U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0091 BLA

GARRETT W. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 11/27/2017
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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, on Request for Modification of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Garrett W. Taylor, Coldiron, Kentucky.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits, on Request for Modification (2014-BLA-05747) of Administrative Law Judge Adele H. Odegard, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] Based on the parties' stipulation, the administrative law judge credited claimant with twenty-three years of coal mine employment, 17.88 years of which took place in underground mines. The administrative law judge found that because claimant did not

[1] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting, on behalf of claimant, that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). In the letter Ms. Napier stated, "[w]e feel that the medical evidence in the file will prove that the miner does have [p]neumoconiosis and is totally disabled from a respiratory impairment from this disease." Letter Dated November 21, 2016 at 1 (unpaginated).

[2] Claimant filed his initial claim on April 10, 2001. Director's Exhibit 1. Administrative Law Judge Thomas Phalen, Jr., found that claimant established total disability, but failed to establish pneumoconiosis and total disability due to pneumoconiosis. *Id*. Accordingly, Judge Phalen denied benefits and the Board affirmed the denial. *Id*.; *Taylor v. RB Coal Co.*, BRB No. 04-0139 BLA (Aug. 26, 2004) (unpub.). Claimant filed a subsequent claim on November 7, 2007, which was denied by Administrative Law Judge Paul C. Johnson, Jr., as claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibits 3, 68. Claimant appealed and the Board remanded the case to Judge Johnson with instructions to consider invocation of the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012), and to reconsider the existence of pneumoconiosis. *Taylor v. Manalapan Mining Co.*, BRB No. 10-0403 BLA (March 11, 2011) (unpub.). Judge Johnson denied benefits on October 17, 2012, finding that the evidence submitted with the subsequent claim was insufficient to establish total disability and, therefore, insufficient to invoke the presumption. Director's Exhibit 83. He also determined that claimant did not prove that he has pneumoconiosis. *Id*. Director's Exhibit 83. On March 18, 2013, claimant requested modification of the denial of his subsequent claim. Director's Exhibit 84.

establish total disability at 20 C.F.R. §718.204(b)(2), he could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[3] In addition, the administrative law judge determined that claimant did not establish the existence of pneumoconiosis and, therefore, was also unable to establish that he is totally disabled due to pneumoconiosis. Consequently, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement or a change in conditions pursuant to 20 C.F.R. §§725.309 and 725.310, respectively. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

I. Consideration of Total Disability – Procedural Posture

As an initial matter, we hold that the administrative law judge erred in determining that claimant did not establish total disability in his subsequent claim.[5] The

[3] 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 coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

[4] Because claimant's last coal mine employment was in Kentucky, we will apply the law 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); Director's Exhibits 4, 83 at 3 n.1.

[5] In this case, because claimant's prior claim was denied for failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, claimant had to submit new evidence establishing one of these elements to obtain review of his subsequent claim on the merits. 20 C.F.R. §725.309(c); *see White v. New White Coal*

administrative law judge did not correctly apply the analysis set forth in 20 C.F.R. §§725.309, 725.310, as she did not acknowledge that Administrative Law Judge Thomas Phalen, Jr., found that claimant established total respiratory or pulmonary disability in his initial claim. Decision and Order at 10; Director's Exhibit 1. This led the administrative law judge to erroneously treat total disability as an applicable condition of entitlement under 20 C.F.R. §725.309(c)(3) and to weigh only the evidence submitted with the subsequent claim. Decision and Order at 10-19. Due to the potential applicability of Section 411(c)(4), however, the administrative law judge should have considered whether claimant invoked the presumption by establishing total disability based on the evidence submitted with the initial claim *and* the evidence submitted with the subsequent claim. Invoking the presumption would demonstrate the required change in an applicable condition of entitlement in light of the presumed facts of pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §725.309(c); *see Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-332 (4th Cir. 2013); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011).

Moreover, because the burden of proof and types of evidence that can establish total disability have not changed since Judge Phalen's initial determination in claimant's favor, a finding that claimant is no longer totally disabled must be supported by specific evidence and a detailed rationale explaining the change. These requirements are set forth in the Administrative Procedure Act (APA), which 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Co., 23 BLR 1-1, 1-3 (2004). Additionally, because claimant sought modification of the denial of his subsequent claim under 20 C.F.R. §725.310, he was required to establish that the prior denial contained a mistake in a determination of fact as to whether the newly developed medical evidence (i.e., the evidence developed since the prior denial of benefits) was sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, or that the newly developed medical evidence submitted with the request for modification was sufficient to establish a change in the applicable condition of entitlement. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

In light of these errors, we must vacate her findings under 20 C.F.R. §§718.204(b)(2), 725.309, and 725.310, and remand this case to her for reconsideration.[6] As explained *infra*, remand is also required based on errors in the administrative law judge's weighing of the new evidence on total disability.

II. Total Disability – Weighing of the New Evidence

The regulations provide that 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 and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R. Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

A. Pulmonary Function Studies

The administrative law judge considered new pulmonary function studies dated January 7, 2013, May 22, 2013, February 24, 2015, and April 6, 2015. Decision and Order at 11; Director's Exhibits 84, 98; Claimant's Exhibits 1, 3. She determined that only the pulmonary function study performed on April 6, 2015 by Dr. Al-Matari is qualifying.[7] Decision and Order at 11. The administrative law judge observed that Dr. Vuskovich reviewed the April 6, 2015 pulmonary function study and found, contrary to the comments on the study, that claimant did not put forth sufficient effort.[8] *Id.* at 11

[6] Administrative Law Judge Paul C. Johnson, Jr., committed the same errors in his second Decision and Order denying benefits on the subsequent claim. Director's Exhibit 83. Claimant did not appeal Judge Johnson's denial of benefits to the Board.

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

[8] The printed comments on the April 6, 2015 test state that claimant had "good effort [and] cooperation." Claimant's Exhibit 1. Dr. Vuskovich stated, "respiratory rate and tidal volume were not sufficient to generate a valid MVV result. [Claimant] did not put forth the effort required to generate valid FVC and FEV1 results. His initial efforts

n.21; *see* Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge then concluded that the April 6, 2015 study is not valid "because the record does not contain evidence of a sufficient number of trials."[9] Decision and Order at 11. The administrative law judge therefore determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

We cannot affirm this finding, as the administrative law judge mischaracterized the pulmonary function study evidence, and did not adequately explain her findings. Although the administrative law judge stated correctly that the regulations require that "[a]ll pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume," 20 C.F.R. §718.103(b), contrary to her finding, the printout of the April 6, 2015 study shows that it contains the requisite three tracings. Claimant's Exhibit 1. The administrative law judge also did not resolve the inconsistencies between the test record, indicating good effort, and Dr. Vuskovich's comment that claimant's effort on the April 6, 2015 study was insufficient to produce valid results.[10] *See* Decision and Order at 11 n.21; Claimant's Exhibit 1; Employer's Exhibit 3. Further, the administrative law judge did not specifically explain the weight, if any, she gave to Dr. Vuskovich's opinion. *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

In light of the factual error made by the administrative law judge regarding the number of tracings, and the omission of a complete explanation of her weighing of the relevant evidence, her finding at 20 C.F.R. §718.204(b)(2)(i) does not accord with the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's determinations that the April 6, 2015 pulmonary function study is not valid and that the new pulmonary function study evidence, as a whole, is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

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were not maximum efforts which artificially lowered his FEV1 results. His deep breath efforts were unacceptably variable which artificially lowered his FEV1 and FVC results." Employer's Exhibit 3.

[9] Each trial produces one flow-volume loop and spirometric tracing. 20 C.F.R. Part 718, Appendix B. A complete pulmonary function study includes three flow-volume loops and three spirometric tracings. *Id*.

[10] In his report, Dr. Vuskovich did not indicate that this study was deficient based on the number of tracings. Claimant's Exhibit 1; Employer's Exhibit 3.

B. Blood Gas Studies

The administrative law judge considered the new blood gas studies dated January 7, 2013, May 22, 2013, and February 24, 2015.[11] Decision and Order at 12; Director's Exhibits 84, 98; Claimant's Exhibit 3. The administrative law judge found that only the January 7, 2013 resting blood gas study, ordered by Dr. Habre, produced qualifying values.[12] Decision and Order at 12. She determined that the validity of this study was not certain because "Dr. Vuskovich critiqued the technique used to obtain the arterial blood gas samples in that test, stating that the time interval between the drawing of the samples and the test analysis was 'unacceptably long,' 42-45 minutes." *Id.*, *quoting* Employer's Exhibit 2. Based on this finding, the administrative law judge concluded that the newly submitted blood gas study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), "[d]ue to questions regarding the validity" of the single qualifying test. Decision and Order at 12.

The administrative law judge's consideration of the blood gas study evidence cannot be affirmed, as she did not provide a rationale for her decision to credit Dr. Vuskovich's opinion on the validity of the January 7, 2013 blood gas study, particularly in light of the fact that Dr. Habre relied on this study to diagnose a totally disabling impairment.[13] *See Wojtowicz*, 12 BLR at 1-165; *Siegel*, 8 BLR at 1-157; Director's Exhibit 84; Claimant's Exhibit 2. Moreover, Dr. Vuskovich stated when questioning time interval issues that when there is a delay between drawing the sample and measuring the pO2 and pCO2, the sample "must be drawn in a pre-packaged glass syringe and iced." Employer's Exhibit 2. On the report of the January 7, 2013 resting and exercise studies, there is a check mark next to "sample iced;" a statement that the administrative law judge did not address. Director's Exhibit 84. In light of the administrative law judge's failure to fully address the evidence and to explain her findings, we vacate her determination that the qualifying January 7, 2013 resting blood gas study is invalid. *See*

[11] The January 7, 2013 and May 22, 2013 blood gas studies were conducted at rest and post-exercise. Director's Exhibits 84, 98. The February 24, 2015 study was conducted at rest only. Claimant's Exhibit 3.

[12] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[13] Dr. Habre, the physician who ordered the January 7, 2013 blood gas study, did not identify any issues in the way it was performed. Director's Exhibit 84.

Wojtowicz, 12 BLR at 1-165; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). We further vacate the administrative law judge's finding that the newly submitted blood gas study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

C. Cor Pulmonale

The administrative law judge accurately determined that there is no evidence in the record that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 13. Consequently, we affirm her finding that claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

D. Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave "little weight" to the new medical opinions of Drs. Habre and Alam based, in part, on their reliance on the January 7, 2013 blood gas study, which the administrative law judge found was invalid. Decision and Order at 18; *see* Director's Exhibit 84; Claimant's Exhibit 2. The administrative law judge gave "some weight" to the opinions of Drs. Vuskovich and Rosenberg because they relied, in part, on non-qualifying pulmonary function studies to conclude that claimant is capable of performing his previous coal mine work. Decision and Order at 19 (footnote omitted); *see* Director's Exhibit 98; Employer's Exhibits 2-4. The administrative law judge concluded that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

Because the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv) are based, in part, on her weighing of the new pulmonary function and blood gas studies, which we have vacated, we also vacate her findings concerning the medical opinion evidence. In addition, we vacate the administrative law judge's determination that the new evidence was insufficient to establish total disability. Finally, we vacate the administrative law judge's findings that claimant did not invoke the Section 411(c)(4) presumption, demonstrate a change in an applicable condition of entitlement, or establish a basis for modification.

On remand, the administrative law judge must reconsider whether claimant has established total disability and invocation of the Section 411(c)(4) presumption. As instructed *supra*, she must weigh the evidence submitted in the prior denied claim *and* the evidence submitted with the 2007 subsequent claim, keeping in mind that the burden of proof and types of evidence that can establish total disability have not changed since Judge Phalen's found that claimant established total disability in his prior claim. Of particular importance in light of the latter instruction, the administrative law judge must

render her findings on remand in compliance with the APA, explicitly identifying the relevant evidence, rendering findings as to its credibility and probative value, and setting forth these findings in detail, including the underlying rationales. *See Wojtowicz*, 12 BLR at 1-165.

The administrative law judge must first weigh the pulmonary function studies and blood gas studies, and render findings under 20 C.F.R. §718.204(b)(2)(i), (ii). She must address all of the evidence relevant to their validity, including direct observations made by medical personnel present at the study, whether a physician or a technician, and the opinion of any physician who assessed claimant's effort by reviewing the results of the study, including the tracings.[14] *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Siegel v. Director, OWCP*, 8 BLR at 1-157. If the administrative law judge gives greater weight to the opinion of a consulting physician as to the validity of a particular pulmonary function study, she must set forth her rationale. *See Siegel*, 8 BLR at 1-157.

Regarding the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must compare her finding that claimant's most recent coal mine work involved heavy labor with the opinions regarding the miner's physical limitations, to reach a conclusion as to whether the miner is totally disabled. *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). If the administrative law judge finds that claimant has established total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv), she must then weigh all of the evidence together to determine whether claimant has met his burden under 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986).

If the administrative law judge finds that claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, she must deny benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). If the administrative law judge determines that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, has invoked the Section 411(c)(4) presumption, claimant will have established a change in an applicable condition of

[14] Pursuant to 20 C.F.R. §718.101(b), "any evidence which is not in *substantial compliance* with the applicable standard is insufficient to establish the fact for which it is proffered." 20 C.F.R. §718.101(b) (emphasis added). Specific to pulmonary function studies, the quality standards provide that an administrative law judge "may consider" the fact that "one or more standards have not been met" in determining the evidentiary weight to be given to the results of the pulmonary function tests, but he or she is not required to do so. 20 C.F.R. Part 718, Appendix B.

entitlement and a change in condition pursuant to 20 C.F.R §§725.309 and 725.310. The administrative law judge must then determine whether employer has rebutted the Section 411(c)(4) presumption.[15] *See* 20 C.F.R. §718.305(d)(1)(i), (ii).

[15] When a claimant has invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order Denying Benefits, on Request for Modification, is affirmed in part, 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge