U.S. Department of Labor

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

BRB No. 18-0404 BLA

CARL E. COLINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 07/11/2019
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Carl E. Colinger, Baxter, Kentucky.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

GILLIGAN, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (2016-BLA-05766) of Administrative Law Judge Scott R. Morris denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on April 1, 2014.

After crediting claimant with 22.99 years of underground coal mine employment,[2] the administrative law judge found that he did not establish the existence of complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because claimant further failed to establish that he is totally disabled, the administrative law judge found he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 18. 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where he establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

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). In meeting this burden, statutory presumptions aid claimants in certain circumstances.

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found that the x-ray evidence and biopsy evidence did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (b), but that the CT scan evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 19-28. Weighing the evidence together, the administrative law judge found it "in equipoise" and insufficient to establish complicated pneumoconiosis. *Id.* at 29.

Based upon our review, we hold that the administrative law judge erred in his consideration of the CT scan evidence, which affected his weighing of the overall evidence. We further hold that the administrative law judge erred when weighing the evidence at subsections (a), (b), and (c) together. Consequently, we cannot determine whether

substantial evidence supports his finding that the evidence does not establish complicated pneumoconiosis.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered ten interpretations of five x-rays taken on March 20, 2012, February 19, 2014, April 30, 2014, April 17, 2015, and June 18, 2015.[4] All of the physicians who rendered x-ray interpretations are dually qualified as B readers and Board-certified radiologists.

The administrative law judge noted that only one of the ten x-ray interpretations is positive for complicated pneumoconiosis: Dr. DePonte interpreted the April 17, 2015 x-ray as revealing a Category A large opacity in the right parahilar region. Decision and Order at 21; Claimant's Exhibit 2. Dr. DePonte also indicated that a "malignancy should be excluded," and therefore the administrative law judge found his interpretation "somewhat vague as to its conclusions regarding the existence of large opacities of pneumoconiosis." *Id.* When the administrative law judge subsequently discussed the biopsy evidence, however, he noted two Board-certified pulmonologists found the April 10, 2015 biopsy specimen of the miner's right middle lobe revealed no evidence of malignancy. Decision and Order at 22-23. But he did not discuss the impact the uncontradicted biopsy evidence had on the evidence of record noting the possibility of a malignancy.

Dr. Shipley also interpreted the April 17, 2015 x-ray, finding it negative for complicated pneumoconiosis. Director's Exhibit 21. Dr. Shipley also identified a right hilar mass,[5] noting that it "was suspicious for malignancy, likely lung cancer."[6] Director's Exhibit 21. Again, the administrative law judge did not discuss Dr. Shipley's suspicion of a malignancy in light of the biopsy evidence. The administrative law judge instead found that the April 17, 2015 x-ray was "at most in equipoise" regarding the existence of complicated pneumoconiosis. Decision and Order at 21-22; Director's Exhibit 22. Because the "vast majority" of the x-ray interpretations did not support a finding of

[4] Although the administrative law judge noted that additional x-ray interpretations were contained in claimant's treatment records, he found that they were not properly classified in accordance with 20 C.F.R. §718.102(e). *See* Decision and Order at 21 n.26; Director's Exhibits 17, 19; Claimant's Exhibits 6-9; Employer's Exhibit 11.

[5] Dr. Shipley also interpreted the most recent x-ray taken on June 18, 2015 as revealing an irregular opacity at the right upper zone. Director's Exhibit 25.

[6] Dr. Shipley indicated that an "ill-defined confluent capacity in the right mid and upper zones is likely air filling and could represent infection." Director's Exhibit 21.

complicated pneumoconiosis, the administrative law judge found that the x-ray evidence does not support a finding of complicated pneumoconiosis.

As noted , the administrative law judge considered the results of a lung biopsy of claimant's right middle lobe conducted on April 10, 2015. 20 C.F.R. §718.304(b). He accurately noted that two Board-certified pathologists, Drs. Tomchin and Caffrey, reviewed the lung tissue, but neither physician reported a finding of massive lesions. Decision and Order at 23; Director's Exhibit 19; Employer's Exhibit 10. The administrative law judge therefore found that the biopsy evidence does not support a finding of complicated pneumoconiosis. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the biopsy evidence does not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), which the administrative law judge failed to consider when weighing the other evidence.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether claimant could establish complicated pneumoconiosis by "other means." Decision and Order at 23-29. He considered four interpretations of CT scans[7] taken on December 31, 2014, March 10, 2015, and May 13, 2015.[8] Dr. DePonte diagnosed complicated pneumoconiosis, interpreting the May 13, 2015 CT scan as revealing a Category A large opacity. Claimant's Exhibit 5. Dr. DePonte also indicated that the 12 mm large opacity would measure over 1.0 centimeter on a standard chest x-ray. *Id.* The administrative law judge credited Dr. DePonte's positive interpretation, and found the CT scan evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 28. We affirm this finding as not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge committed several errors when weighing the CT scan evidence against the x-ray evidence. First, he improperly excluded Dr. Tiu's interpretation

[7] The administrative law judge noted that Drs. Shipley and DePonte indicated that CT scans are recognized as an acceptable diagnostic tool and are beneficial in detecting complicated pneumoconiosis. Decision and Order at 26; Director's Exhibit 18; Claimant's Exhibit 5.

[8] The administrative law judge noted that the miner's treatment notes include diagnoses of complicated pneumoconiosis. Decision and Order at 28-29; Claimant's Exhibits 6-8. However, because the objective tests underlying the diagnoses were not indicated, the administrative law judge found that claimant's treatment notes neither supported nor disproved the existence of complicated pneumoconiosis. Decision and Order at 29.

of the May 13, 2015 CT scan because claimant had already submitted an affirmative interpretation of it. Decision and Order at 27. The regulations provide that "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). In this case, the administrative law judge admitted the treatment records containing Dr. Tiu's interpretation of the May 13, 2015 CT scan into the record. Decision and Order at 2; Claimant's Exhibit 11. Because there are no evidentiary limitations for treatment records, claimant was not required to designate it as affirmative evidence under 20 C.F.R. §718.107 for it to be considered. We therefore hold the administrative law judge erred in not weighing this CT scan interpretation along with the other CT scan evidence at 20 C.F.R. §718.304(c). 30 U.S.C. §923(b). Dr. Tiu interpreted the May 13, 2015 CT scan as revealing "[u]nderlying changes of . . . complicated coal workers' pneumoconiosis." Claimant's Exhibit 11.

The administrative law judge further erred in his consideration of Dr. Tiu's interpretations of the December 31, 2014 and March 10, 2015 CT scans. In his interpretation of the December 31, 2014 CT scan, Dr. Tiu suspected "[u]derlying changes of complicated coal workers' pneumoconiosis . . . in the form of conglomerate massive fibrosis in the right upper lobe . . . ."[9] Claimant's Exhibit 11. Dr. Tiu also interpreted the March 10, 2015 CT scan as revealing "signs of complicated coal workers' pneumoconiosis." *Id.* The administrative accorded less weight to these interpretations because Dr. Tiu "failed to perform an equivalency determination." Decision and Order at 27. The United States Court of Appeals for the Sixth Circuit, however, has not adopted the equivalency requirement established by the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000).[10] We decline to apply *Scarbro* outside of the Fourth Circuit.

[9] Dr. Shipley also interpreted the December 31, 2014 CT scan. The doctor indicated that it revealed a right hilar mass that was "suspicious for lung cancer, less likely fibrosing mediastinitis." Director's Exhibit 18.

[10] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000), the court held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis -- an x-ray opacity greater than one centimeter in diameter -- the administrative law judge must determine whether a condition diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if seen on a chest x-ray. *Scarbro*, 220 F.3d at 255; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

Consequently, the administrative law judge erred in requiring an "equivalency determination" when he assessed the CT scan evidence.[11]

Those errors affected his overall weighing of the evidence pursuant to 20 C.F.R. §718.304. The administrative law judge found the x-ray evidence "generally stronger" than the CT scan evidence, noting that nine of the ten x-ray interpretations are negative for complicated pneumoconiosis. Decision and Order at 29. He found the "near univocal [x]-ray evidence" undermined Dr. DePonte's sole positive interpretation of the May 13, 2015 CT scan. *Id.* He therefore found that the weight of the evidence was "in equipoise" and insufficient to satisfy claimant's burden to establish complicated pneumoconiosis. *Id.*

As discussed above, Dr. DePonte was not the only physician to interpret the CT scan evidence as supportive of a finding of complicated pneumoconiosis. Moreover, the administrative law judge failed to adequately explain why he accorded greater weight to the x-ray evidence when he acknowledged that CT scans are "more sensitive" than x-rays and "can be beneficial in documenting the presence or absence of complicated pneumoconiosis."[12] Decision and Order at 29.

We thus vacate the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis and remand the case for further consideration. In determining whether claimant has invoked the irrebuttable presumption at 20 C.F.R. §718.304, the administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then weigh together the evidence at subsections (a), (b), and (c). *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33.

[11] The administrative law judge also erred in not considering the medical opinions of Drs. Ajjarapu, Dahhan, and Fino regarding the nature of the right hilar mass in the miner's lung. Director's Exhibit 12; Employer's Exhibits 7, 8.

[12] The administrative law judge may not rely on numerical superiority when resolving medical questions. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992) (holding that it is error for an administrative law judge to rely on a head count of the physicians providing assessments, rather than on a qualitative analysis of their interpretations); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (holding that an administrative law judge may not base a decision on numerical superiority of the same items of evidence).

The Section 411(c)(4) Presumption

A miner is 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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant 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), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered four pulmonary function studies conducted on February 19, 2014, April 30, 2014, June 18, 2015 and June 19, 2015.[13] Decision and Order at 10-11; Director's Exhibits 12, 15, 24, 25; Claimant's Exhibit 4. The administrative law judge found only the April 30, 2014 study produced qualifying values.[14] Recognizing that "spurious high values are not possible," the administrative law judge accorded greater weight to the three non-qualifying studies, crediting the two most recent conducted on June 19, 2015 and May 17, 2016 as better indicators of claimant's respiratory condition. Decision and Order at 11. The administrative law judge therefore found that the pulmonary function studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

The administrative law judge acted within his discretion, taking into account that two of the three valid non-qualifying pulmonary function studies are more recent that the qualifying April 30, 2014 pulmonary function study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174 (4th Cir 1997); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Sexton v. S. Ohio Coal Co.*, 7 BLR 1-411, 1-412 (1984); Decision and Order at 10-11; Director's Exhibit 12

[13] The administrative law judge found that a pulmonary function study conducted on June 8, 2017 was invalid. *Id*. Although the FEV1 and MVV values are qualifying, the administrative law judge found that the MVV value was not valid since claimant performed only one trial. Decision and Order at 10 n.10; 20 C.F.R. §718.103(b); Claimant's Exhibit 4.

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

at 22; 15 at 7; 24, 25; Claimant's Exhibit 4. Because it is supported by substantial evidence,[15] we affirm his finding that the pulmonary function studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three blood gas studies dated April 30, 2014, April 17, 2015, and June 18, 2015. The April 30, 2014 blood gas study produced non-qualifying values at rest, but qualifying values during exercise. Director's Exhibit 12. The April 17, 2015 blood gas study produced non-qualifying values both at rest and during exercise. Director's Exhibit 21. The blood gas study conducted on June 18, 2015, which was conducted at rest, also produced non-qualifying values. Director's Exhibit 25.

In finding claimant's blood gas studies non-qualifying, Decision and Order at 12, the administrative law judge mischaracterized the evidence, failing to address the significance of the qualifying exercise blood gas study conducted on April 30, 2014. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Therefore, we must vacate his finding that the blood gas study evidence did not establish total disability, and remand the issue for further consideration.[16] As the arterial blood gas study evidence affected his weighing of the medical opinion evidence on the issue of total respiratory disability,[17] we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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[15] The administrative law judge did not address the results of pulmonary function studies found in claimant's treatment records. However, because these studies (conducted on April 19, 2007, January 13, 2009, October 27, 2010, September 19, 2011, January 24, 2012, June 29, 2015, and June 20, 2016) are non-qualifying, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 17; Employer's Exhibit 11.

[16] The administrative law judge accurately found there is no evidence in the record of cor pulmonale with right-sided congestive heart failure. Decision and Order at 12. We therefore affirm his finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[17] The administrative law judge credited the opinions of Drs. Dahhan and Fino that claimant is not totally disabled from a pulmonary standpoint over Dr. Ajjarapu's contrary opinion because he found that their opinions were better supported by the objective evidence. Decision and Order at 12-19.

On remand, the administrative law judge must reconsider whether the arterial blood gas studies and medical opinions establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Should he find the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), he must weigh all of the relevant evidence together, both like and unlike, to determine whether claimant has established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Fields*, 10 BLR at 1-21.

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.[18] 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, 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 [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. *See Trent*, 11 BLR at 1-27.

[18] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 22.99 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9. 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).

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.

RYAN GILLIGAN
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge