U.S. Department of Labor

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

BRB No. 15-0185 BLA

CHRIS NEWSOME	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXCEL MINING, LIMITED LIABILITY CORPORATION	)	DATE ISSUED: 03/03/2016
	)	
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 Awarding Benefits on Second Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2011-BLA-6281) of Administrative Law Judge Thomas M. Burke (the administrative law judge) with respect to a claim filed on August 20, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is on appeal to the Board for a third time.[1] Pursuant to the most recent appeal

of this case, the Board noted the administrative law judge's acceptance of employer's stipulation that the record established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and affirmed his finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iii). *Newsome v. Excel Mining, LLC*, BRB No. 13-0437 BLA (Mar. 14, 2014)(unpub). However, the Board vacated the administrative law judge's finding that the medical opinions were insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for a reevaluation of the medical opinions of Drs. Ranavaya, Broudy, and Dahhan that comports with the requirements of the Administrative Procedure Act (APA).[2]

Specifically, the administrative law judge was directed to identify claimant's usual coal mine work and the exertional requirements thereof, and to determine whether, in light of those exertional requirements, Dr. Ranavaya rendered a reasoned and documented opinion on total disability. Additionally, the administrative law judge was instructed to reconsider the opinions of Drs. Broudy and Dahhan to ascertain whether their determinations that claimant did not have a totally disabling respiratory impairment were sufficiently explained, in light of the exertional requirements of claimant's previous coal mine work. The Board advised that if the administrative law judge found total disability established, he must then consider whether claimant has also established at least fifteen years of qualifying coal mine employment[3] and, thus, is entitled to

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[1] When first before the Board, the findings of Administrative Law Judge Richard A. Morgan, that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), but failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), were affirmed as unchallenged on appeal. The case was remanded to the district director at the request of claimant and the Director, Office of Workers' Compensation Programs, for submission of a supplemental report to complete the total disability assessment by Dr. Ranavaya. *Newsome v. Excel Mining, LLC*, BRB No. 09-0418 BLA, slip op. at 2 n.1, 6-7 (Mar. 18, 2010)(unpub.).

[2] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[3] The Board observed that, while the administrative law judge accepted the parties' stipulation to thirty years of coal mine employment, and noted claimant's testimony that all of his coal mining work was underground, he did not render a finding as to whether claimant's coal mine employment was qualifying under Section 411(c)(4)

invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4) (2012).[4]

On remand, the administrative law judge found that the weight of the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of the Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b) and his determination that benefits should commence as of the date the claim was filed. Claimant responds, urging affirmance of the award of benefits.[5] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

Employer asserts that the administrative law judge failed to follow the Board's remand instructions to identify claimant's usual coal mine work and to specify the exertional requirements of that work. Employer also argues that Dr. Ranavaya's total

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of the Act, 30 U.S.C. §921(c)(4) (2012). *Newsome v. Excel Mining, LLC*, BRB No. 13-0437 BLA, slip op. at 7 n.9 (Mar. 14, 2014); *see also* Decision and Order at 6; Director's Exhibits 10, 13 at 19-20, 36 at 11.

[4] Pursuant to Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen 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 or pulmonary impairment at 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[5] By Order issued on July 21, 2015, the Board granted claimant's motion to dismiss his cross-appeal filed in this case, BRB No. 15-0185-A.

[6] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, 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 (1989)(en banc).

disability opinion is unreasoned and contrary to the results of later pulmonary function testing of record "which confirms [that claimant] only has a mild impairment." Employer's Brief at 12. Further, employer argues that the administrative law judge improperly discounted the opinions of Drs. Dahhan and Broudy, and failed to weigh the contrary probative evidence of record in analyzing the issue of total disability. Thus, employer maintains that the administrative law judge's findings fail to comport with the requirements of the APA. Employer's Brief at 8-12.

In finding total respiratory disability established, the administrative law judge initially acknowledged the Board's instruction that the fact that the November 13, 2007 pulmonary function study relied upon by Dr. Ranavaya is nonqualifying[7] does not, by itself, provide a basis for discrediting Dr. Ranavaya's opinion. Decision and Order at 4. The administrative law judge reviewed Dr. Ranavaya's opinion at length, and determined that his medical report and deposition testimony were based on claimant's work history, symptoms, physical examination and diagnostic testing, including the results of the November 13, 2007 pulmonary function study that demonstrated a moderate pulmonary impairment, which Dr. Ranavaya found to be totally disabling in comparison with the physical demands of claimant's last coal mine job. Decision and Order at 4-5; Claimant's Exhibit 1; Director's Exhibit 55. The administrative law judge also reconsidered the medical opinions of Drs. Broudy and Dahhan pursuant to Section 718.204(b)(2)(iv), and found that they failed to establish that claimant retained the pulmonary capacity to perform his previous coal mine work. Decision and Order at 5-6; Director's Exhibits 11, 33, 34.

At the outset, we reject employer's assertion that the administrative law judge "failed to make a specific finding as to [claimant's] usual coal mine job." Employer's Brief at 6. The administrative law judge reviewed Dr. Ranavaya's reports and deposition testimony, which described claimant's last coal mining job as an "electrician and maintenance man." Decision and Order at 3, 4; Director's Exhibits 4, 10, 55 at 2; Claimant's Exhibit 1 at 11, 13, 19-22. Moreover, the administrative law judge acknowledged the Board's reference to Dr. Ranavaya's finding that claimant's previous work was "as an electrician and maintenance worker," and claimant's Form CM-911a, which identified his usual coal mine jobs as "electrician" and "maintenance," and detailed his work duties as an electrician and repairman. Decision and Order at 4; *see Newsome*, BRB No. 13-0437 BLA, slip op. at 6 n.8; Director's Exhibits 3, 55; Claimant's

[7] A qualifying pulmonary function study yields results that are equal to, or less than, the values set out in the table at 20 C.F.R. Part 718, Appendix B. A nonqualifying study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Exhibit 1 at 13; Director's Exhibit 36 at 10.[8] Employer also concedes that "[claimant's] usual coal mining job was that of an electrician and repairman."[9] Employer's Brief at 7, 10. As employer has failed to identify any unresolved evidentiary conflict on this issue, and the record reveals none, we reject employer's assignment of error.

Employer next argues that the administrative law judge failed to render factual findings regarding the exertional requirements of claimant's usual coal mine work. According to employer, the administrative law judge "merely cited to Dr. Ranavaya's testimony where 'he expressed doubt at [c]laimant's testimony that he had to lift 100-500 pounds on a regular basis,' . . . [and] said that if [c]laimant were truly required to lift 100 pounds regularly, then that would be considered more than a medium physical demand level." Employer's Brief at 6-7, *citing* Decision and Order at 3; *see* Claimant's Exhibit 1 at 19-22. Employer maintains that the administrative law judge "summarily accepted Dr. Ranavaya's opinion simply because he referenced the Dictionary of Occupational Titles (DOT) in assessing the exertional requirements of [claimant's] last job title." Employer's Brief at 3. Thus, employer contends, the administrative law judge "did not resolve the conflicting evidence as to the exertional requirements of [claimant's] last coal mining job, or whether Dr. Ranavaya demonstrated actual knowledge of these requirements." Employer's Brief at 7. Further, employer argues that claimant "never indicated whether he lifted [100-500 pound] items alone, or with assistance."[10] *Id*.

There is no merit to employer's contentions. The administrative law judge reviewed Dr. Ranavaya's reports and testimony, as instructed by the Board. Decision and Order at 3-5. In particular, he assessed Dr. Ranavaya's understanding of the exertional requirements of claimant's last coal mining job as an electrician and maintenance man,

[8] Claimant testified that, during his last year working for employer, "I was electrician and repairman." Director's Exhibit 36 at 10.

[9] Dr. Broudy recorded that claimant "worked as electrician and repairman." Dr. Dahhan stated that "all of his work was underground as a repairman and electrician." Director's Exhibits 33 at 2, 34 at 2; Employer's Exhibit 1.

[10] Claimant explained that "if anything breaks down on the miners or anything like motors, some of it was so heavy you couldn't lift it, you'd just have to use chain ratchets and stuff. And like wheel units and stuff like that for buggies and shuttle cars." Director's Exhibit 36 at 10. He indicated that tram motors weigh about 700-800 pounds, and wheel units weigh about 300-500 pounds, so "for a big job like that they usually have somebody help sometimes." Director's Exhibit 36 at 11. He stated that he would have to lift, using his arms, from around 100 pounds to 500 pounds. *Id*.

noting that, in addition to considering claimant's "29-year coal mine employment history with duties as described on [c]laimant's CM911A,"[11] Dr. Ranavaya also questioned claimant "about his job tasks during the examination."[12] Decision and Order at 3; Director's Exhibit 55 at 2. Dr. Ranavaya explained that claimant's previous work required "a medium physical demand level of exertion," and stated that he had looked up the miner's last job title in the DOT, published by the Department of Labor, to find that this job "had at least required a physical exertion demand level of maybe into heavy." Decision and Order at 3, 4; Director's Exhibit 55. Based on the foregoing, Dr. Ranavaya concluded that claimant "will not be able to perform any job at the physical demand level of medium exertion including his last coal mining job as a[n] electrician and maintenance man on a sustained basis on at least an 8 hour per day shift." Director's Exhibit 55. The administrative law judge noted Dr. Ranavaya's description of the DOT as "an especially valuable resource" because "at some time we all overestimate what assignment or task we have been given." Decision and Order at 3. Employer does not challenge Dr. Ranavaya's reliance on the DOT titles to establish that claimant's job required a medium level of exertion. Nor does employer argue that claimant's work duties as an electrician/repairman/maintenance man required *less than* medium exertion, or identify

[11] Claimant indicated that his last coal mining job included loading and unloading tools twice daily, lifting 60-65 pounds twice daily, 35 pounds five times daily, and 30 pounds once a day, and carrying 40 pounds seventy feet daily. Director's Exhibit 4 at 2; *Newsome*, BRB No. 13-0437 BLA, slip op. at 6 n.8.

[12] Dr. Ranavaya testified at deposition that: "My routine procedure is I take a comprehensive history which includes the exposure history, their work data, particularly their work in the coal mines. [Claimant] told me that he had worked for 32 years in the coal mining industry, 29 years of which was underground coal mining doing the job as an electrician and maintenance worker. I as a routine always ask these individuals of various job tasks and so on. Based on that and based on the Dictionary of Occupational Titles, it was my determination that he had at least required a physical exertion demand level of maybe into heavy." Claimant's Exhibit 1 at 12-13.

While Dr. Ranavaya "doubt[ed] that anybody is required to lift 500 pounds on a regular basis," and stated that lifting 100 pounds regularly would equate to heavy labor, he indicated that "I have no problem accepting the notion that [claimant] in his last coal mining employment was required at least to have a sustained medium physical demand level of exertion for which he lacks the pulmonary capacity to engage in that kind of a physical demand level of exertion on a sustained basis." Claimant's Exhibit 1 at 20. Dr. Ranavaya concluded that claimant does not have the "pulmonary capacity to even do less than what he says he was asked to do." Claimant's Exhibit 1 at 22.

any evidence to that effect. Furthermore, employer has not explained how claimant's testimony, that he was required to lift 100 or more pounds, detracts from Dr. Ranavaya's opinion that claimant is unable to perform even medium labor.[13] Additionally, employer has not identified any evidence that conflicts with the administrative law judge's crediting of Dr. Ranavaya's description of the exertional requirements of claimant's usual coal mine employment.[14] Consequently, we reject employer's arguments.

We also reject employer's challenge to the administrative law judge's finding that Dr. Ranavaya's medical opinion is documented and reasoned and establishes total disability. Employer's Brief at 8-9. Questions regarding the credibility of the evidence, and whether an opinion is sufficiently reasoned, are within the sound discretion of the administrative law judge. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005). To the extent that employer reiterates its argument that Dr. Ranavaya referenced the DOT and "[did] not demonstrate that [he] knew the exertional requirements of [claimant's] specific position," Employer's Brief at 8, that argument is again rejected. Further, substantial evidence supports the administrative law judge's finding that Dr. Ranavaya's opinion was documented, as he considered claimant's history and symptoms, and conducted a physical examination and diagnostic testing. Thus, the administrative law judge rationally credited Dr. Ranavaya's opinion that claimant's moderate pulmonary impairment shown on pulmonary function studies is totally disabling in view of the physical demands of claimant's job duties. Decision and Order at 4-5; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123

[13] The Dictionary of Occupational Titles (DOT), Section 824.261-010, describes "Heavy work" as "exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." "Very heavy work" is described as "exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects." The DOT definition of medium work requires *occasional* exertion of no more than 50 pounds of force.

[14] The administrative law judge found that neither of Dr. Dahhan's reports demonstrated knowledge or consideration of the exertional requirements of claimant's work, Decision and Order at 6; Director's Exhibit 33; Employer's Exhibit 1; and a review of the record indicates that Dr. Broudy merely noted that "[o]n the job, [claimant] was short of breath, especially carrying around all of his equipment." Director's Exhibits 11, 34 at 3.

(6th Cir. 2000); *accord Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).

Weighing the opinion of Dr. Ranavaya against the contrary medical opinions, the administrative law judge acted within his discretion in discounting the opinions of Drs. Broudy and Dahhan that claimant is not totally disabled. After noting that Dr. Broudy diagnosed a "mild to moderate restriction and slight obstruction with no bronchoreversibility," the administrative law judge found that Dr. Broudy "fail[ed] to explain how [c]laimant would be able to perform his last coal mine job in light of his interpretation of the spirometry as showing a mild to moderate impairment." Decision and Order at 5; Director's Exhibit 34 at 2-3. The administrative law judge also properly found that Dr. Dahhan's opinion merited "diminished weight," as the physician diagnosed a non-disabling "mild pulmonary defect [] without showing knowledge of or consideration of the exertional requirements of [c]laimant's job." Decision and Order at 6; Director's Exhibit 33; Employer's Exhibit 1. Thus, the administrative law judge rationally assigned "less credit" to the opinions of Drs. Dahhan and Broudy than he did to the opinion of Dr. Ranavaya. Decision and Order at 5-6; *see Cornett*, 227 F.3d at 577, 22 BLR at 2-123. We find no support in the record for employer's assertions that the administrative law judge substituted his own opinion for that of the medical experts and merely discounted the opinions of Drs. Dahhan and Broudy "for failing to explain why [claimant] is not totally disabled despite the non-qualifying pulmonary functions studies." Employer's Brief at 10. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that Dr. Ranavaya's medical opinion establishes total respiratory disability at Section 718.204(b)(2)(iv).

Employer next argues that the administrative law judge failed to weigh the evidence supportive of total disability against the contrary probative evidence of record. Specifically, employer argues that the more recent pulmonary function testing of Drs. Broudy and Dahhan "outweighs Dr. Ranavaya's disability opinion," as it shows that the moderate impairment found on Dr. Ranavaya's 2007 testing improved to a mild or mild to moderate impairment on 2008 and 2011 testing. Employer's Brief at 11. Employer's argument lacks merit. The administrative law judge adequately considered the 2008 and 2011 ventilatory studies relied on by Drs. Broudy and Dahhan, and rationally accorded Dr. Ranavaya's opinion greater weight, as Dr. Broudy did not explain how claimant could perform his job duties with a mild to moderate respiratory impairment as shown on Dr. Broudy's ventilatory studies, and Dr. Dahhan did not exhibit any understanding of the exertional requirements of claimant's job. Decision and Order at 5-6; *see Cornett*, 227 F.3d at 578, 22 BLR at 2-124 (even a "mild" respiratory impairment may preclude the performance of a miner's usual coal mine employment). The administrative law judge's conclusion that the weight of the evidence establishes total respiratory disability is rational, supported by substantial evidence, and comports with the requirements of the

APA. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). We therefore affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b).

As employer raises no other arguments on the merits of entitlement, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption, and that employer failed to establish rebuttal of the presumption. *See* Decision and Order at 6-7; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Lastly, employer challenges the administrative law judge's determination that because "the evidence does not clearly establish an onset date of total disability due to pneumoconiosis," the August 1, 2007 filing date of this claim is the appropriate date for the commencement of benefits. Decision and Order at 7-8. Employer asserts that the administrative law judge failed to "consider all relevant evidence when making this determination because the later pulmonary function testing confirms [claimant's] impairment only improved over time." Employer's Brief at 13.

A miner's entitlement to benefits begins in the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, an administrative law judge must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3rd Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, 12 BLR at 1-183.

In this case, the administrative law judge's finding, that Dr. Ranavaya's November 2007 examination demonstrated the miner's total respiratory disability due to pneumoconiosis, merely indicates that the miner became totally disabled at some point *prior to* Dr. Ranavaya's November 2007 examination. *See Krecota*, 868 F.2d at 603-604, 12 BLR at 2-184; *Lykins*, 12 BLR at 1-183; *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985). Moreover, in light of the administrative law judge's credibility determinations regarding the pulmonary function testing, and our affirmance of his assignment of greatest weight to Dr. Ranavaya's opinion, which was based upon claimant's November 2007 physical examination and diagnostic testing, the record does not substantiate employer's assertion that claimant was not totally disabled due to pneumoconiosis as of August 1, 2007. 20 C.F.R. §725.503(b); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Lykins*, 12 BLR at 1-183. Because the administrative law judge reasonably found that the record does not establish when the miner became totally disabled due to

pneumoconiosis, and employer identifies no credited medical evidence indicating that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, the designation of August 1, 2007 as the date from which benefits commence is affirmed, as rational and supported by substantial evidence.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge