U.S. Department of Labor

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

BRB No. 15-0277 BLA

MITCHELL COZART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/07/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Lois A Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2009-BLA-05712) of Administrative Law Judge Paul R. Almanza awarding 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). The case involves a miner's claim filed on June 19, 2009.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012), the administrative law judge credited claimant with twenty-seven years of qualifying coal mine employment,[1] and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4).[2] Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and, therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 13. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.[3]

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. 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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. Employer specifically argues that the administrative law judge erred in determining that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

[1] 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, 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 a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Employer does not challenge the administrative law judge's finding that claimant established twenty-seven years of qualifying coal mine employment. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Relevant to total disability, the administrative law judge initially considered the four pulmonary function studies of record, performed in 2008, 2009, 2011, and 2012. The administrative law judge correctly noted that only the 2008 pre-bronchodilator test performed by Dr. Alam yielded qualifying values.[4] Decision and Order at 6-7, 15. The administrative law judge further noted that, while Dr. Alam indicated that the 2008 qualifying results were valid, and that claimant gave "good effort," Dr. Vuskovich opined that the results were not valid, due to poor effort.[5] *Id.* at 7, 15. The administrative law judge found, however, that it was unnecessary to resolve the conflict of opinion because, even if valid, the single qualifying values were outweighed by the preponderance of the non-qualifying pulmonary function study results.[6] *Id.* at 15. Thus, the administrative law judge concluded that claimant could not establish total disability by the pulmonary function study evidence, at 20 C.F.R. §718.204(b)(2)(i). *Id.* The administrative law judge also found that, as all of the blood gas studies yielded non-qualifying values, claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Turning to whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Alam and Jarboe, together with claimant's medical treatment records. Dr. Alam diagnosed a "moderate pulmonary impairment" and indicated that claimant is totally disabled. Director's Exhibit 13. Conversely, Dr. Jarboe opined that there is no evidence of any pulmonary impairment, and that claimant retains the functional

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The administrative law judge rationally noted that Dr. Alam's opportunity to observe claimant "first-hand" would have given him insight into claimant's level of effort. Decision and Order at 15. The administrative law judge further noted, however, that Dr. Vuskovich provided an extensive and well-reasoned analysis of the qualifying test results. Decision and Order at 15. In declining to resolve this conflict, the administrative law judge explained that he had "difficulty reconciling Dr. Alam's first-hand account of [claimant] giving a 'good effort' with Dr. Vuskovich's well-documented rebuttal." Decision and Order at 16.

[6] The 2008 pulmonary function study produced qualifying values before, but non-qualifying values after, the administration of a bronchodilator. Director's Exhibit 13. The 2009, 2011, and 2012 pulmonary function studies produced only non-qualifying values. Claimant's Exhibit 3; Employer's Exhibits 5, 6.

respiratory capacity to perform his usual coal mine work. Employer's Exhibits 3; 5; 6 at 18. The administrative law judge credited Dr. Alam's opinion, that claimant is totally disabled, as well-reasoned. Decision and Order at 16-17. The administrative law judge discredited Dr. Jarboe's opinion, that claimant is not disabled, finding it to be contrary to the regulations and internally inconsistent. *Id.* at 15-16. The administrative law judge, therefore, found that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 17.

Employer contends that the administrative law judge failed to adequately consider whether Dr. Alam's opinion, that claimant is totally disabled, constitutes a reasoned medical opinion. Employer's Brief at 12. Dr. Alam examined claimant on behalf of the Department of Labor and noted that claimant had thirty-two years of coal mine dust exposure and never smoked. *Id.* at 17, 19. Dr. Alam also noted, among claimant's chief complaints, that claimant is "[short of breath with] exertion, [and] cannot do any exertional work." Director's Exhibit 13 at 17. Dr. Alam interpreted claimant's pulmonary function study results as showing "moderate airflow obstruction" with "concomitant moderate restriction" and a positive bronchodilator response. Director's Exhibit 13 at 9. Dr. Alam diagnosed chronic bronchitis, emphysema, and shortness of breath, and opined that claimant has a "moderate pulmonary impairment." *Id.* Dr. Alam indicated that he based his opinion on claimant's employment and smoking histories, his pulmonary signs and symptoms, the reduced FEV1 on pulmonary function testing, and a chest x-ray showing emphysema. *Id.* Dr. Alam concluded that claimant has permanent pulmonary disability. *Id.*

The administrative law judge initially found that Dr. Alam's "opinion that [claimant] has 'moderate pulmonary impairment' and 'cannot do any exertional work' . . . is based on the qualifying pulmonary function test result and his findings of chronic bronchitis, dyspnea and emphysema." Decision and Order at 16. Noting that there was a conflict in medical opinion regarding the validity of Dr. Alam's qualifying pulmonary function study, the administrative law judge stated that he would disregard the qualifying values. *Id.* The administrative law judge further found, however, that "[t]he remainder of the evidence that Dr. Alam relied upon - his diagnoses of chronic bronchitis, dyspnea, and emphysema - supports a finding of disability." Decision and Order at 17. Further, the administrative law judge found that Dr. Alam's diagnoses of chronic bronchitis, dyspnea, and emphysema were internally consistent with claimant's symptoms and Dr. Alam's chest x-ray reading, and externally consistent with Dr. Jarboe's findings and claimant's treatment records. *Id.* Thus, the administrative law judge credited Dr. Alam's opinion as "well-reasoned" and found that it established that claimant suffers from a totally disabling respiratory impairment. *Id.*

Employer asserts that the administrative law judge failed to adequately consider the extent to which Dr. Alam's diagnosis of a disabling respiratory impairment was based on his 2008 qualifying pulmonary function study results, which were both called into question by Drs. Vuskovich and Jarboe, and contradicted by all of the subsequent pulmonary function testing. Employer's Brief at 12-13. Employer asserts that because Dr. Alam relied on the flawed pulmonary function study to conclude that claimant is disabled, his opinion is not reasoned. *Id.*

Employer's contention has merit. The determination of whether a medical opinion is reasoned and documented requires the fact finder to examine the validity of the physician's reasoning in light of studies the conducted and the objective indications upon which the opinion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). While the regulations do not require a physician's diagnosis of total disability to be based on qualifying objective testing, *see* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), a medical opinion based on invalid testing may be unreliable. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-233-34 (3d Cir. 1997).

Here, the administrative law judge recognized that Dr. Alam's diagnosis of total disability was based, in part, on a qualifying pulmonary function study that had been called into question by Dr. Vuskovich. Decision and Order at 16. The administrative law judge found it unnecessary, however, to resolve the conflict in medical opinion regarding the validity of the study because he found that Dr. Alam's opinion was also supported by independent factors such as "his diagnoses of chronic bronchitis, dyspnea, and emphysema." Decision and Order at 16-17. However, a finding of pulmonary or respiratory impairment refers to a loss of *function. See Clay v. Director, OWCP*, 7 BLR 1-82 (1984). Thus, the presence or absence of a disease, such as chronic bronchitis or emphysema, is not necessarily reflective of the presence or absence of impairment. *See Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Further, a mere recitation of symptoms, such as shortness of breath, is not a finding of the existence of an impairment, or a conclusion as to its severity. *See Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365 (1983). Thus, while the determination of whether a physician's opinion is sufficiently documented and reasoned is for the fact-finder, here the administrative law judge has not explained how Dr. Alam's additional diagnoses of chronic bronchitis, dyspnea, and emphysema support the physician's conclusion that claimant is disabled by a moderate respiratory impairment.[7] Further, while the administrative law judge found that Dr.

[7] While the administrative law judge also found that Dr. Alam's opinion was consistent with the treatment records of Dr. Echeverria and the findings of Dr. Jarboe, the

Alam's statement, that claimant "cannot do any exertional work," also supported his diagnosis of total disability, the administrative law judge failed to address whether this statement constituted an assessment of physical limitations by Dr. Alam, or merely a narrative of claimant's self-reported symptoms which, as noted above, are insufficient alone to establish total disability. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988). Additionally, as employer points out, in determining the weight given to Dr. Alam's opinion, the administrative law judge failed to consider that the pulmonary function testing conducted subsequent to the issuance of Dr. Alam's opinion was non-qualifying. We, therefore, agree with employer that the administrative law judge has not adequately considered whether Dr. Alam's diagnosis of total disability constitutes a reasoned medical opinion. For these reasons, we vacate the administrative law judge's finding that Dr. Alam's opinion is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration of Dr. Alam's opinion. On remand, the administrative law judge should address the conflict regarding the validity of Dr. Alam's qualifying pulmonary function study result,[8] reconsider whether Dr. Alam's opinion constitutes a reasoned medical opinion of disability, in light of all of the relevant evidence of record, and explain his findings.

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administrative law judge failed to explain this conclusion. Decision and Order at 17. While Dr. Echeverria diagnosed chronic obstructive pulmonary disease, on multiple occasions he also recorded that claimant denied any shortness of breath. Employer's Exhibit 8 at 5-6, 8, 11, 12-13, 14. Further, Dr. Echeverria did not offer an opinion as to the existence, or severity, of any impairment. *Id.* While Dr. Jarboe diagnosed chronic bronchitis, by history, he stated that it is not associated with any respiratory impairment. Employer's Exhibit 3.

[8] As the administrative law judge correctly observed, in resolving a conflict regarding the validity of a pulmonary function study, an administrative law judge may give greater weight to the opinion of the physician who administered the test. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211-12 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); Decision and Order at 15. Further, while the administrative law judge also correctly observed that an administrative law judge is not required to credit the opinion of the physician who performed the test, an administrative law judge must provide a rationale for preferring the opinion of a consulting physician over that of an administering doctor. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). If the administrative law judge is unable to resolve the conflict regarding the validity of the pulmonary function study, he nonetheless must reconsider whether Dr. Alam has provided a reasoned medical opinion.

On remand, the administrative law judge should also reconsider Dr. Jarboe's opinion. Dr. Jarboe examined claimant and recorded his exposure histories and complaints, noting that claimant reported a daily cough and "state[d] that walking [] 100 feet to feed his dog will cause some shortness of breath as will one flight of stairs." Employer's Exhibit 3. Dr. Jarboe also performed objective testing, noting that claimant's pulmonary function study results were "completely normal" and showed no evidence of restriction or obstruction. Employer's Exhibit 3. Dr. Jarboe diagnosed chronic bronchitis, based on claimant's history of a daily cough and some mucus production, with no associated impairment of ventilatory or respiratory function. *Id.* Dr. Jarboe explained that, absent some objective evidence of an impairment, he was reluctant to attribute claimant's chronic bronchitis to coal mine dust exposure. Employer's Exhibits 6 at 16; 7 at 15. Dr. Jarboe concluded that claimant "fully retains" the functional respiratory capacity to perform his usual coal mine work. Employer's Exhibits 3, 5.

In discrediting Dr. Jarboe's opinion, the administrative law judge found that "Dr. Jarboe's reports and testimony betray a bias for a particular type of evidence" in that "Dr. Jarboe appears reluctant to diagnose disability based on patient symptoms if pulmonary function tests do not yield qualifying values." Decision and Order at 16. Noting that such a position is inconsistent with the regulations, which allow for a finding of disability even in the absence of qualifying objective studies,[9] the administrative law judge found Dr. Jarboe's opinion entitled to little weight. *Id.* The administrative law judge also discredited Dr. Jarboe's opinion as internally inconsistent because he diagnosed claimant with chronic bronchitis, but opined that the disease was not associated with any impairment, and stated that "walking up a slight incline of 100 feet will cause [claimant] to stop after halfway," but concluded that claimant is not disabled. Decision and Order at 16. The administrative concluded that "these inconsistencies between Dr. Jarboe's findings and his conclusions" further undermined the credibility of his opinion. Decision and Order at 16.

Employer asserts that the administrative law judge mischaracterized Dr. Jarboe's opinion. Employer's Brief at 15. We agree. Contrary to the administrative law judge's finding, Dr. Jarboe did not base his opinion, that claimant is not disabled, on the fact that claimant's pulmonary function study results were non-qualifying. Rather, Dr. Jarboe stated that the fact that claimant's objective test results, including the pulmonary function study, diffusing capacity, and blood gas study results are "completely normal" and reflect

[9] The regulations provide that where total disability cannot be shown through objective studies, "total disability may nevertheless be found if a physician exercising reasoned medical judgment" concludes that a miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work. 20 C.F.R. § 718.204(b)(2)(iv).

"no evidence of an impairment" whatsoever, supported his conclusion that claimant is not disabled. *See* Employer's Exhibits 3 at 46; 5 at 3-4; 6 at 7-8, 12-13; 7 at 13-14. Further, Dr. Jarboe did not opine that claimant could not walk one-hundred feet without becoming short of breath. Rather, a review of Dr. Jarboe's medical reports and deposition testimony reveals that Dr. Jarboe simply noted claimant's self-reported complaints. Employer's Exhibits 3; 6 at 6; 7 at 5-6, 14. Because substantial evidence does not support the administrative law judge's conclusions that Dr. Jarboe's opinion is biased and internally inconsistent, we vacate the administrative law judge's determination to discredit this opinion. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). On remand, in addressing whether Dr. Jarboe's opinion is adequately reasoned, the administrative law judge should bear in mind that Dr. Jarboe's opinion, that claimant is not disabled, is both consistent with his own pulmonary function testing, and with the administrative law judge's conclusion that the preponderance of the pulmonary function testing of record does not support total disability. Further, as with Dr. Alam, the administrative should consider whether any statements regarding claimant's physical limitations represent Dr. Jarboe's conclusions, or merely a recitation of claimant's symptoms. *See McMath* 12 BLR at 1-10.

If the administrative law judge finds that the medical opinion evidence establishes total disability, he must weigh it against the contrary probative evidence to determine whether claimant has established total disability. *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 finding that the evidence established total disability, we also vacate his findings that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer failed to rebut the presumption. 30 U.S.C. §921(c)(4) (2012). If, on remand, the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption, he must then reconsider whether employer has rebutted that presumption. If claimant fails to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order awarding 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

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge