U.S. Department of Labor

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

BRB No. 17-0290 BLA

BRUCE DANIEL CAVANAUGH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEN AMERICAN RESOURCES, INCORPORATED	)	DATE ISSUED: 03/28/2018
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Cheryl Intravaia (Fierich, Mager, Green and Ryan), Carbondale, Illinois, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05660) of Administrative Law Judge Jonathan C. Calianos, rendered on a subsequent claim filed on May 20, 2011,[1] 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 accepted the parties' stipulation to 25.88 years of underground coal mine employment, and determined that claimant established a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[3] Further, the administrative law judge determined that employer did not rebut the presumption and he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled and is entitled to invocation of the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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[1] Claimant filed an initial claim on November 16, 2001, which was denied on March 21, 2005, by Administrative Law Judge Daniel J. Roketenetz, because the evidence was insufficient to establish any element of entitlement. Director's Exhibit 1.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that at least "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Here, because the prior claim was denied for failure to establish any element of entitlement, claimant was required to establish at least one element in order to obtain a review of his subsequent claim on the merits.

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.[4] 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).

Total Disability – Invocation of the Section 411(c)(4) Presumption

In the absence of contrary probative evidence, a miner's total disability is established by: (i) pulmonary function tests showing values equal to or less than those listed in Appendix B of 20 C.F.R. Part 718; (ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; (iii) evidence of cor pulmonale with right-sided congestive heart failure; or (iv) where a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered seven pulmonary function tests: Dr. Baker conducted a June 17, 2011 test without a bronchodilator; Dr. Repsher conducted an October 26, 2011 test without a bronchodilator; Dr. Selby conducted a May 3, 2012 test before and after administering a bronchodilator; Dr. Chavda conducted a May 15, 2012 test before and after administering a bronchodilator; and Dr. Chavda conducted an August 26, 2014 test without a bronchodilator. Decision and Order at 9-10; Director's Exhibit 11; Claimant's Exhibits 4, 5. The administrative law judge correctly found that all of the tests are qualifying[5] for total disability. Decision and Order at 30. The administrative law judge gave no weight to the October 26, 2011, May 3, 2012 and August 26, 2014 tests, finding them to be invalid.[6] The administrative law

[4] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

[5] A "qualifying" pulmonary function test yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] With regard to the October 26, 2011 test, Dr. Repsher stated, "Patient had a poor understanding of test. Spirometry inconsistent due to poor understanding, poor tolerance."

judge found that the June 17, 2011 and May 15, 2012 tests were valid and qualifying, and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer argues that the administrative law judge's findings regarding the validity of the June 17, 2011 and May 15, 2012 tests are not adequately explained in accordance with the Administrative Procedure Act.[7] We agree.

Dr. Baker administered the June 17, 2011 pulmonary function test for the Department of Labor (DOL), which was qualifying for total disability. Dr. Baker indicated that claimant had "fair cooperation, good understanding" but also noted "variation in the tracings." Director's Exhibit 11. Dr. Mettu subsequently completed the DOL validation form indicating that the "vents" were "acceptable."[8] *Id*. Although the administrative law judge determined that the June 17, 2011 pulmonary function test was valid based on Dr. Mettu's opinion, the administrative law judge did not properly address the contrary opinions of Drs. Zaldivar and Selby. In his April 22, 2013 report, Dr. Zaldivar opined that the June 17, 2011 test "showed very poor effort" and that it "cannot be used for any purposes." Employer's Exhibit 7 at 2. Reviewing Dr. Baker's comments with regard to the June 17, 2011 test, Dr. Selby testified that "variations in the tracings" would be

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Employer's Exhibit 5. Dr. Selby concluded that the May 3, 2012 test was an "invalid spirometry due to very poor patient cooperation and consistency." Employer's Exhibit 6.

Dr. Chavda indicated that the August 26, 2014 test satisfied the American Thoracic Society guidelines for acceptability and reproducibility. Claimant's Exhibit 5. The administrative law judge noted that Dr. Selby invalidated the August 26, 2014 test. Without further explanation, the administrative law judge concluded that the August 26, 2014 test "lacks the required loops and tracings, so its validity cannot be independently verified." Decision and Order at 30. The administrative law did not provide an explanation as to why Dr. Selby's invalidation was credited.

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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).

[8] We agree with employer that the administrative law judge mischaracterized the evidence by stating that Dr. Baker accepted Dr. Mettu's validation, as Dr. Baker neither accepted nor rejected it. Dr. Baker noted only that there was variation in the tracings without further comment and opined that the results met the regulatory standards for total disability. Director's Exhibit 11.

consistent with an invalid test. Employer's Exhibit 18 at 5-16. The administrative law judge erred in failing to resolve the conflict between Drs. Mettu, Repsher, and Selby regarding the validity of the June 17, 2011 pulmonary function test.

The administrative law judge similarly erred in considering Dr. Chavda's May 15, 2012 test. Dr. Chavda indicated that claimant gave "good efforts and cooperation" and that the test "met the [American Thoracic Society] standards for acceptability and repeatability." Claimant's Exhibit 5. The administrative law judge credited Dr. Chavda's validation, but failed to discuss Dr. Zaldivar's contrary opinion that the test could not be validated as "[t]here are no tracings for this [test], . . . [t]he only tracings sent were flow/volume tracings but no volume versus time tracings."[9] Employer's Exhibit 7 at 14. The administrative law judge also failed to discuss Dr. Chavda's deposition testimony in which the physician agreed with Dr. Zaldivar's invalidation.

The administrative law judge has great leeway in evaluating the record evidence, but may not reject relevant medical evidence without adequate explanation. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-6 (1987); *Ridings v. C&C Coal Co., Inc.*, 6 BLR 1-227, 1-230 (1983). Because the administrative law judge did not explain the weight accorded all of the relevant evidence, we vacate his finding that the June 17, 2011 and May 15, 2012 pulmonary function tests are valid and supportive of a finding of total disability. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand). We therefore vacate the administrative law judge's determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[10]

[9] Dr. Chavda's May 15, 2012 pulmonary function test is part of claimant's treatment record, although claimant designated it as affirmative evidence. Generally, a pulmonary function test contained in treatment records is not subject to the specific quality standards set forth in Appendix B of 20 C.F.R. Part 718, but the administrative law judge must still determine if the results are sufficiently reliable to support a finding of total disability. 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2008).

[10] The administrative law judge found that claimant did not establish total disability based on the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 30. The administrative law judge did not render a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii), although the record does not contain evidence that claimant has cor pulmonale.

Turning to the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that Dr. Baker's diagnosis of total disability was credible, as it was based on the qualifying June 11, 2011 pulmonary function test, which the administrative law judge found was valid. Decision and Order at 31; Director's Exhibit 11. The administrative law judge noted that Dr. Houser opined that claimant is totally disabled but that the physician relied on a pulmonary function test administered on April 10, 2013, that was not admitted into the record.[11] Decision and Order at 6; Claimant's Exhibit 7. Nonetheless, the administrative law judge found that Dr. Houser's diagnosis of total disability "accords with my findings as to the [pulmonary function tests] on the whole." Decision and Order at 31. In contrast, the administrative law judge gave no weight to the opinions of Drs. Zaldivar and Selby, that claimant has no disabling respiratory or pulmonary impairment, because the administrative law judge found that they are based on the incorrect assumption that there were no valid pulmonary function tests in the record.[12] *Id*.; Employer's Exhibits 7, 18. Because we have vacated the administrative law judge's reliance on the June 17, 2011 and May 15, 2012 pulmonary function tests to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and to the extent that the administrative law judge determined the credibility of the medical opinions based on the pulmonary function evidence, we vacate the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Additionally, we agree with employer that administrative law judge's crediting of Dr. Houser's opinion as supported by the qualifying pulmonary function tests is not rational, as Dr. Houser did not review any of the pulmonary function tests admitted into the record. *Id*. Thus, we vacate the administrative law judge's determination that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv),

[11] The administrative law judge excluded Dr. Houser's April 10, 2013 pulmonary function test as in excess of the evidentiary limitations. Decision and Order at 6.

[12] We agree with employer that Dr. Selby's opinion is not internally inconsistent to the extent that his agreement that claimant's numbers on the test would qualify for oxygen under the guidelines is not inconsistent with his position that claimant does not need oxygen and is not impaired from a pulmonary perspective. It was Dr. Selby's position that claimant should not receive oxygen as a matter of clinical judgment, that the pO2 was a better indicator of impairment than oxygen saturation, and that the guidelines are not dispositive in this case. Exhibit 18 at 21-22, 33-34. On remand, the administrative law judge must consider Dr. Selby's actual explanations in evaluating his opinion.

and further vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.[13]

On remand, the administrative law judge must resolve the conflict in the evidence regarding the validity of the June 17, 2011 and May 15, 2012 pulmonary function tests and determine whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must reweigh the conflicting medical opinions on total disability and determine whether they are reasoned and documented by considering the explanations and documentation underlying their medical judgments. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). If total disability is established under any subsection, the administrative law judge must also make a finding as to whether claimant established a totally disabling respiratory or pulmonary impairment, taking into consideration all of the contrary probative evidence pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

If claimant is unable to establish total disability, benefits are precluded in this case. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). However, if claimant establishes total disability and thereby invokes the Section 411(c)(4) presumption, the administrative law judge shall make findings as to whether employer established rebuttal of the Section 411(c)(4) presumption.[14]

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[13] Employer argues that claimant is not a credible witness and that the administrative law judge erred in relying on claimant's testimony to find total disability established. Contrary to employer's contention, the administrative law judge's finding of total disability was based on medical evidence and his own observations of claimant at the hearing, and not claimant's testimony. Decision and Order at 32. However, we agree with employer that in analyzing whether claimant has a totally disabling respiratory or pulmonary impairment the administrative law judge failed to consider all relevant evidence, and in particular, the explanations provided by Drs. Selby and Zaldivar for claimant's shortness of breath and exercise limitations. Decision and Order at 31-32

[14] Because we have vacated the award of benefits and remanded the case for further consideration relevant to invocation of the Section 411(c)(4) presumption, and because the administrative law judge's specific findings, on remand, may affect his determinations with respect to rebuttal, should he reach that issue, we decline to address employer's arguments that the administrative law judge erred in finding that it did not establish rebuttal of the presumption. However, our decision to not address employer's arguments on rebuttal does

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded 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

not preclude employer from raising these arguments again in further appellate proceedings before the Board.