U.S. Department of Labor

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

BRB Nos. 15-0370 BLA
and 15-0370 BLA-A

WILLIAM BOYD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PEABODY WESTERN COAL COMPANY	)	
	)	DATE ISSUED: 06/30/2016
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

William Boyd, Kayenta, Arizona, *pro se*.

Scott A. White (White & Risse, LLP), Arnold, Missouri, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order (13-BLA-5108) of Administrative Law Judge Scott R. Morris 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 July 20, 2011.

The administrative law judge accepted the parties' stipulation that claimant had twenty-eight years of qualifying coal mine employment,[1] and found that the stipulation was "reasonable based on the record before [him]." Decision and Order at 2 n.2. Considering the medical evidence, the administrative law judge found that claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 33 U.S.C. §921(c)(4) (2012).[2] Further, because claimant did not establish total disability, an essential element of entitlement, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that substantial evidence does not support the administrative law judge's finding that claimant failed to establish that he suffers from a totally disabling respiratory or pulmonary impairment. The Director urges the Board to vacate the administrative law judge's decision and remand the case to the administrative law judge "for application of the fifteen year presumption." Director's Brief at 4. Employer filed a reply to the Director's response, reiterating its argument that the denial of benefits should be affirmed.

[1] The record indicates that claimant's coal mine employment was in Arizona. Director's Exhibits 3, 35; Hearing Tr. at 31. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth 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 the miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

In its cross-appeal, employer challenges the administrative law judge's finding of twenty-eight years of qualifying coal mine employment, contending that claimant's hearing testimony is insufficient to establish that his years of surface mining employment were in conditions substantially similar to those in underground coal mine employment. The Director responds that the administrative law judge properly credited claimant with twenty-eight years of qualifying coal mine employment, based on employer's stipulation at the hearing. Employer filed a reply, contending that it never stipulated that claimant's employment at surface mines was substantially similar to underground coal mine employment.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994). We must affirm the findings of the administrative law judge if they are 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).

Where a claimant has at least fifteen years of qualifying coal mine employment, if claimant can also establish a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Having credited claimant with twenty-eight years of qualifying coal mine employment, the administrative law judge considered whether the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).

The administrative law judge correctly noted that all three pulmonary function studies were non-qualifying,[3] and that the record contains no evidence of cor pulmonale

[3] 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).

with right-sided congestive heart failure. Decision and Order at 8, 9, 11; Director's Exhibits 11, 18; Employer's Exhibit 26. Therefore, we affirm the administrative law judge's finding that claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the record contains three blood gas studies conducted on September 27, 2011, March 8, 2012, and May 8, 2013, all of which were qualifying.[4] Director's Exhibits 11, 18; Employer's Exhibit 26. The administrative law judge accorded more weight to the September 27, 2011 blood gas study than to the other two studies,[5] but determined that, overall, the blood gas study evidence "weigh[s] in favor of a showing that [c]laimant is totally disabled due to a pulmonary or respiratory impairment."[6] Decision and Order at 11. Substantial evidence supports the

[4] 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).

[5] Considering the blood gas studies in light of the quality standards for conducting and reporting those tests, set forth at 20 C.F.R. §718.105(c), the administrative law judge found that only the September 27, 2011 blood gas study, conducted by Dr. Gagon on behalf of the Department of Labor (DOL), complied with each standard listed in the regulation. The administrative law judge therefore accorded greater weight to the September 27, 2011 qualifying blood gas study than to the March 28, 2012 and May 8, 2013 qualifying blood gas studies, which the administrative law judge found were missing some of the information required by 20 C.F.R. §718.105(c). Decision and Order at 11.

[6] In determining that the blood gas study evidence supported a finding of total respiratory disability, the administrative law judge declined to credit a physician's opinion that criteria other than those in the Appendix C tables should be used to assess the blood gas studies. Specifically, the administrative law judge considered Dr. Renn's review of Dr. Gagon's September 27, 2011 blood gas study. In his review report, Dr. Renn opined that, although the study was qualifying under the Appendix C tables, if the study were adjusted for claimant's age and the barometric pressure at the time of the study, and if a calculated "AADO2 gradient" were used, the blood gas study was normal. Director's Exhibit 14. The administrative law judge also considered the contrary report of Dr. Kennedy, who had initially reviewed and validated the September 27, 2011 blood gas study conducted by Dr. Gagon. Director's Exhibits 11, 15. In response to Dr. Renn's review of the study, Dr. Kennedy noted that the Appendix C tables represent DOL's effort to adjust for the effects of altitude, and to approximate the "Alveolar Air Equation"

administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). That finding is therefore affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Gagon, Farney, and Hippensteel. Dr. Gagon, who is Board-certified in Family Practice, opined that claimant is unable to perform the strenuous work required by his last coal mine job,[7] due to hypoxemia and shortness of breath. Director's Exhibits 11, 46; Employer's Exhibit 44. Drs. Farney and Hippensteel, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant is not totally disabled from a respiratory standpoint. Dr. Farney stated that, although claimant's blood gas studies were qualifying under the Department of Labor (DOL) tables, they were within normal limits if adjusted for age and elevation and if an "A-a gradient" value were used to assess the studies. Employer's Exhibits 5 at 4; 53 at 12-15. Dr. Farney concluded that claimant's blood gas study values were likely reduced to the "lower limit of normal" by obesity and cardiac disease. Employer's Exhibit 5 at 4.

Dr. Hippensteel opined that claimant's blood gas studies are "mildly below the normal range," but he is not totally disabled by an "intrinsic lung impairment." Employer's Exhibits 51 at 8; 54 at 17. Dr. Hippensteel stated that claimant suffers from a mild abnormality in his gas exchange that is likely due to heart disease. Employer's Exhibit 54 at 33, 43. Dr. Hippensteel therefore concluded that claimant is not totally disabled "from a pulmonary standpoint." Employer's Exhibit 51 at 9.

The administrative law judge gave less weight to Dr. Gagon's opinion because Dr. Gagon lacked qualifications in Internal Medicine and Pulmonary Disease. Additionally, the administrative law judge found that Dr. Gagon's opinion was "equivocal and contradictory." Decision and Order at 18. Specifically, the administrative law judge noted that, at one point, Dr. Gagon indicated that claimant has a "moderate impairment,"

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used by Dr. Renn. Because the administrative law judge found that the Appendix C tables "already account for Dr. Renn's concerns," he declined to discount the September 27, 2011 qualifying blood gas study. Decision and Order at 10.

[7] The record reflects that claimant's last coal mine job on the drag line crew required him to stand for six hours, sit for two hours, crawl twenty-five feet, and to lift and carry seventy-five to 100 pounds from fifty to seventy-five feet twice per day. Director's Exhibits 4, 35. Based on that evidence, the administrative law judge found that "[c]laimant has adequately proven th[e] strenuousness of [his] last coal mine employment." Decision and Order at 3 n.5.

but at another point, testified that claimant "would be unable to return to the job he had." *Id.*, quoting Director's Exhibits 11, 46; Employer's Exhibit 44 at 51. Additionally, the administrative law judge noted that Dr. Gagon testified that claimant's job duties involved a "moderate amount of strenuous activity," but later stated that claimant's work involved "heavy exertional requirements." Decision and Order at 18, quoting Employer's Exhibit 44 at 14.

In contrast, the administrative law judge found that the opinions of Drs. Farney and Hippensteel were well-documented and reasoned, and gave them additional weight because of the physicians' qualifications. The administrative law judge found that Drs. Farney and Hippensteel "convincingly attributed [c]laimant's qualifying arterial blood gas tests to [c]laimant's many non-pulmonary illnesses," such as heart disease and hypertension. Decision and Order at 21. The administrative law judge therefore concluded that the medical opinion evidence "weigh[ed] in favor of a finding that the [c]laimant is not totally disabled due to a pulmonary or respiratory impairment." *Id.*

Substantial evidence does not support the administrative law judge's finding that total disability was not established by the medical opinion evidence. With respect to Dr. Gagon's opinion, the administrative law judge did not adequately explain his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Specifically, given that the administrative law judge found that claimant's last coal mine work was strenuous, Decision and Order at 3 n.5, he did not explain how Dr. Gagon's descriptions of claimant's job as involving "moderate . . . strenuous activity" or "heavy exertional requirements" rendered the doctor's opinion contradictory.[8] Similarly, the administrative law judge did not explain what was equivocal or contradictory in Dr. Gagon's statements that claimant has a "moderate" impairment and is "unable to return to" his coal mine work.[9] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78, 22 BLR 2-107, 2-123-24 (6th Cir. 2000).

[8] The administrative law judge discounted Dr. Hippensteel's opinion, because the administrative law judge was unable to determine whether Dr. Hippensteel adequately understood the exertional requirements of claimant's usual coal mine employment. Decision and Order at 20 n.41. The administrative law judge found that Dr. Farney's opinion need not be similarly discounted, because Dr. Farney adequately understood that claimant's job duties were "strenuous." Decision and Order at 19, quoting Employer's Exhibit 5 at 2.

[9] It has been held that even a mild impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). Referring

The administrative law judge stated that he also gave Dr. Gagon's opinion less weight because Dr. Gagon is not as highly qualified as Drs. Farney and Hippensteel. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). However, for the reasons that follow, the Board is unable to conclude that this credibility determination provides a sufficient basis to affirm the administrative law judge's finding that total disability was not established.

The administrative law judge found that the opinions of Drs. Farney and Hippensteel were well-reasoned because the physicians explained that any impairment reflected on claimant's qualifying blood gas studies is due to heart disease and hypertension. Decision and Order at 20-21. Such opinions, however, go to the cause of claimant's respiratory or pulmonary impairment, not to whether a respiratory or pulmonary impairment exists that prevents claimant from performing the strenuous tasks required by his last coal mine job. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the totally disabling impairment is a distinct issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989).

Thus, we conclude that substantial evidence does not support the reasons the administrative law judge gave for finding the medical opinions of Drs. Farney and Hippensteel to be better-reasoned and more convincing than Dr. Gagon's opinion. We must therefore vacate the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for him to reconsider the medical opinion evidence.

When analyzing the medical opinions on remand, the issue at 20 C.F.R. §718.204(b)(2) is the existence of total disability. The administrative law judge should consider the physicians' opinions regarding total disability in light of his finding that claimant's job was strenuous. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Additionally, the administrative law judge should consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.

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to claimant's exertional requirements, Dr. Gagon opined that "with his hypoxemia and shortness of breath, [claimant] could not carry 75 pounds 50 feet," and is therefore "totally disabled from doing his last coal mine job." Director's Exhibit 46 at 2.

See Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-315 (10th Cir. 2010).

As we have vacated the administrative law judge's finding that the medical opinion evidence weighed against a finding of total disability, we also vacate his finding that all of the medical evidence weighed together did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and we vacate the denial of benefits. After reconsidering on remand whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See* 20 C.F.R. §718.204(b)(2); *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).

Because we have vacated the administrative law judge's denial of benefits and will remand this case for further consideration, we will now address employer's cross-appeal, challenging the administrative law judge's finding that claimant had twenty-eight years of qualifying coal mine employment.

Section 411(c)(4) requires a claimant to establish at least fifteen years of employment either in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(i). Employer initially contended that the administrative law judge erred in finding twenty-eight years of qualifying coal mine employment, arguing that claimant's testimony is insufficient to establish that his work conditions in surface mines were substantially similar to those in underground coal mine employment. Employer's Brief in Support of Cross-Appeal at 28-29; Decision and Order at 2 n.2. The Director responds that the administrative law judge properly credited claimant with twenty-eight years of qualifying coal mine employment, based on employer's stipulation.[10] In its reply to the Director's brief, employer now acknowledges its stipulation, but contends that it did not concede that claimant's work at surface mines was substantially similar to underground coal mine employment. Employer's contention lacks merit. Based on the context of employer's stipulation, we agree with the Director that the administrative law judge properly found

[10] The Director argues further that, even if employer had not entered into the stipulation, the uncontradicted evidence of record establishes that claimant had fifteen or more years of employment in surface mines that was substantially similar to underground mines. Director's Brief at 2.

that employer stipulated to twenty-eight years of employment in conditions similar to an underground mine by stipulating to twenty-eight years of *qualifying* coal mine employment.

The record reflects that when the district director awarded benefits to claimant in a Proposed Decision and Order issued on July 23, 2012, the district director applied the Section 411(c)(4) presumption. Director's Exhibit 38. Employer requested a hearing. At the hearing, employer's counsel informed the administrative law judge that "[t]he Department of Labor found 28 years of qualifying coal mine employment, so we could agree to what the DOL found." Hearing Tr. at 7. Further review of the hearing transcript reflects that employer understood that the administrative law judge would apply the Section 411(c)(4) presumption if he found total disability established, since employer had already stipulated to at least fifteen years of qualifying coal mine employment. Tr. at 14-16. Therefore, the administrative law judge reasonably interpreted counsel's statement at the hearing as a stipulation that claimant had twenty-eight years of qualifying coal mine employment for purposes of invocation of the Section 411(c)(4) presumption. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 501, BLR (4th Cir. 2015)(describing the employment required to invoke the Section 411(c)(4) presumption as "qualifying coal mine employment").

Stipulations of fact that are fairly entered into are binding on the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730, 25 BLR 2-405, 2-418 (7th Cir. 2013). Employer is therefore bound by its stipulation that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.[11] *See Richardson v. Director, OWCP*, 94 F.3d 164, 167, 21 BLR 2-373, 2-378-79 (4th Cir. 1996). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding of twenty-eight years of qualifying coal mine employment.

Therefore, on remand, if the administrative law judge finds that claimant has established total disability, claimant will have invoked the Section 411(c)(4) presumption, and the administrative law judge must then consider whether employer has rebutted that presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[12] or by establishing that "no part of the miner's respiratory or

[11] Employer does not argue that it requested permission from the administrative law judge to withdraw its stipulation.

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting)(holding that rebuttal of the presumed fact of disability causation requires "credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by clinical or legal pneumoconiosis"). If claimant fails to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge