U.S. Department of Labor

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

BRB No. 17-0563 BLA

DAVID A. LARGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & G COAL CORPORATION	)	DATE ISSUED: 11/26/2018
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

David A. Large, Wise, Virginia.

Sarah Y.M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits in an Initial Claim (2013-BLA-05162) of Administrative Law Judge Larry S. Merck, 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).[1] This case involves a miner's claim filed on June 24, 2011.

The administrative law judge credited claimant with twenty-nine years of coal mine employment in conditions substantially similar to those in an underground mine. The administrative law judge found, however, that claimant failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2), precluding invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Because claimant did not establish total disability, an essential element of entitlement, 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 raised to be whether the Decision and Order below is supported by substantial evidence. *See 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 the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[3]

[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] 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 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), as implemented by 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

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).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his totally disabling impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). A claimant can also establish entitlement to benefits with the aid of the presumptions at Section 411(c)(3) and Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(3), (4).

TOTAL DISABILITY

In the absence of contrary probative evidence, a miner's disability is established by pulmonary function studies, arterial blood-gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *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 four pulmonary function studies dated October 17, 2011, May 1, 2012, August 23, 2012, and September 1, 2015. Decision and Order at 18-19; Director's Exhibits 12, 13; Claimant's Exhibit 2; Employer's Exhibit 6. With respect to the qualifying[4] pre-bronchodilator studies performed on October 17, 2011 and September 1, 2015, the administrative law judge relied on reviews performed by consulting physicians to determine that these tests are not valid. Decision and Order at 13, 18; Director's Exhibits 12, 13. He found that the two remaining studies are in equipoise, as the May 1, 2012 study produced qualifying values before bronchodilation, while the August 23, 2012 study produced non-qualifying values before and after bronchodilation. Decision and Order at

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

18; Claimant's Exhibit 2; Employer's Exhibit 6. The administrative law judge therefore concluded that the pulmonary function studies are insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

We cannot affirm the administrative law judge's weighing of the pulmonary function study evidence, as he erred in invalidating the qualifying pre-bronchodilator studies performed on October 17, 2011 and September 1, 2015, based on the opinions of Drs. Michos and Rosenberg. Dr. Michos reviewed the October 17, 2011 pre-bronchodilator pulmonary function study, which produced qualifying FEV1 and MVV values. He checked the box on a Department of Labor (DOL) form entitled "Validation of Pulmonary Function and Arterial Blood Gas Studies," indicating that the "vents are acceptable." Director's Exhibit 12. He placed an asterisk on the same line of the form and added a written notation of "suboptimal MVV performance." *Id.* The administrative law judge stated:

> I interpret Dr. Michos['s] review to be that[,] overall[,] the pulmonary function study was valid, but that the MVV results were not valid due to poor effort by [c]laimant on the MVV test.
>
> . . . .
>
> In view of Dr. Michos' comment . . . and in view of the [DOL's] acknowledgement that the MVV maneuver is more difficult for a patient, and the [DOL's] statement that MVV tests are "much more dependent upon patient cooperation for the test result to be reliable," I find that the MVV portion of this pulmonary function study is not valid, and therefore, the qualifying results of the pre-bronchodilator test are not valid.

Decision and Order at 18, *quoting* 45 Fed.Reg. 13,678, 13,682 (Feb. 29, 1980).

The administrative law judge's finding that Dr. Michos invalidated the MVV value on the October 17, 2011 pulmonary function study is not supported by substantial evidence. Although Dr. Michos described claimant's performance of the MVV maneuver as "suboptimal," he did not label the MVV results as invalid, nor did he check the available boxes on the DOL form to indicate that the MVV was "not acceptable" due to "[l]ess than optimal effort, cooperation and comprehension." Director's Exhibit 12. Nothing in the quality standards requires "optimal" effort for a pulmonary function study to be deemed valid; the Board has held that "fair" cooperation and comprehension are sufficient. 20 C.F.R. §718.103(b)(5); *see Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Moreover, the administrative law judge failed to consider comments from the physician who administered the test, Dr. Alam, that claimant's effort and cooperation were "good,"

and noting that the study meets "the [American Thoracic Society] standards for repeat and acceptability." Director's Exhibit 12.

The administrative law judge's consideration of Dr. Rosenberg's report regarding the validity of the September 1, 2015 pulmonary function study is similarly flawed. Dr. Rosenberg opined that this study "probably displays severe airflow obstruction," even though "all criteria for validity are not met." Employer's Exhibit 9. Relying on Dr. Rosenberg's review, the administrative law judge found that this qualifying pulmonary function study is not valid because "this test did not meet all of the validity criteria."[5] Decision and Order at 13 (emphasis in original). The proper standard to be applied, however, is whether the study is in "substantial compliance" with the quality standards at 20 C.F.R. §§718.101(b), 718.103(c).[6] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (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 claimant's pulmonary function. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring).

For the foregoing reasons, we vacate the administrative law judge's findings that the October 17, 2011 and September 1, 2015 pulmonary function studies are invalid and entitled to no weight, and that the pulmonary function study evidence overall is insufficient to demonstrate total disability under 20 C.F.R. §718.204(b)(2)(i). *See Keener*, 23 BLR at 1-237; Decision and Order at 18-19. Because the administrative law judge's weighing of

[5] Dr. Rosenberg indicated in his review of the September 1, 2015 pulmonary function study that "the expiratory efforts were not maximal," and only one MVV value was performed, contrary to the regulatory requirements. Employer's Exhibit 9. However, Dr. Rosenberg concluded that while the study "do[es] not meet all of the validity criteria," it "likely display[s] a significant degree of obstruction." *Id*. We note further that the technician who administered the test identified "good effort." Claimant's Exhibit 2.

[6] Dr. Rosenberg stated in his July 8, 2016 report that "the variation of [claimant's] best FVC and FEV1 values were acceptable based on American Thoracic Society criteria" but "the expiratory efforts were not maximal, in the sense that they only lasted up to six seconds. Based on this fact, coupled with inspection of the volume-time curves, a plateau was not reached. Hence, the vital capacity could have been greater than measured. However, the expiratory efforts up until around six seconds appeared forceful, with the FEV1 being 1.55 liters (42% predicted) and the FEV1/FVC ratio being 48%. Obviously, with better efforts, the FEV1/FVC ratio could have been lower than 48%, since if the expiratory time was greater than six seconds, the FVC would have been greater in magnitude, lowering the ratio further." Employer's Exhibit 9.

the pulmonary function study evidence played a role in his consideration of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv),[7] we must also vacate his finding that the medical opinions of Drs. Alam and Fino are insufficient to establish total disability. Decision and Order at 20-21.

Our review of the administrative law judge's decision reveals additional errors in his weighing of the medical opinions on the issue of total disability. The administrative law judge found that claimant's usual coal mine work required moderate physical exertion based on Dr. Fino's report that claimant last worked as a loader operator and "described the breakdown of the work load as follows: heavy labor – 20%; moderate labor – 40%; light labor – 40%." Employer's Exhibit 8; Decision and Order at 10, 19. The administrative law judge provided no explanation, however, of how he used the work load figures claimant reported to Dr. Fino to arrive at his conclusion that claimant's usual coal mine work involved moderate exertion. Thus, his finding must be vacated as it does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In addition, the administrative law judge erred in discrediting Dr. Alam's opinion on the ground that the physician did not explain why he initially opined that claimant does not suffer from a total respiratory or pulmonary disability, but subsequently diagnosed a

[7] Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge correctly found that the sole arterial blood gas study of record, administered at rest during claimant's Department of Labor (DOL)-sponsored examination on October 17, 2011, yielded non-qualifying values, and therefore, did not establish total respiratory disability. Decision and Order at 19; Director's Exhibit 12. Dr. Alam, who performed the DOL-sponsored examination, indicated that a post-exercise blood gas study was contraindicated because claimant was not capable of exercising. Director's Exhibit 12. Further, the administrative law judge properly found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure and, therefore, total respiratory disability could not be demonstrated under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19. Accordingly, we affirm these findings.

[8] 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

totally disabling pulmonary impairment.[9] Decision and Order at 19-20; Director's Exhibits 12, 38. Contrary to the administrative law judge's finding, Dr. Alam consistently diagnosed claimant as being totally disabled from a pulmonary standpoint. In the report of his examination of claimant on October 17, 2011, Dr. Alam stated that claimant had a moderate obstructive impairment that "met the disability guidelines." Director's Exhibit 12. In a letter dated January 26, 2012, Dr. Alam reviewed the results of his examination, and reiterated his diagnosis of a moderate pulmonary impairment, "which meets the criteria for pulmonary disability." Director's Exhibit 12. He further commented:

> [Claimant] is totally disabled from a pulmonary standpoint . . . because of his underlying diagnosis of lung cancer, emphysema and clinical coal workers' pneumoconiosis . . . . [T]he patient is not in any condition to perform any work at this time or have gainful employment because of his overall poor medical state and he cannot go back to his previous work with the current FEV1 and limited pulmonary reserve.

Id. After reviewing the subsequent medical reports of Drs. Fino and Rosenberg, Dr. Alam continued to diagnose total pulmonary disability, stating in a letter dated June 14, 2016:

> [N]one of the doctors has provided any evidence that he will allow [claimant] to go back to work to do the same kind of exertional work because all the studies that they have done is just to prove that his FEV1 is variable without any evidence that he is maintaining his oxygenation during exercise. If that is not available, none of the doctors can allow him to go back to do the same kind of exertional work [based] on the current workups.

Director's Exhibit 38. Because the administrative law judge's weighing of Dr. Alam's opinion is not supported by substantial evidence, we must vacate his finding that it is entitled to "no weight."[10] Decision and Order at 20; *see Harris v. Director, OWCP*, 3 F.3d 103, 106 (4th Cir. 1993).

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[9] The administrative law judge observed: "Dr. Alam stated that [c]laimant had a 'moderate pulmonary impairment.' In a subsequent letter responding to questions from the claims examiner, Dr. Alam stated that he had diagnosed a moderate pulmonary impairment based on [c]laimant's FEV1 result, but two paragraphs later, Dr. Alam referred to Claimant as being totally disabled from a pulmonary standpoint." Decision and Order at 19.

[10] Further, to the extent the administrative law judge intended to discredit Dr. Alam for diagnosing total disability based on a "moderate impairment," such a rationale cannot be affirmed. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, (6th Cir. 2000) ("[E]ven a 'mild' respiratory impairment may preclude the performance of the miner's usual duties .

The administrative law judge also did not properly consider Dr. Fino's opinion diagnosing a totally disabling pulmonary impairment. The administrative law judge reviewed the August 23, 2016 report in which Dr. Fino diagnosed a "significant respiratory impairment," and found that it was worthy of no probative weight as it was "generalized," "insufficiently explained," and focused predominantly on the cause, rather than the extent, of claimant's impairment. Decision and Order at 20; Employer's Exhibit 8. The administrative law judge did not, however, address the reports submitted by Dr. Fino on May 23, 2012 and October 31, 2014.[11] Director's Exhibit 14; Employer's Exhibit 8. As the administrative law judge did not acknowledge and weigh these reports, we must vacate his determination that Dr. Fino's diagnosis of total pulmonary disability is entitled to "no probative weight." Decision and Order at 20; *see* 30 U.S.C. §923(b) (the fact-finder must address all relevant evidence); *Wojtowicz*, 12 BLR at 1-165.

Lastly, because we have vacated the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), we further vacate his determination that the evidence of record, as a whole, is insufficient to demonstrate total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 21. We must also vacate, therefore, the administrative law judge's finding that claimant failed to invoke the Section 411(c)(4) presumption. *Id*.

REMAND INSTRUCTIONS

To remedy an omission in the administrative law judge's consideration of the issue of total disability, the administrative law judge must first determine whether claimant can

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. . ."). There is no inherent conflict, as the administrative law judge seems to suggest, between the moderate impairment revealed on claimant's pulmonary function study (which also qualifies for total disability under the regulations) and Dr. Alam's assessment that such impairment renders claimant incapable of performing his usual coal mine work, i.e., totally disabled. Decision and Order at 19.

[11] On May 23, 2012, Dr. Fino reviewed medical records and opined that from a respiratory standpoint, claimant is disabled from returning to his former coal mine work. Director's Exhibit 14. In his October 31, 2014 report, Dr. Fino noted the October 17, 2011 pulmonary function study, which preceded the study he administered on August 23, 2012, "showed moderate obstruction, although there was improvement following bronchodilators" and stated that claimant suffers from "a significant respiratory impairment and disability." Employer's Exhibit 8. On August 3, 2016, Dr. Fino noted he examined claimant on August 23, 2012 and, after reviewing additional records, he reiterated his previous disability opinion. *Id*.

invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.204(b)(1), 718.304. If he finds that claimant cannot invoke the irrebuttable presumption, he must then reconsider the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) and determine whether the studies dated October 17, 2011 and September 1, 2015 are in substantial compliance with the quality standards at 20 C.F.R. §718.103. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (The administrative law judge is not authorized to interpret medical data, and cannot make his own assessment of the significance of study values.).[12] The administrative law judge is then required to reweigh the pulmonary function studies of record to determine whether claimant has established total disability under 20 C.F.R. §718.204(b)(2)(i), taking into consideration his findings as to the validity and reliability of the October 17, 2011 and September 1, 2015 studies.

The administrative law judge must then reconsider the medical opinions of Drs. Alam and Fino under 20 C.F.R. §718.204(b)(2)(iv), in light of his findings regarding the pulmonary function study evidence. The administrative law judge must address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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). He must also make a finding as to the exertional requirements of claimant's usual coal mine work and

[12] When an objective test performed during a DOL-sponsored examination of a miner is not administered or reported to be in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). In this case, the district director requested that Dr. Michos review the October 17, 2011 pulmonary function study administered during Dr. Alam's DOL-sponsored examination of claimant. Director's Exhibit 12. The district director noted on a Schedule for the Submission of Additional Evidence that Dr. Michos "validated" the study and found it "acceptable with suboptimal MVV performance." Director's Exhibit 27. In a subsequent Proposed Decision and Order, the district director stated, "[u]nfortunately, the MVV result was the only part of the test to meet disability standards in addition to the FEV1 and because it was deemed suboptimal [it] cannot be used to establish total disability." Director's Exhibit 31. If the administrative law judge finds on remand that Dr. Michos's opinion establishes that the October 17, 2011 pulmonary function study is not in substantial compliance with the quality standards, he must consider whether remand to the district director to give claimant the opportunity to perform another pulmonary function study is appropriate under 20 C.F.R. §725.406(c).

compare them with the opinions of the medical experts regarding claimant's physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-44, 1-50 (1985) (en banc) ("A medical report only needs to describe either the severity of the impairment or the physical effects imposed by claimant's respiratory impairment sufficiently so that the administrative law judge can infer that claimant is totally disabled."). In so doing, the administrative law judge must render a specific determination as to whether claimant's usual coal mine work was as a truck driver, a loader operator, or both, before determining the exertional requirements of that work.[13] *See Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982) (An individual's usual coal mine work is "the most recent job the miner performed regularly and over a substantial period of time."). The administrative law judge is required to set forth his findings on remand in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge finds that total disability is established at 20 C.F.R. §718.204(b)(2)(i) and/or (iv), he must weigh all relevant evidence together to determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence. *See Defore*, 12 BLR at 1-28-29; *Shedlock*, 9 BLR at 1-198. If the administrative law judge finds that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will be entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1). The administrative law judge must then consider whether employer can rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Alternatively, if the administrative law judge finds that claimant did not establish total disability, an essential element of entitlement, he may reinstate the denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112.

[13] In his Decision and Order, the administrative law judge appeared to treat both jobs as claimant's usual coal mine work. Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in an Initial Claim is affirmed in part and vacated in part, and the case is remanded 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