, he must deny benefits.[12] *See Trent*, 11 BLR at 1-27.

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

RYAN GILLIGAN
Administrative Appeals Judge

[12] Because there is no evidence of complicated pneumoconiosis in the record, claimant is unable to establish entitlement under Section 718.304. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; Decision and Order at 16.