U.S. Department of Labor

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

BRB No. 15-0347 BLA

PAUL R. DOZIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY ALABAMA, LLC	)	DATE ISSUED: 06/30/2016
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Kary B. Wolfe (Jones Walker LLP), Birmingham, Alabama, for employer.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in a Subsequent Claim (2011-BLA-6057) of Administrative Law Judge Lystra A. Harris (the administrative law judge) rendered 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). The administrative law judge credited claimant with twenty-three years of coal mine employment, based on the parties' stipulation, and adjudicated this subsequent claim,[1] filed on July 28, 2010, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. Finding that the newly submitted evidence was insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant, the administrative law judge concluded that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Accordingly, benefits were denied.

[1] Noting that records from claimant's prior claims were included in the district director's exhibit file, but had not been assigned an exhibit number, the administrative law judge designated this evidence collectively as "[Director's Exhibit] DX 1-A." Decision and Order at 2 n.2. The administrative law judge determined that claimant's initial claim, filed on September 2, 1993, was finally denied by the district director on March 2, 1994, because claimant failed to establish any element of entitlement; claimant's second claim, filed on September 15, 1995, was finally denied by the district director on December 11, 1995, because claimant failed to establish any element of entitlement; claimant's third claim, filed on March 25, 2002, was finally denied by the district director on November 12, 2002, because claimant failed to establish total respiratory or pulmonary disability; and claimant's fourth claim, filed on August 18, 2005, was finally denied by the district director on April 20, 2006, because claimant failed to establish total respiratory or pulmonary disability. Decision and Order at 2.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's most recent claim was denied because he failed to establish total respiratory disability. Consequently, claimant had to submit new evidence

On appeal, claimant contends that the administrative law judge erred in admitting the medical opinion of Dr. Goldstein into the record in its entirety, and asserts that the administrative law judge abused her discretion by not according Dr. Hawkins' opinion dispositive weight on the issue of total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's finding that total respiratory or pulmonary disability was not established and remand this case for the administrative law judge to apply the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Alternatively, the Director urges the Board to remand this case to the district director to discharge the Director's statutory obligation to provide claimant with a complete pulmonary evaluation.[4]

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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that his totally disabling

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establishing this element of entitlement to obtain review of the merits of his claim. *See* 20 C.F.R. §725.309(c).

[3] 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); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit is applicable, as claimant was employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

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, 1-2 (1986) (en banc).

In considering whether the evidence was sufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b), the administrative law judge found that none of the newly-submitted pulmonary function studies or the arterial blood gas studies yielded qualifying results,[6] and that there was no evidence of cor pulmonale with right-sided congestive heart failure. Thus, the administrative law judge properly found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).[7] Decision and Order at 7-8; Director's Exhibit 9; Employer's Exhibits 4, 5.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge reviewed the medical opinions of Drs. Barney and Goldstein and the treatment notes of Dr. Hawkins.[8] Decision and Order at 9-15; Director's Exhibits 9, 10; Employer's Exhibit 6; Claimant's Exhibit 6. Dr. Barney performed the Department of Labor-sponsored evaluation of claimant on December 7, 2010, and obtained a chest x-ray, a pulmonary function study, and a blood gas study. Director's Exhibit 9. Dr. Barney indicated that claimant worked as a roof bolter from 1973 to April 1993, and concluded that claimant is "disabled due to degenerative disc disease" and that he is "severely short of breath with mild exertion."

[6] 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). A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Claimant's Brief at 5.

[8] The administrative law judge also summarized claimant's hospitalization records and the treatment notes of Drs. Boger, Solomon, Lott and Mendelsohn. Decision and Order at 12-16; Director's Exhibit 10; Claimant's Exhibit 6; Employer's Exhibits 7, 8, 9, 10, 11, 12. The administrative law judge determined that these physicians did not address whether claimant was totally disabled from a respiratory or pulmonary standpoint. Decision and Order at 15.

Id. The administrative law judge found that Dr. Barney failed to specifically designate the degree of claimant's impairment, or indicate whether it totally disabled claimant from performing his usual coal mine employment. Decision and Order at 11. Further, the administrative law judge indicated that even if Dr. Barney's opinion is interpreted as a diagnosis of total disability, Dr. Barney's opinion "is still lacking as he does not clearly indicate whether the disability is due to severe shortness of breath or to degenerative disc disease." *Id*. The administrative law judge additionally found that Dr. Barney did not relate claimant's exertional abilities to the exertional requirements of his position as a roof bolter, and provided only a conclusory connection between claimant's shortness of breath and pneumoconiosis. *Id*. Consequently, the administrative law judge determined that Dr. Barney's opinion "lacks the required detail and reasoning," and gave it diminished weight. *Id*.

Dr. Goldstein examined claimant on September 1, 2011, and indicated that claimant "demonstrate[s] hypoxia with minimal walking" which is "inconsistent with his [negative] chest x-ray and his pulmonary functions and bespeaks cardiac disease." Employer's Exhibit 6. Dr. Goldstein did not diagnose pneumoconiosis and concluded that claimant's "shortness of breath is in no way related to his occupation as a coal miner." *Id*. The administrative law judge noted that Dr. Goldstein did not specifically state that claimant is totally disabled from performing his last coal mine employment, and he did not list exertional requirements or indicate that he took them into consideration when authoring his opinion. Decision and Order at 12. Additionally, the administrative law judge determined that although Dr. Goldstein concluded that claimant's "disability" was due to cardiac issues and not pneumoconiosis, Director's Exhibit 6, he did not explain his rationale for excluding a respiratory or pulmonary impairment as a contributing cause of disability. Decision and Order at 11-12. Thus, the administrative law judge determined that Dr. Goldstein's opinion is largely conclusory, not well-reasoned, and entitled to little weight. *Id.*

Dr. Hawkins provided treatment notes from 2005 to 2012. In his note dated January 28, 2011, Dr. Hawkins concluded that "[claimant's] lung disease, standing alone, is responsible for the majority of his exertional impairment" and that "he is unable to perform manual labor or his last coal mine work." Claimant's Exhibit 6. After summarizing the treatment notes from 2005 to 2012, the administrative law judge determined that only the January 28, 2011 treatment note addressed whether claimant is disabled from performing his last coal mine work. Decision and Order at 15. The administrative law judge acknowledged Dr. Hawkins' status as a treating physician, but found that his opinion did not merit enhanced weight pursuant to 20 C.F.R. §718.104(d), as Dr. Hawkins did not explain how he came to his conclusion that claimant is unable to perform manual labor primarily due to lung disease. Decision and Order at 15-16. The administrative law judge determined that the lack of reasoning in Dr. Hawkins' opinion is

"especially critical where treatment notes indicate other potential cardiac issues which could cause dyspnea in [c]laimant, i.e., cardiac impairments as diagnosed by Dr. Goldstein."[9] Decision and Order at 16. In addition, the administrative law judge found that, in subsequent treatment notes, Dr. Hawkins "seem[ed] to describe a less severe prognosis than in his January 28, 2011 note," and that this was "unexplained."[10] *Id*. Thus, the administrative law judge found Dr. Hawkins's treatment notes to be inadequately reasoned and, therefore, entitled to little weight.

Considering all relevant evidence together, like and unlike, the administrative law judge found that the evidence was insufficient to establish the existence of a totally

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[9] Claimant challenges the administrative law judge's consideration of Dr. Goldstein's opinion in its entirety, noting that Dr. Goldstein's report refers to two sets of past medical records he reviewed, dated June 6, 2011 and August 30, 2011, without specifying what either set included. As a medical report must be based on evidence that is properly admitted in a claim, *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc), claimant correctly maintains that the administrative law judge should have ascertained the degree to which Dr. Goldstein's opinion was influenced by his review and reliance on evidence not contained in the record before according any credit to the opinion on the issue of disability causation. 20 C.F.R. §725.414; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *see also Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

[10] In his treatment note dated December 1, 2011, Dr. Hawkins diagnosed coal workers' pneumoconiosis and indicated that:

> [Claimant] remains limited with exertional shortness of breath. He will continue his current bronchodilator regimen. He will let us know if he has any new problems or questions.

In his treatment note dated April 18, 2012, Dr. Hawkins diagnosed coal workers' pneumoconiosis and indicated that:

> [Claimant] is limited but at baseline in regards to exertional shortness of breath. He will continue his current bronchodilators.

Claimant's Exhibit 6.

disabling respiratory or pulmonary impairment and, consequently, that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309. Decision and Order at 16.

Claimant and the Director contend that the administrative law judge erred in finding that total respiratory or pulmonary disability was not established, noting that: all three physicians found that claimant became severely short of breath after minimal exertion; Dr. Goldstein found, based on oxygen saturation values, that claimant developed hypoxia within three minutes of walking in the hall; and Dr. Hawkins explicitly stated that claimant is unable to perform manual labor or his last coal mine work, which the Director notes involved operating large machinery as a roof bolter and regularly lifting seventy to one hundred pounds. The Director asserts that the administrative law judge improperly conflated the issues of disability and disability causation when she discounted Dr. Hawkins' opinion for not taking into account whether "cardiac issues" could have caused claimant's breathing problems. Director's Brief at 2; Decision and Order at 16.

We agree that the administrative law judge erred in combining her analysis of the issue of total disability with her analysis of the issue of disability causation. The proper inquiry under each subsection of 20 C.F.R. §718.204(b)(2) is whether claimant has established a totally disabling respiratory or pulmonary impairment. The cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the amended Section 411(c)(4) presumption has been rebutted by proving that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii). Thus, the administrative law judge's findings at Section 718.204(b)(2)(iv) cannot be affirmed.

However, as the administrative law judge found that all of the medical opinions were inadequately reasoned, we grant the Director's request that the Board remand the case to the district director so that he may comply with the statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406. The Director correctly maintains that Dr. Barney failed to adequately address the issue of total disability, noting that the administrative law judge found that the doctor "does not specifically designate the degree of claimant's impairment, or indicate whether it totally disables him from performing his last coal mine position." Director's Brief at 3; Decision and Order at 11. Dr. Barney diagnosed pneumoconiosis due to coal dust exposure based on an abnormal chest x-ray and blood gas study results. He opined that claimant is disabled due to degenerative disc disease; that claimant is severely short of breath with mild exertion; and that pneumoconiosis contributes sixty percent to the impairment. Director's Exhibit 9. The administrative law judge determined that even if

she read Dr. Barney's opinion as a diagnosis of total disability, the opinion "is still lacking as he does not clearly indicate whether the disability is due to severe shortness of breath or to degenerative disc disease." Decision and Order at 11. Dr. Barney opined that claimant is disabled due to a combination of respiratory and non-respiratory conditions, but he did not address whether claimant's pulmonary or respiratory impairment alone would totally disable him. *See R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-145-46 (2009) (en banc), *citing Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); 20 C.F.R. §718.204(b)(1). Consequently, we vacate the administrative law judge's finding that claimant did not establish either total disability at Section 718.204(b)(2) or a change in an applicable condition of entitlement pursuant to Section 725.309, and remand the case to the district

director for further evidentiary development in the form of a supplemental report from Dr. Barney. Employer is entitled to respond to Dr. Barney's supplemental report.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Subsequent Claim is affirmed in part, and vacated in part, and this case is remanded to the district director for further evidentiary development consistent with this opinion, and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge