U.S. Department of Labor

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

BRB No. 17-0258 BLA

CHARLES LEONARD GRAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL CONSTRUCTION COMPANY	)	DATE ISSUED: 03/28/2018
	)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05789) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed on October 23, 2013, 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 determined that claimant established 22.75 years of coal mine employment, working in conditions that were

substantially similar to underground mines. She also found that claimant established a totally disabling respiratory or pulmonary impairment, and thus invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge concluded that employer did not rebut the presumption and she awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding: that claimant worked in conditions substantially similar to an underground mine; that claimant is totally disabled; and that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Presumption – Qualifying Coal Mine Employment

Section 411(c)(4) requires that a miner work for at least fifteen years either in "underground coal mines," or in "substantially similar" conditions. 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Above ground coal mine employment at the site of an underground mine is not subject to the requirement that claimant establish substantial similarity of conditions. *See Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013) (because the miner's "above ground work . . . was carried out at an

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

underground mine site, it constituted "qualifying employment for purposes of the fifteen-year presumption.").

The administrative law judge found that claimant worked for *employer* for at least seventeen years in above ground coal mine employment, which we affirm as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11. Claimant worked in coal mine construction for employer from 1994 to December 12, 2012, at both underground and surface coal mine operations. Hearing Transcript at 24-25. Claimant first worked for employer as a millwright/mechanic and then for approximately fourteen to fifteen years as a crane operator.

Employer contends that there is insufficient evidence to conclude that claimant was regularly exposed to coal dust while working as a millwright/mechanic or crane operator. Employer asserts that the administrative law judge "essentially manufactured testimony of alleged dust exposure" to support a finding that claimant established that his above ground work for employer was substantially similar to underground coal mine employment." Employer's Brief at 11. We agree, in part.

The administrative law judge rationally found that claimant was exposed to coal mine dust in his job as a crane operator from trucks transporting both coal and construction material.[3] Claimant testified that he operated a crane and built belt lines, tipples and "everything to process the coal." Hearing Transcript at 14. The administrative law judge noted correctly that claimant testified that he was exposed to "coal mine dust from the trucks that hauled coal around the mine site and because he operated a crane that moved coal at times." Decision and Order at 12, *citing* Hearing Transcript at 12. Claimant specifically stated that "[i]t was dusty wherever you were, sitting beside the road trucks running in and out all day long." Hearing Transcript at 17. Claimant described that the "road trucks" were "[*b*]*ig coal trucks* and slate trucks" and construction trucks hauling the steel to build the belt lines. *Id*. at 22 (emphasis added). Claimant also described that he

[3] Exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment. *See Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 25 BLR 2-725 (6th Cir. 2015); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990). The definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990).

was "sometimes within 25 to 50 feet" of an operating mine while performing his job.[4] *Id*. at 17, 22.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, the administrative law judge permissibly found that claimant's uncontradicted testimony was credible and demonstrated that he worked in conditions substantially similar to those in underground mines, while working as a crane operator for employer.[5] *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 25 BLR 2-549 (10th Cir. 2014); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-274 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

Although the administrative law judge permissibly credited claimant's working conditions as a crane operator as being substantially similar to underground mines, she did not make a specific finding as to whether claimant worked at least fifteen years in that particular job. Rather the administrative law judge acknowledged claimant's testimony that he worked *fourteen or fifteen* years as a crane operator. Because the administrative law judge has not made the necessary determinations as to whether claimant established that he worked *at least fifteen years* in conditions that are substantially similar to underground mines, we vacate her determination that claimant established the requisite coal mine employment to invoke the Section 411(c)(4) presumption. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). On remand, the administrative law judge must determine whether claimant worked as a crane operator for at least fifteen years. If claimant is unable to establish at least fifteen years of qualifying coal mine employment with employer, the administrative law judge must identify the exact

[4] Contrary to employer's assertion, the administrative law judge specifically considered that claimant worked in an enclosed cab while operating the crane. Decision and Order at 8.

[5] Employer correctly asserts that claimant did not provide specific testimony regarding his dust exposure as a *millwright for employer*, other than to state that it was above ground and was the work of a "mechanic." Hearing Transcript at 16. Thus, we are unable to affirm the administrative law judge's determination that claimant satisfied his burden to establish substantial similarity between the dust exposure in his millwright work and an underground mine.

number of years credited to claimant and then more fully consider whether claimant established qualifying coal mine employment with Slab Fork Coal Company. [6]

Invocation of the Presumption – Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function tests, arterial blood-gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The record contains three pulmonary function tests, performed by Dr. Rasmussen on December 19, 2013, by Dr. Zaldivar on April 9, 2014, and by Dr. Porterfield on December 2, 2015, and one arterial blood-gas study by Dr. Rasmussen on December 19, 2013. Director's Exhibits 12, 20; Claimant's Exhibit 1. Because all of the tests were non-

[6] The administrative law judge found that claimant established five years of qualifying coal mine employment with Slab Fork Coal Company because claimant's construction work occurred above ground at an underground coal mine. Decision and Order at 12, *citing* Hearing Transcript at 14, 28. Employer alleges that claimant's work for Slab Fork should not be counted as coal mine employment, based on claimant's testimony that he worked in construction of a plant for Slab Fork that made pulverized dust. Employer alleges that "the Black Lung Benefits Act does not cover the processing of coal for commercial uses unrelated to the extraction or preparation of coal." Employer's Brief at 11. In light of our decision to remand this case, as discussed *supra*, the administrative law judge must address employer's contention that claimant's work for Slab Fork was not as a miner and therefore he is unable to rely on that employment to invoke the Section 411(c)(4) presumption. We note, however, that claimant also described that he "built beltlines" at an active underground mine site, while employed by Slab Fork. Claimant stated that he "was building belt lines and putting additions on the plant to upgrade their production and all of that." Hearing Transcript at 28.

The administrative law judge also counted claimant's construction work for B&E Construction, EL&G Mine Construction, Four Diamonds Construction, and Nichols Construction as coal mine employment. We agree with employer that the administrative law judge failed to adequately explain why she considered this to be qualifying employment, as claimant provided no specific testimony regarding his dust exposure with any of those companies. Employer's Brief at 12.

qualifying,[7] the administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 14-15. As there was no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the opinions of Drs. Rasmussen and Zaldivar. Dr. Rasmussen examined claimant on behalf of the Department of Labor on December 19, 2013. Director's Exhibit 12. He described claimant's work as a crane operator and mechanic requiring "considerable heavy lifting and carrying of heavy pieces of equipment and parts." *Id*. He reported that the pulmonary function test and resting arterial blood-gas study were normal, but that a diffusion capacity study was "markedly reduced" to "38% of normal." *Id*. Dr. Rasmussen stated: "These studies indicate marked loss of lung function as reflected by [claimant's] marked reduction of diffusion capacity. A diffusing capacity reduced to 38% of predicted indicates *severe chronic lung disease* and clearly indicates that [claimant] is incapable of performing his last regular mine job, which required heavy and some very heavy manual labor." *Id*. (emphasis added).

Dr. Zaldivar examined claimant on April 9, 2014, and obtained a pulmonary function test and diffusion capacity study. Director's Exhibit 20. He reported that "there is no evidence of a pulmonary impairment," based on the pulmonary function test, but noted "moderate diffusion capacity" impairment. *Id*. Dr. Zaldivar did not indicate whether claimant was totally disabled based on the results of the diffusion capacity study. *Id*. In an April 15, 2016 supplemental report, Dr. Zaldivar reviewed Dr. Rasmussen's examination report, a pulmonary function test dated December 2, 2015, and various hospital and treatment records. Employer's Exhibit 1. Dr. Zaldivar stated that the only valid pulmonary function test of record, from Dr. Rasmussen,[8] showed minimal obstruction and a "markedly impaired" diffusion capacity. Employer's Exhibit 1. He also noted that claimant's diffusion capacity on December 2, 2015, was reported to be 10.4 or 35% of predicted, but noted that there were no tracings accompanying the test to review. *Id*. Dr. Zaldivar

[7] A "qualifying" pulmonary function test or arterial blood-gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" pulmonary function test or arterial blood-gas study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Dr. Zaldivar did not explain why the other pulmonary function tests were invalid. Employer's Exhibit 1.

attributed claimant's mild obstruction and diffusion capacity impairment entirely to smoking. *Id*.

In weighing the medical opinion evidence, the administrative law judge observed that claimant's usual coal mine work for employer was as a construction crane operator, involving moderate manual labor and not heavy manual labor as described by Drs. Rasmussen and Zaldivar.[9] Decision and Order at 19. She credited Dr. Rasmussen's opinion that claimant had a disabling impairment based on the reduction in the diffusion capacity. She explained:

> . . . Until the April 17, 2014 amendments, the regulations defined a pulmonary or respiratory impairment as an "inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and *diffusion*." [20 C.F.R.] § 718.202(a)(1)(ii)(B) (2010) (emphasis added). The regulatory definition of "pulmonary or respiratory impairment," though currently abrogated, supports Dr. Rasmussen's thesis that a reduced diffusion capacity may indicate the presence of a pulmonary or respiratory impairment. Moreover, according to the American Medical Association, a DLCO between 65% and 74% percent of the predicted value constitutes a Class 1 "minimal impairment." American Medical Association[,] Guides to the Evaluation of Permanent Impairment (AMA Guides), Table 5-4 (6th ed. 2008); see also Gregg Ruppel, Manual of Pulmonary Function Testing, 9th ed. (2009) at 308 ("The DLCO is useful in determining impairment because of chronic impairment of gas exchange in both obstructive and restrictive disorders."). Here, [c]laimant's DLCO value [of 38%], as shown on Dr. Rasmussen's pulmonary function test results[,] was well below the [AMA Guides] for an impairment; Dr. Zaldivar's capture of a "moderate diffusion impairment" of 49% of normal in his April 9, 2014 pulmonary function test ([Director's Exhibit] 20), shows that the test that Dr. Rasmussen reviewed was not an isolated result.

[9] Dr. Rasmussen described that claimant performed "considerable heavy lifting and carrying of heavy pieces of equipment and parts." Director's Exhibit 12. Claimant told Dr. Zaldivar that he built tipples as a crane operator and conducted heavy labor as part of his work. Director's Exhibit 20.

Decision and Order at 21.[10] In contrast to Dr. Rasmussen's opinion, the administrative law judge found Dr. Zaldivar's opinion "internally inconsistent" and that it did not specifically address the diffusion capacity results. *Id*. at 20. Relying on Dr. Rasmussen's opinion, the administrative law judge concluded that the medical opinion evidence "weigh[s] considerably in favor of [claimant's] burden to show that he [is] totally disabled" pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

The administrative law judge also considered claimant's hearing testimony relevant to the issue of total disability. *See* 20 C.F.R. §718.204(d)(5). She noted claimant's testimony that he was frequently short of breath and sometimes required supplemental oxygen. Decision and Order at 22, *citing* Hearing Transcript at 19, 27. Weighing claimant's testimony along with the medical reports, the administrative law judge found claimant totally disabled because the "evidence contained in the medical reports demonstrates that [his] diffusion value was reduced to such an extent that he is unable to perform the exertional requirements of his last usual coal mine employment." Decision and Order at 22.

Initially, we agree with employer that the administrative law judge did not adequately explain her conclusion that claimant's usual coal mine employment required moderate manual labor. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Claimant specifically testified that "there was nothing physical really" involved in his job as a crane operator. Hearing Transcript at 26. The administrative law judge acknowledged that she relied on her own knowledge of the mining industry and claimant's description that "the toughest part of his job was climbing ladders to access the cab of his crane, because he had 'no wind.'" Decision and Order at 22, *quoting* Hearing Transcript at 27. In so doing, she erroneously equated claimant's subjective symptoms with the exertional demands of his coal mine work. The mere fact that claimant gets short of breath performing an aspect of his job does not necessarily establish that the job, or the particular task, required moderate exertion.[11] We therefore vacate the administrative law judge's finding. *See Wojtowicz*, 12 BLR at 1-165.

[10] The administrative law judge noted that she was permitted to take judicial or "official notice" of "any material fact, not appearing in evidence in the record" and that "reputable dictionaries, directories and medical guidelines have generally been accepted as types of facts appropriate for judicial notice." Decision and Order at 21, n. 1.

[11] Employer notes that the official listing in the Dictionary of Occupational Titles (DOT) for claimant's job as a crane operator, 921.663-0101, indicates that the job requires only light strength and not moderate exertion. Employer's Brief at 16. Although employer maintains that the administrative law judge should rely on the DOT in determining the

Employer next contends that the administrative law judge erred in taking official notice of the AMA Guides and the Manual of Pulmonary Function Testing. Employer asserts that "the types of 'facts' that the administrative law judge drew from these sources" cannot be established by official notice because "[t]he significance of particular test results is inherently a medical opinion" and not a fact beyond dispute. Employer's Brief at 16. Employer maintains that the administrative law judge "is not qualified to say that the test results in this case standing alone support a particular medical assessment" under the sources she cited. *Id*.

Employer's assertions of error have merit.[12] The administrative law judge did not specify the material fact for which she took official notice in the AMA Guides and Manual of Pulmonary Function Testing, although she appears to have concluded from these sources that claimant has greater than a Class I respiratory or pulmonary impairment, based on a reduction in the diffusion capacity below fifty percent.[13] She also appears to rely on these sources to reject employer's argument that a finding of total disability should be established based solely on the pulmonary function tests or arterial blood-gas study evidence and not a diffusion capacity measurement. Because we are unable to discern the administrative law judge's specific findings for which she took judicial notice, her Decision and Order

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exertional requirements of claimant's job, she is not required to do so. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

[12] Employer asserts that judicial notice applies only to a fact beyond controversy and that a source's accuracy must be "beyond reasonable doubt" to support reliance on judicial notice. Employer's Brief at 15. Employer notes that the administrative law judge relied on the 2009 edition of Ruppel's Manual of Pulmonary Function Testing, and not the most recent edition issued in 2012. Because we are vacating the administrative law judge's Decision and Order, as discussed, *supra*, employer will have the opportunity to present evidence or argument regarding the reliability of the sources cited by the administrative law judge on remand. *See* 29 C.F.R. §18.84.

[13] The administrative law judge noted that each of the three pulmonary function tests included a diffusion capacity measurement - DLCO value - below 50 percent of normal. Decision and Order at 14, *citing* Ruppel's Manual of Pulmonary Function Testing, 9th ed. (2009) at 308 ("The DLCO is useful in determining impairment because of chronic impairment of gas exchange in both obstructive and restrictive disorders.").

fails to satisfy the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz,* 12 BLR at 1-165.

Furthermore, we agree with employer that the administrative law judge improperly substituted her opinion for that of a medical expert insofar as she attempted to independently classify claimant's impairment under the AMA Guides and the Manual of Pulmonary Function Testing. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987) (Weighing of the evidence is for the administrative law judge, but the interpretation of medical data is for the medical experts). The administrative law judge did not apply the correct analysis in considering whether claimant established total disability, which is to compare the exertional requirements of claimant's usual coal mine employment with the *physicians' assessment* of claimant's respiratory or pulmonary impairment and physical limitations identified *by the physician*s that are associated with that impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996).

For all of the above-stated reasons, we vacate the administrative law judge's determination that claimant established a totally disabling respiratory or pulmonary impairment, and we further vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.[14] On remand, the administrative law judge must make a specific finding as to claimant's usual coal mine employment and the physical requirements associated with it. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. The administrative law judge then must determine the degree of respiratory or pulmonary impairment identified by the physicians, resolve any conflict in the evidence on that issue, and reach a conclusion as to whether claimant is totally disabled from performing his usual coal mine work. In determining the weight to accord the medical opinion evidence, the administrative law judge should address the physician's qualifications, the rationales and objective studies underlying their opinions and determine whether their conclusions are reasoned and documented. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge must explain the bases for her findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz,* 12 BLR at 1-165.

[14] Because we vacate the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption, we decline to address employer's arguments that the administrative law judge erred in finding that employer failed to establish rebuttal of the presumption. Employer may still raise these arguments, as necessary, in any future appellate proceeding in this case.

If the administrative law judge finds that claimant has established invocation of the Section 411(c)(4) presumption, she must address whether employer has established rebuttal. If claimant is unable to establish total disability, benefits are precluded.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge