U.S. Department of Labor

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

BRB No. 18-0271 BLA

KATHLEEN STURGILL (o/b/o FARLEY B. STURGILL)	)	
Claimant-Petitioner	)	
v.	)	
STEVEN R. MULLINS EXCAVATING	)	
and	)	DATE ISSUED: 05/08/2019
TRAVELLERS INDEMNITY COMPANY OF ILLINOIS	)	
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 Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2013-BLA-05957) of Administrative Law Judge Paul R. Almanza, rendered on the miner's subsequent claim filed on August 21, 2012,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that the miner had at least twenty-eight years of coal mine employment, and found that at least fifteen years was spent in conditions comparable to underground mines. He also determined that the miner was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and thus found claimant did 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] establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, or establish entitlement under 20 C.F.R. Part 718.[4]

[1] Claimant is the widow of the miner, who died on November 17, 2016, while his case was pending with the Office of Administrative Law Judges. Claimant is pursuing the miner's claim on his behalf.

[2] The miner filed an initial claim which was finally denied by the district director on July 12, 2011, because he failed to establish any element of entitlement. Director's Exhibit 1.

[3] Under Section 411(c)(4) of the Act, a miner is presumed to have been totally disabled due to pneumoconiosis if he had 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); 20 C.F.R. §718.305(b).

[4] Because the record lacks evidence of complicated pneumoconiosis, the administrative law judge found that the irrebuttable presumption of total disability due to pneumoconiosis is inapplicable. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

On appeal, claimant contends the administrative law judge erred in finding that the miner was not totally disabled. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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.[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 his previous claim, the subsequent claim must also 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). The miner's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 2. Therefore, claimant was required to submit new evidence establishing at least one element of entitlement[7] in order to obtain review of the merits of the miner's subsequent claim. 20 C.F.R. §725.309(c)(3).

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[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[7] Because the miner's claim is governed by 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Perry v. v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

I. 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 and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability may be established by pulmonary function studies, 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). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

A. Pulmonary Function Studies

There is one new pulmonary function study in the record, obtained by Dr. Wolfe on September 19, 2012, as part of the Department of Labor (DOL)-sponsored examination. Decision and Order at 12; Director's Exhibit 13. The administrative law judge found the study qualifying[8] for total disability, based on the reductions in the FEV1 and MVV values. Decision and Order at 12. He concluded it is unreliable, however, based on what he viewed as inconsistencies between the report of ventilatory study (Form CM-2907) indicating that the miner gave good effort and cooperation in performing the study, and Dr. Wolfe's comment in his medical report that "the 'significant' *reduction* in [the miner's] MVV 'may well be effort related rather than due to the bronchodilator.'"[9] *Id*. at 12 (emphasis added), *quoting* Director's Exhibit 13. He also noted Dr. Vuskovich's opinion that the miner was physically unable to perform a valid pulmonary function study because of the effects of Parkinson's disease and other medical conditions. Decision and Order at 12; Employer's Exhibit 5. Finding the record "lacks substantial evidence as to whether the [pulmonary function study] results reflect a good faith effort" by the miner, the administrative law judge found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 13.

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[8] A "qualifying" pulmonary function study or 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" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Although the pulmonary function study was performed by a technician, the report of ventilator study includes Dr. Wolfe's signature. Director's Exhibit 13.

Claimant contends that the administrative law judge erred in discrediting the entire September 19, 2012 qualifying pulmonary function study based on Dr. Wolfe's comments regarding the "improvement" in post-bronchodilator MVV values. Claimant's Brief at 7. We agree, in part.[10] Dr. Wolfe indicated that the miner's FEV1 was 1.64 liters or 50 percent of predicted, the FEV1/FVC ratio was 66 percent of predicted, and that these values showed no clinically significant change after use of a bronchodilator. Director's Exhibit 13. With regard to the MVV values, Dr. Wolfe stated: "His [pre-bronchodilator] MVV is significantly reduced at 38 liters per minute or 29% of predicted with mild improvement post[-]bronchodilator to 53 liters . . . or 40 % of predicted . . . . This may well be effort related rather than due to the bronchodilator." *Id*.

As noted by claimant, even if the MVV improved with more effort by the miner, it was still qualifying for total disability. Claimant's Brief at 5. The administrative law judge did not adequately explain his credibility finding with regard to the validity of the MVV values, in light of the qualifying nature of both the pre-bronchodilator and post-bronchodilator results. Consequently his decision does not satisfy the Administrative Procedure Act.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Additionally, when considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of the miner's pulmonary function. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring). In accomplishing this task, the administrative law judge must evaluate the reasoning and credibility of the medical opinions as to the reliability of the testing, but cannot substitute his opinion for that of the

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[10] Claimant argues that because the FVC value was 2.49 or 61 percent of predicted, which is one percentage point away from qualifying under the regulations, it weighs in favor of finding that he is totally disabled, regardless of the MVV values. Contrary to claimant's contention, however, total disability can only be established under 20 C.F.R. §718.204(b)(2)(i) if both the FEV1 and FVC are qualifying.

[11] 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).

medical experts. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Because the administrative law judge did not address whether the September 19, 2012 study is in substantial compliance with the quality standards, and his rationale for rejecting the study does not satisfy the APA, we vacate his finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Wojtowicz*, 12 BLR at 1-165.

B. Medical Opinions

Under 20 C.F.R. §718.204(b)(2)(iv),[12] the administrative law judge considered the opinions of Drs. Wolfe, Jarboe, and Vuskovich. As noted by the administrative law judge, Dr. Wolfe opined that the miner had a disabling respiratory impairment and was unable to work in his usual coal mine employment, based on the results of the pulmonary function study showing significant obstruction and a blood gas study showing moderate hypoxemia. Director's Exhibit 13. The administrative law judge rejected Dr. Wolfe's opinion because he relied on an invalid pulmonary function study. Decision and Order at 14. He also stated that Dr. Wolfe "did not elaborate at how an [arterial blood gas study] in normal ranges is indicative of moderate hypoxemia and, given [the miner's] many non-pulmonary conditions, whether the [arterial blood gas] results alone" support a finding that the miner was totally disabled. *Id*. Thus, the administrative law judge concluded that Dr. Wolfe's opinion was neither well-documented nor well-reasoned, and that claimant did not establish total disability based on the medical opinion evidence.[13] *Id*. at 15, 17.

Because we have vacated the administrative law judge's discrediting of Dr. Wolfe's pulmonary function study at 20 C.F.R. §718.204(b)(2)(i), we also vacate his discrediting of Dr. Wolfe's opinion. Additionally, the administrative law judge erred in rejecting Dr. Wolfe's opinion on the issue of total disability because he did not discuss how the miner's "non-pulmonary conditions" affected his pulmonary impairment. Decision and Order at

[12] We affirm, as unchallenged on appeal, the administrative law judge's findings that there is no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), as the blood gas studies are non-qualifying and there is no evidence in the record of cor pulmonale with right-sided congestive heart failure. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14.

[13] The administrative law judge found the opinions of Drs. Jarboe and Vuskovich that the miner was not totally disabled to be reasoned and documented. Decision and Order at 15-17; Employer's Exhibits 1, 3, 5, 15.

15. The sole issue at 20 C.F.R. §718.204(b)(2) is whether the miner had a disabling respiratory or pulmonary impairment.[14] Although Dr. Wolfe stated that the miner had "multiple medical problems which generally have added to his disability," he specifically diagnosed a total disability based on the results of the pulmonary function and arterial blood gas studies. Director's Exhibit 13. Moreover, whether "non-pulmonary conditions" contributed to his respiratory or pulmonary impairment is relevant only to the issue of disability causation at 20 C.F.R. §718.204(c), or rebuttal of the Section 411(c)(4) presumption.[15] *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Consequently, we vacate the administrative law judge's determination that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and his overall finding that that miner was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2). We therefore vacate the administrative law judge's findings that claimant did not invoke the Section 411(c)(4) presumption or establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and we further vacate the denial of benefits.

II. REMAND INSTRUCTIONS

The administrative law judge must reconsider whether claimant established total disability based on the September 19, 2012 pulmonary function study at 20 C.F.R. §718.204(b)(2)(i), taking into consideration all of the evidence relevant to the validity of the study. He must also reconsider the opinions of Drs. Wolfe, Jarboe, and Vuskovich and determine whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge must determine the credibility of the

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[14] The administrative law judge also erred to the extent he discredited Dr. Wolfe's opinion on total disability because Dr. Wolfe diagnosed clinical pneumoconiosis based on a positive x-ray reading that the administrative law judge did not find persuasive. Decision and Order at 14. The issue of clinical pneumoconiosis is distinct from the issue of total disability. 20 C.F.R. §§718.202(a), 718.204(b)(2).

[15] An administrative law judge may, of course, reject a physician's opinion that does not credibly interpret test results as demonstrating total respiratory or pulmonary disability. He may also consider the existence of other medical conditions in determining whether a physician has persuasively attributed a claimant's total disability to a pulmonary or respiratory impairment.

medical opinions based on the physicians' understanding of the miner's usual coal mine employment, the sophistication of their diagnoses, and the rationales underlying their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

If claimant establishes total disability under either or both subsections, the administrative law judge must weigh the supporting and contrary evidence together and determine whether claimant has established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). If claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, in which case the administrative law judge must determine whether employer rebutted the presumption. *Bender*, 782 F.3d at 137. If the administrative law judge finds that the evidence does not establish total disability, however, he must reinstate the denial of benefits. In rendering his findings of fact and conclusions of law, the administrative law judge must set forth the reasons for his findings consistent with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge