U.S. Department of Labor

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

BRB No. 18-0420 BLA

WILLIE E. FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC, DBA TRINITY COAL MARKETING	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 07/30/2019
	)	
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 on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2015-BLA-05156) of Administrative Law Judge Steven D. Bell, rendered on a subsequent claim filed on January 13, 2014,[1] 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 second time.

In his first Decision and Order, the administrative law judge found claimant established forty years of qualifying coal mine employment. He determined, however, that claimant did not establish total disability and thus could not invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] or establish entitlement to benefits under 20 C.F.R. Part 718. In consideration of claimant's appeal, the Board held the administrative law judge erred in weighing the new medical opinions at 20 C.F.R. §718.204(b)(2)(iv).[3] The Board specifically concluded the administrative law judge erred in rejecting the opinions of Drs. Habre, Baker, and Jarboe that claimant is totally disabled, because they either relied on non-qualifying[4] pulmonary function studies or did not

[1] Claimant's initial claim for benefits, filed on August 23, 2000, was denied by the district director because he did not establish any element of entitlement. Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, 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 in 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.

[3] The Board affirmed as unchallenged the administrative law judge's findings claimant established forty years of qualifying employment and did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Fields v. Frasure Creek Mining, LLC*, BRB No. 16-0543 BLA, slip op. at 5-6 (Aug. 7, 2016) (unpub.) (Gilligan, J., concurring and dissenting).

[4] 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).

expressly describe the exertional requirements of claimant's usual coal mine work.[5] *Fields v. Frasure Creek Mining, LLC*, BRB No. 16-0543 BLA, slip op. at 5-7 (Aug. 7, 2016) (unpub.) (Gilligan, J., concurring and dissenting). Thus, the Board vacated the denial of benefits and remanded the case for the administrative law judge to reconsider the physicians' opinions in conjunction with claimant's usual coal mine work to determine if he is totally disabled. *Id*. at 7-8.

On remand, the administrative law judge determined claimant established total disability, thus invoking the Section 411(c)(4) presumption and establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in reopening the record on remand to obtain claimant's deposition testimony regarding the exertional requirements of his usual coal mine work. Employer also asserts that even if the administrative law judge had authority to reopen the record he erred in admitting claimant's Exhibit 4 – the transcript of claimant's deposition – as it was not submitted within the timeframe allowed by the administrative law judge. Additionally, employer contends the administrative law judge erred in finding claimant totally disabled. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion.

[5] The Board held the administrative law judge did not adequately consider that Drs. Habre, Baker, and Jarboe "identified a respiratory impairment; had general knowledge of claimant's work history; and specifically opined that claimant is totally disabled from returning to the jobs they identified in their respective reports." *Fields*, BRB No. 16-0543 BLA, slip op. at 5-6, *citing Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713 (6th Cir. 2002) (where a certain position, such as an underground repairman, has a "precise meaning in the context of coal mining," an administrative law judge may conclude doctors understand the job's demands).

[6] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law 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 7.

20 C.F.R. §725.455(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

A miner is 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). Total disability may be established by: qualifying pulmonary function studies or 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). If the administrative law judge finds total disability established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Admission of Claimant's Deposition Testimony

After reviewing briefs filed by the parties on remand, the administrative law judge held a conference call on January 10, 2018, and concluded the record did not contain sufficient information from which to determine the exertional requirements of claimant's usual coal mine work.[7] He reopened the record over employer's objection,[8] and gave claimant thirty days to "develop the factual record as to [c]laimant's 'usual coal mine work and the physical requirements associated with that work.'"[9] January 11, 2018 Order at 2, *quoting Fields*, BRB No. 16-0543 BLA, slip op. at 7. Claimant was deposed on February 2, 2018, and submitted the transcript to the administrative law judge on March 2, 2018. Employer filed a letter on March 20, 2018, asserting the transcript should be excluded because claimant did not submit it within the thirty-day timeframe the administrative law judge set for claimant's evidentiary development. In a March 26, 2018 Order, the administrative law judge overruled employer's objection to the admission of claimant's Exhibit 4.

[7] Claimant indicated on his employment history form that his last mining job was running an end-loader, but he did not identify the exertional requirements of that job. Director's Exhibit 5.

[8] Employer objected to the deposition, primarily arguing that the record was closed and the administrative law judge could simply take official notice of the Dictionary of Occupational Titles (DOT) in determining the exertional requirements of claimant's job.

[9] The administrative law judge also gave employer thirty days to respond to claimant's evidence. January 11, 2018 Order at 2.

We reject employer's contention the administrative law judge lacked authority to reopen the record for additional evidentiary development. Such a decision is within the province of the administrative law judge and employer has not shown he abused his discretion. *See* 20 C.F.R. §§725.456; 725.458; *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169, 1-174 (1989) (en banc). The administrative law judge permissibly concluded that obtaining claimant's deposition testimony was necessary to satisfy the Board's instruction to identify the physical requirements of claimant's usual coal mine employment.[10] *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Additionally, he did not abuse his discretion in overruling employer's objection that the deposition transcript should be excluded as not timely submitted. 20 C.F.R. §725.455(c). He rationally found claimant's Exhibit 4 timely because the deposition was conducted within the thirty-day timeframe "to develop the evidentiary record" set by the January 11, 2018 Order, and claimant's counsel submitted the transcript as soon as he received it from the court reporter. March 26, 2018 Order at 2. Discerning no abuse of discretion, we affirm the administrative law judge's decision to reopen the record and his admission of claimant's deposition testimony. *See Keener*, 23 BLR at 1-236; *Clark*, 12 BLR at 1-153.

Total Disability

We also reject employer's assertion the administrative law judge did not adequately explain why he found claimant totally disabled. In accordance with the Board's remand instruction, the administrative law judge determined claimant's work running an end-loader involved moderate manual labor, and was not sedentary as employer alleged.[11] Decision and Order Awarding Benefits on Remand at 4 n.20. He also noted correctly that while Drs. Habre, Baker, and Jarboe described varying levels of respiratory impairment – ranging from moderate obstructive to severe restrictive – they agreed claimant's respiratory impairment precludes him from performing his usual coal mine employment.[12] Decision

[10] Employer unpersuasively argues that deposing claimant on remand was prejudicial because claimant had time to develop "the perfect answer," which effectively took the "spontaneity factor out of the deposition process." Employer's Brief at 8 n 1.

[11] We affirm as unchallenged the administrative law judge's finding that claimant's usual coal mine work involved medium labor based on the DOT and claimant's description of his job duties during his deposition. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] Dr. Habre reviewed claimant's employment history form and opined he is totally disabled from his usual coal mine employment based on a qualifying pulmonary function study and "cannot perform strenuous labor or mining related occupation." Director's

and Order Awarding Benefits on Remand at 7 n.51. This was in contrast to Dr. Dahhan, who opined that claimant has only a mild respiratory impairment and is not totally disabled. Director's Exhibit 13. The administrative law judge permissibly determined that claimant is totally disabled based on the weight of the medical opinions, which included employer's own expert, Dr. Jarboe.[13] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order Awarding Benefits on Remand at 7. We therefore affirm the administrative law judge's determination claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[14] *Defore*, 12 BLR at 1-28-29 (1988); Decision and Order Awarding Benefits on Remand at 5 n.36, 7.

Thus, we affirm the administrative law judge's finding claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. We further affirm, as unchallenged, the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R.

Exhibit 15. Although the pulmonary function studies obtained after Dr. Habre's examination were non-qualifying, Dr. Baker diagnosed a moderate respiratory impairment and explained that claimant's reduced FEV1 precluded him from performing the work of an end-loader operator. Director's Exhibit 12. Similarly, Jarboe opined that claimant's non-qualifying pulmonary function study demonstrated a totally disabling, severe restrictive respiratory impairment based on an FEV1 of forty-eight percent of the predicted value. Employer's Exhibit 1.

[13] As the Board explained in the prior appeal, there is no merit to employer's assertion the opinions of Drs. Habre, Baker, and Jarboe are not reasoned because they "weigh in contradiction" of the administrative law judge's finding that the pulmonary function studies are non-qualifying. *Fields*, BRB No. 16-053 BLA, slip op. at 9, *citing Cornett Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see* 20 C.F.R. §718.204(b)(2)(iv) (a reasoned medical opinion may establish total disability even "[w]here total disability cannot be shown" by the objective testing).

[14] We decline employer's request to remand this case for the administrative law judge to more fully explain his findings. If a reviewing court can discern what the administrative law judge did, and why he did it, the duty of explanation under the Administrative Procedure Act is satisfied. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557, (4th Cir. 2013); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997).

§718.305(d)(1)(i), (ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order Awarding Benefits on Remand at 7-13.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

RYAN GILLIGAN
Administrative Appeals Judge