U.S. Department of Labor

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

BRB No. 18-0026 BLA

JOEL EDWIN MILES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
17 WEST MINING, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/11/2019
	)	
17 WEST MINING/MAPCO, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joel Edwin Miles, Paintsville, Kentucky.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikevillle, Kentucky, for employer/carrier.

Leonard H. Gerson (Kate S. O'Scannlain, Solicitor of Labor; Barry Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2016-BLA-05319) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 18, 2015.[2]

Because the parties stipulated to nine years of coal mine employment, the administrative law judge found claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He also found that because the new evidence does not establish complicated pneumoconiosis, claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act.[4] 30 U.S.C. §921(c)(3); *see* 20

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This is claimant's second claim for benefits. Director's Exhibit 3. His first claim, filed on November 24, 2000, was denied by the district director on April 19, 2001 because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing this subsequent claim.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305(b).

[4] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by

C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without either presumption, the administrative law judge found claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and denied benefits.[5]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief alleging error in the administrative law judge's finding that claimant failed to establish total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if it is 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must be denied unless the administrative law judge finds that "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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new

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other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[5] The administrative law judge considered the old and new evidence together and permissibly relied upon the evidence submitted with the current claim, which he found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 9.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4; Hearing Transcript at 11.

evidence establishing at least one element to obtain a review of the merits of his subsequent claim. 20 C.F.R. §725.309(c).

Total Disability

Total disability is a requisite element of entitlement under Section 411(c)(4) and Part 718. A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, total disability is established by: qualifying[7] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds total disability established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five new pulmonary function studies dated April 1, 2015, October 1, 2015, November 17, 2015, February 11, 2016 and January 31, 2017.[8] Decision and Order at 4, 10. He found that the pulmonary function study evidence establishes total disability, stating:

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

[8] The recorded heights for claimant on the pulmonary function studies dated April 1, 2015, October 1, 2015, November 17, 2015, February 11, 2016 and January 31, 2017 were 68 inches, 67.25 inches, 67 inches, 67 inches, and 67 inches, respectively. Director's Exhibit 11; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 2. The administrative law judge resolved the height discrepancy by relying on the most often reported height of 67 inches. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 10. Because claimant's height falls between the table heights of 66.9 and 67.3 inches listed in 20 C.F.R. Part 718, Appendix B, the administrative law judge used the table values for the closest greater height of 67.3 inches to evaluate the studies. Decision and Order at 10, *citing Toler*, 43 F.3d at 116 n.6, 19 BLR at 2-84 n.6.

> Miner's two most recent [pulmonary function studies] (conducted in 2016 and 2017) are qualifying. He also underwent three [pulmonary function studies] in 2015. Two produced qualifying values pre-bronchodilator, and all three produced non-qualifying values post-bronchodilator. Because pneumoconiosis is latent and progressive, I afford greater probative value to the two most recent [pulmonary function studies], and find that they provide better representations of Claimant's current medical condition. Accordingly, I find that the [pulmonary function studies] weigh in favor of total disability.

Decision and Order at 10.

While an administrative law judge may credit later evidence that better reflects the miner's current respiratory or pulmonary condition, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988), here the administrative law judge did not explain his determination that the 2016 study is qualifying. For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce *both* a qualifying FEV_1 value *and* either an FVC or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV_1 to FVC ratio equal to or less than 55%. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). In his chart summarizing the pulmonary function study evidence, the administrative law judge noted that the February 11, 2016 study conducted by Dr. Ajjarapu produced an FEV1 value of 1.78, an FVC value of 2.44, and an FEV1 to FVC ratio of 73%; no other values were listed. Decision and Order at 4. As only the FEV1 value is qualifying under the regulations, the 2016 pulmonary function study is not qualifying based on the values relied upon by the administrative law judge.[9] We note, however, that a review of Dr. Ajjarapu's February 11, 2016 pulmonary function study reveals that she also performed an MVV, which was not considered by the administrative law judge.[10] Claimant's Exhibit 4. Because the administrative law judge has not explained his determination with respect to this study, we

[9] As the miner was 59 years old on the date of testing, and the administrative law judge used the table height of 67.3 inches, the qualifying FVC value is 2.37 or less. *See* 20 C.F.R. Part 718, Appendix B.

[10] We note that the January 31, 2017 study also contained an MVV value that was not considered by the administrative law judge. Decision and Order at 4; Claimant's Exhibit 3. Any error is harmless, however, as he correctly noted that both the FEV1 value of 1.46 and the FVC value of 1.97 are qualifying for a miner who is 60 years old and 67.3 inches tall and, therefore, correctly concluded that the study is qualifying under the regulations. *See* 20 C.F.R. Part 718, Appendix B; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 4.

vacate his finding that the pulmonary function study evidence as a whole establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[11] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). On remand, the administrative law judge should consider the MVV value, determine whether the 2016 study is qualifying, and render a determination as to whether the pulmonary function study evidence as a whole is qualifying for total disability. Claimant's Exhibit 4.

The administrative law judge's finding that the new blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) is affirmed as he correctly found that all three studies produced non-qualifying values. Decision and Order at 10-11; Director's Exhibit 11; Employer's Exhibits 1, 2. We also affirm his finding that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) as there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11.

Pursuant to 20 C.F.R. §718.204(b)(iv), the administrative law judge considered the new medical opinions of Drs. Rosenberg, Jarboe, and Ajjarapu. Drs. Rosenberg[12] and Jarboe[13] opined claimant could return to his last coal mine employment from a respiratory

[11] The administrative law judge accurately characterized the remaining new pulmonary function studies. Decision and Order at 4, 10. The April 1, 2015 study conducted by Dr. Ajjarapu yielded qualifying values before the use of bronchodilators and non-qualifying values after the use of bronchodilators. Director's Exhibit 11. The October 1, 2015 study conducted by Dr. Jarboe yielded non-qualifying values before and after the use of bronchodilators. Employer's Exhibit 2. The November 17, 2015 study conducted by Dr. Rosenberg yielded qualifying values before the use of bronchodilators and non-qualifying values after the use of bronchodilators. Employer's Exhibit 1. Finally, the January 31, 2017 study, also conducted by Dr. Ajjarapu, yielded qualifying pre-bronchodilator values; post-bronchodilator studies were not performed. Claimant's Exhibit 3.

[12] Dr. Rosenberg opined, based on a November 17, 2015 examination, that claimant has a mild to moderate degree of restriction but is not disabled, from a pulmonary perspective, from performing his previous coal mine job or a similarly arduous type of labor. Employer's Exhibits 1, 5.

[13] Dr. Jarboe opined, based on an October 1, 2015 examination and review of medical evidence, that claimant does not have a significant ventilatory impairment and is not totally disabled from a pulmonary standpoint. Employer's Exhibits 2, 4.

standpoint. Decision and Order at 11; Employer's Exhibits 1, 2, 4, 5. While Dr. Ajjarapu initially opined that claimant is totally disabled, the administrative law judge found that she "appeared to abandon" her opinion during her deposition.[14] Decision and Order at 11; Director's Exhibit 11; Employer's Exhibit 6. Finding Dr. Ajjarapu's opinion equivocal, the administrative law judge relied on the opinions of Drs. Rosenberg and Jarboe to conclude that the medical opinions do not establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 12.

We agree with the Director that the administrative law judge erred in discrediting Dr. Ajjarapu's opinion. Director's Brief at 2-4. The administrative law judge accurately observed that in her medical report, Dr. Ajjarapu opined claimant is totally disabled from a respiratory standpoint. Decision and Order at 11. In finding that she "abandoned" that opinion in her deposition, the administrative law judge stated:

> [Dr. Ajjarapu] testified that she based her opinion finding total disability on the [pulmonary function study] alone and acknowledged that Claimant's results would have increased had he given maximum effort. Dr. Ajjarapu further acknowledged the possibility that Claimant's obesity could have an effect on his breathing problems. Dr. Ajjarapu also reviewed Dr. Jarboe's spirometry, which included FEV1 and FVC values above the criteria for disability, and agreed that Claimant would not be totally disabled based thereon.

Id. Thus he found Dr. Ajjarapu's opinion insufficient to meet claimant's burden of proof. Decision and Order at 12.

As the Director correctly asserts, however, the administrative law judge mischaracterized Dr. Ajjarapu's testimony. Director's Brief at 3-4. Dr. Ajjarapu did not state that claimant's pulmonary function study results would have been higher if he gave maximum effort.[15] Rather, despite repeated efforts by employer's counsel, she refused to concede that point and stated her belief claimant "ha[d] given his best effort in doing this

[14] Dr. Ajjarapu examined claimant on April 1, 2015 and opined he does not have the pulmonary capacity to do his previous coal mine employment. Director's Exhibit 11. She also testified by deposition on March 1, 2017. Employer's Exhibit 6.

[15] Referring to Dr. Vuskovich's opinion that Dr. Ajjarapu's April 1, 2015 pulmonary function study is invalid due to poor effort, employer's counsel asked Dr. Ajjarapu whether she would expect the pulmonary function study results to increase if claimant had given maximum effort. Employer's Exhibit 6 at 23-27. She repeatedly answered "no" and strongly disagreed with Dr. Vuskovich's opinion that the test is invalid. *Id.* at 24-26.

test." Employer's Exhibit 6 at 23; *see* Director's Brief at 3. Moreover, the administrative law judge did not explain, as required by the Administrative Procedure Act (APA),[16] how reliance on a pulmonary function study "alone" would undermine her opinion. *See Wojtowicz*, 12 BLR at 1-165.

We further agree with the Director that Dr. Ajjarapu's comments regarding the possible contribution of obesity to claimant's impairment are not relevant to whether claimant is totally disabled, as that testimony relates to the cause of his impairment not its existence.[17] *See* 20 C.F.R. §718.204(a); Director's Brief at 3. Finally, it is not clear how her opinion is undermined by her agreement that claimant would not be disabled when looking only at the results of Dr. Jarboe's earlier non-qualifying pulmonary function study. Director's Brief at 3-4; Employer's Exhibit 6 at 29-31. Dr. Ajjarapu did not state that those results caused her to change her opinion that claimant is disabled. Rather, she noted that Dr. Jarboe's pulmonary function study results were "not normal," reflected "a moderate impairment," and observed that a physician could still explain how they support disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000) (even a mild impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment); Employer's Exhibit 6 at 31. Because substantial evidence does not support the administrative law judge's conclusion that Dr. Ajjarapu "abandoned" her opinion that claimant is totally disabled, we vacate his discrediting of her opinion. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tackett*, 7 BLR at 1-706. We, therefore, further vacate his finding that claimant failed to establish total disability by medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

In sum, we have vacated the administrative law judge's evaluation of the pulmonary function studies and medical opinions at 20 C.F.R. §§718.204(b)(2)(i), (iv), respectively. We therefore vacate the administrative law judge's finding that claimant did not establish

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[16] The Administrative Procedure Act 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).

[17] Dr. Ajjarapu stated it was "possible" for claimant to suffer an obesity-related restriction, "but it wouldn't be to this degree." Employer's Exhibit 6 at 31. She also stated, "one can say that obesity can play a role, but I wouldn't say it's a significant factor in this case." *Id*. at 34.

total disability pursuant to 20 C.F.R. §718.204(b)(2). We therefore also vacate his finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[18]

On remand, the administrative law judge must weigh the qualifying and non-qualifying pulmonary function studies, and explain his determination of whether that evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Additionally, at 20 C.F.R. §718.204(b)(2)(iv), he must reconsider the medical opinions, including that of Dr. Ajjarapu in its entirety, and render a finding as to whether the medical opinion evidence establishes total disability.[19] *See Rowe*, 710 F. 2d at 255. The administrative law judge must fully explain the bases for all of his findings of fact and credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Should the administrative law judge find total disability established based on the new pulmonary function studies or medical opinions at 20 C.F.R. §718.204(b)(2)(i), (iv), he must weigh all relevant evidence together, like and unlike, to determine whether claimant has established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If the new evidence establishes total disability, claimant will have established as a matter of law a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). The administrative law judge must then consider whether claimant is entitled to benefits pursuant to 20 C.F.R. Part 718, based on his consideration of all of the record evidence. If, however, the administrative law judge finds that the evidence does not establish total

[18] We affirm, however, the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, as the record contains no evidence of complicated pneumoconiosis. Decision and Order at 8 n.9. We also affirm his finding that claimant has insufficient coal mine employment to invoke the Section 411(c)(4) presumption. Decision and Order at 7; Hearing Transcript at 8.

[19] As noted by the Director, to the extent Dr. Rosenberg relied on claimant's non-qualifying post-bronchodilator pulmonary function study to conclude that he is not totally disabled, the Department of Labor has recognized that post-bronchodilator results are not an adequate assessment of a miner's disability. S*ee* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order at 11; Director's Brief at 4. Further, neither Dr. Rosenberg nor Dr. Jarboe had the benefit of reviewing the most recent pulmonary function study conducted on January 31, 2017. Director's Brief at 5.

disability pursuant to 20 C.F.R. §718.204(b)(2), he must deny benefits as claimant will have failed to establish an essential element of entitlement under 20 C.F.R. Part 718. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge