



BRB No. 18-0354 BLA

LINDA S. GUMM)
(Widow of GARY M. GUMM))
)
Claimant-Respondent)

v.)

MOLLOY MINING, INCORPORATED)

and)

DATE ISSUED: 05/15/2019

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2017-BLA-05206) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on November 26, 2015.

The administrative law judge credited the miner with thirty years of coal mine employment.¹ He further found at least fifteen of those years were underground, and that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.² 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding the miner totally disabled and in invoking the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding it failed to rebut the presumption.³ Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

¹ The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth 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's death was due to pneumoconiosis if claimant establishes that the miner 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act also provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). There is no indication that the miner was awarded benefits. Decision and Order at 2 n.1. Claimant therefore cannot benefit from Section 422(l).

³ Because employer does not challenge the administrative law judge's finding that the miner had at least fifteen years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. 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. 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).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on 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).

The administrative law judge found the pulmonary function and arterial blood gas studies established disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and that the evidence as a whole established total disability pursuant to 20 C.F.R. §718.204(b)(2).⁴ Decision and Order at 8-16. Employer argues that the administrative law judge erred by failing to consider the reliability of the pulmonary function and arterial blood gas studies. We agree.

The administrative law judge considered five pulmonary function studies contained in Dr. Keith's treatment records conducted on January 29, 2010,⁵ March 10, 2010, February 22, 2011, January 18, 2013, and March 12, 2015. Director's Exhibits 15, 16. The January 29, 2010 study produced qualifying values.⁶ Director's Exhibit 15. The administrative

⁴ The administrative law judge found the miner did not have cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 11. He further found the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-16. Although Drs. Spagnolo and Castle opined that the miner was not disabled from a pulmonary standpoint, the administrative law judge found their opinions insufficiently reasoned. *Id.*

⁵ The administrative law judge inaccurately identified the January 29, 2010 pulmonary function study as a February 4, 2010 study, apparently based upon a time stamp indicating when it was faxed. Director's Exhibit 15; Employer's Exhibit 9.

⁶ A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-

law judge did not accord it any weight, however, because Dr. Keith noted that the miner did not provide good effort.⁷ Decision and Order at 9. Additionally, the administrative law judge accorded no weight to the non-qualifying March 10, 2010 study because it was not accompanied by any tracings. *Id.*

Although the February 22, 2011 and January 18, 2013 studies produced non-qualifying values, the administrative law judge accurately noted that the most recent study, conducted on March 12, 2015, produced qualifying values both before and after the administration of a bronchodilator. Decision and Order at 9-10; Director's Exhibit 15. He found it entitled to the most weight as the most recent study of record. *Id.* at 10. He therefore found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer contends the administrative law judge erred in failing to consider the reliability of the March 12, 2015 pulmonary function study. Employer notes it did not contain any tracings and Dr. Castle opined there was no way to determine the reproducibility of the results. Employer's Brief at 11-13. Although the quality standards apply only to evidence developed for a claim and are inapplicable to treatment records, *J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008); the administrative law judge must still be persuaded a study is "reliable" for "it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928. Because the administrative law judge did not address the reliability of the March 12, 2015 study, we must vacate his finding that the pulmonary function studies established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration.

The administrative law judge also considered four arterial blood gas studies in the miner's treatment records. An April 11, 2001 study produced non-qualifying values. Decision and Order at 10; Director's Exhibit 15. Although two studies taken on October 13, 2014 produced qualifying values, they were conducted when the miner "seemed to be

qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i). The administrative law judge accurately found that two earlier pulmonary function studies, conducted on May 10, 1993 and August 7, 2001, produced non-qualifying values. Decision and Order at 8-9; Director's Exhibit 15.

⁷ The administrative law judge noted that a handwritten note on the January 29, 2010 study indicated that the miner was critically ill in the weeks before the study. Decision and Order at 9. The study was administered during the miner's hospitalization for exacerbation of congestive heart failure and chronic obstructive pulmonary disease. Director's Exhibits 15 at 2; 16 at 115-129.

in severe distress.” *Id.* at 11. Because the regulations provide that “tests shall not be performed during or soon after an acute illness or cardiac illness,” the administrative law judge gave them little weight. Decision and Order at 11, *quoting* 20 C.F.R. Part 718, Appendix C. Finally, the most recent study, conducted while the miner was hospitalized on August 27, 2015,⁸ produced qualifying values. Acknowledging that Dr. Castle indicated the miner’s blood gas studies were “done during acute periods of illness,”⁹ the administrative law judge nevertheless found, as a whole, they support disability. Decision and Order at 11.

Employer contends the administrative law judge erred because the qualifying August 27, 2015 study was performed “during or soon after an acute respiratory or cardiac illness.” Employer’s Brief at 7, *quoting* 20 C.F.R. Part 718, Appendix C. Submitted with treatment records and not generated for a claim, the study is not subject to the quality standards in 20 C.F.R. Part 718. *See* 20 C.F.R. §718.101(b); *Stowers*, 24 BLR at 1-89, 1-92. Despite the inapplicability of the standards, however, the administrative law judge was still required to determine the study’s reliability. *Stowers*, 24 BLR at 1-89; 65 Fed. Reg. at 79,928.

Because the administrative law judge did not do so, we vacate his finding that the blood gas study evidence established disability. Because we have vacated the administrative law judge’s finding of total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.¹⁰ 30 U.S.C. §921(c)(4).

⁸ The miner was hospitalized from August 27, 2015 to September 3, 2015, when he was discharged home with hospice care with a final diagnosis of chronic hypercapnic respiratory failure due to acute heart failure, chronic obstructive pulmonary disease, and obstructive sleep apnea. Employer’s Exhibit 8 at 158. The miner died on September 5, 2015, two days after his discharge from the hospital. Director’s Exhibit 13.

⁹ Dr. Castle specifically noted that the miner’s August 27, 2015 arterial blood gas study was conducted upon his admission to the hospital when he was in acute respiratory failure. Employer’s Exhibit 10 at 28.

¹⁰ We decline to address, at this time, employer’s challenge to the administrative law judge’s determination that it failed to establish rebuttal of the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge’s rebuttal findings.

On remand, the administrative law judge must consider whether the August 27, 2015 study is reliable and sufficient to establish a totally disabling respiratory impairment. If the administrative law judge finds the pulmonary function or blood gas studies establish disability, he must weigh all relevant evidence to determine whether the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *Rafferty*, 9 BLR at 1-232.

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge