U.S. Department of Labor

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

BRB No. 17-0678 BLA

AARON E. PENDLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 11/26/2018
	)	
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 Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05826) of Administrative Law Judge Timothy J. McGrath, 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 May 9, 2013.[1]

The administrative law judge found that claimant established eighteen years of underground coal mine employment,[2] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] He therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a totally disabling respiratory impairment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption.

[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. The more recent claim, filed on March 18, 2009, was denied by the district director because claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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).

[3] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[4] 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.

Claimant responds in support of the administrative law judge's award 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. 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).

Invocation of the Section 411(c)(4) Presumption – 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. *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 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the 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).

Employer argues that the administrative law judge erred in finding that the new pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[6]

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four new pulmonary function studies, dated May 30, 2013, December 17, 2013, July 8, 2014, and August 22, 2014. Decision and Order at 5-6; Director's Exhibits 14, 15; Claimant's Exhibits 5, 6. Before determining whether the studies were qualifying[7]

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of eighteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14. Further, because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[7] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R.

for total disability, he noted a discrepancy in the measurements of claimant's height, which ranged from sixty-nine to seventy inches.[8] Decision and Order at 12-13. The administrative law judge resolved the evidentiary conflict by averaging the various heights, finding that claimant's correct height is 69.2 inches.[9] *Id*.

Based on claimant's height and age at the time of the study, the administrative law judge found that the May 30, 2013, December 17, 2013, and July 8, 2014 studies produced qualifying values for total disability before the administration of a bronchodilator, whereas the August 22, 2014 study did not produce qualifying values pre-bronchodilator. Decision and Order at 12-13. The administrative law judge further found that the December 17, 2013, July 8, 2014, and August 22, 2014 studies produced qualifying values after the administration of bronchodilators.[10] *Id*. The administrative law judge then summarily concluded that the preponderance of the pulmonary function study evidence established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer argues that the administrative law judge erred in concluding that the May 30, 2013, December 17, 2013, and July 8, 2014 pulmonary function studies support a finding of total disability. Employer's Brief at 11-14 (unpaginated). Specifically, employer argues that the administrative law judge erred in finding that these studies are valid. Employer's argument has merit with respect to the May 30, 2013 and December 17, 2013 pulmonary function studies.

1. May 30, 2013 Pulmonary Function Study

The administrative law judge first addressed employer's argument that the May 30, 2013 pulmonary function study is not valid. Decision and Order at 13. Drs. Chavda, Gaziano, Houser, and Tuteur discussed the validity of this study. Director's Exhibits 14, 15; Employer's Exhibit 3. As noted by the administrative law judge, Dr. Chavda opined

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Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] Claimant's height was measured as sixty-nine inches for the May 30, 2013, July 8, 2014, and August 22, 2014 pulmonary function studies, and as seventy inches for the December 17, 2013 study. Director's Exhibits 14, 15; Claimant's Exhibits 5, 6.

[9] The administrative law judge applied the next greater height listed in the table at 20 C.F.R. Part 718, Appendix B, which he noted was 69.3 inches. Decision and Order at 12-13.

[10] The May 30, 2013 pulmonary function study did not include post-bronchodilator testing. Director's Exhibit 14.

that this study "showed good effort [by claimant] and correct values." Decision and Order at 13; *see* Director's Exhibit 14 at 7. Dr. Gaziano opined that the "vents were acceptable." Director's Exhibit 14 at 18. Dr. Houser, however, disputed that this study evidenced any respiratory impairment based on its low MVV value. Director's Exhibit 15 at 3. Because the MVV value for this study was fifty percent of predicted,[11] and because MVV testing is generally the most effort-dependent, Dr. Houser opined that claimant's effort for the entire study was poor. *Id*. Dr. Tuteur invalidated this study because he opined that it lacked the requisite reproducibility under the American Thoracic Society/European Respiratory Society (ATS/ERS) criteria. Employer's Exhibit 3 at 3-4. Dr. Tuteur explained that, "[q]uantitatively, reproducibility is defined by the ATS/ERS as the two best tests [being] within [five] percent of each other." *Id*. He opined that the May 30, 2013 study did not meet the ATS/ERS reproducibility standard. *Id*. The administrative law judge also noted that "the technician who performed [this study] reported [that] [c]laimant had good effort and cooperation, and the results met the ATS standards for acceptability and repeatability." Decision and Order at 13; *see* Director's Exhibit 14.

The administrative law judge found that Dr. Tuteur's opinion was not credible because he did not review the May 30, 2013 study and did not "explain the basis for his conclusion" that it is invalid. Decision and Order at 13. Further, the administrative law judge found that Dr. Houser's opinion was speculative. *Id*. The administrative law judge credited the "observations" of the technician who conducted the study, "as well as [the] assessments by Dr. Chavda and Dr. Gaziano," and thus found that the May 30, 2013 study is "valid and acceptable." *Id*.

We agree with employer that the administrative law judge erred in resolving the conflict in the evidence with respect to the validity of the May 30, 2013 study. The administrative law judge erroneously found that Dr. Tuteur did not review this study, as Dr. Tuteur indicated in his report that he reviewed the "[g]raphical and numerical data associated" with the May 30, 2013 pulmonary function study. Employer's Exhibit 3 at 2. Thus, the administrative law judge mischaracterized Dr. Tuteur's opinion. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 13. The administrative law judge also did not set forth the basis for his finding that Dr. Houser's opinion was speculative, or for his finding that Dr. Tuteur's opinion was inadequately explained in light of the reasoning provided by Drs. Houser and Tuteur. Accordingly, the administrative law judge's credibility findings with respect to Drs. Houser and Tuteur do not comport with the

[11] Dr. Houser explained that "the standard for a valid MVV is approximately 40-45 times the FEV1[,] which in this case would be a minimum of 56 [liters per minute]" Director's Exhibit 15 at 3. The MVV value for the May 30, 2013 pulmonary function study was 27 liters per minute. Director's Exhibit 14.

Administrative Procedure Act (APA).[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge erred in crediting the opinions of Drs. Chavda and Gaziano. Whether a physician's opinion is adequately reasoned is for the administrative law judge to determine. *Rowe*, 710 F. 2d at 255. However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny to determining the credibility of the evidence under 20 C.F.R. §718.204(b)(2). 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Although the administrative law judge found that Dr. Houser's opinion was speculative and Dr. Tuteur's opinion was inadequately explained, he did not address whether the opinions of Drs. Chavda and Tuteur suffered from the same deficiencies.[13] Therefore, we vacate the administrative law judge's finding that the May 30, 2013 pulmonary function study is valid.

2. December 17, 2013 Pulmonary Function Study

The administrative law judge also erred in weighing the December 17, 2013 pulmonary function study. The administrative law judge noted that Dr. Chavda opined that claimant gave good effort, while Dr. Houser opined that the study was invalid due to poor effort. Decision and Order at 13. The administrative law judge also noted that Dr. Tuteur opined that it did not did not meet the ATS/ERS reproducibility standard. *Id*.

The administrative law judge again found that Dr. Tuteur's opinion was not credible because he did not review this study and because his opinion was not adequately explained. Decision and Order at 13. Moreover, he found that, "even accepting Dr. Houser's assessment, the only value that would not be valid was the pre-bronchodilator FVC [result], as reflected by the comments on the test itself." *Id*. Thus, the administrative law judge

[12] 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).

[13] The administrative law judge erred insofar as he credited the notations of the technician who conducted this study over the opinions of Drs. Houser and Tuteur. A technician's notations of good effort and cooperation do not amount to substantial evidence that a study is valid in the face of competent medical opinions showing the contrary. *See Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (holding that an administrative law judge erred in assuming a technician was equally qualified as a reviewing doctor to assess the validity of pulmonary function studies without evidence in the record to support that assumption).

found that the remainder of the study was valid and supported a finding of total disability. *Id*.

In assessing the validity of the December 17, 2013 study, the administrative law judge again erred in finding that Dr. Tuteur did not review this study, as the record reflects that he reviewed the "[g]raphical and numerical data associated" with the December 17, 2013 study. Employer's Exhibit 3 at 1-2; *see Rowe*, 710 F. 2d at 255; *Tackett*, 7 BLR at 1-706. Moreover, the administrative law judge again did not explain why Dr. Tuteur's opinion was not adequately reasoned in light of Dr. Tuteur's explanation that the study did not meet the reproducibility standard set forth by the ATS/ERS. *See Wojtowicz*, 12 BLR at 1-165; Employer's Exhibit 3. Further, the administrative law judge erred by failing to address Dr. Chavda's testimony that claimant may have been sick or experiencing bronchospasms on the day that this study was conducted. *See Rowe*, 710 F. 2d at 255; Employer's Exhibit 2 at 21. As noted by employer, Appendix B to Part 718, which sets forth standards for the administration and interpretation of pulmonary function studies, provides that "[t]ests shall not be performed during or soon after an acute respiratory illness." 20 C.F.R. Part 718, App. B (2)(i); Employer's Brief at 13 (unpaginated). Thus we vacate the administrative law judge's finding that the December 17, 2013 study, with the exception of the pre-bronchodilator FVC results, is valid. Decision and Order at 13-14.

Moreover, notwithstanding the validity of this study, the administrative law judge erred in finding that the study produced qualifying values for total disability before and after the administration of a bronchodilator. Decision and Order at 5, 13-14. Pursuant to 20 C.F.R. §718.204(b)(2)(i), a pulmonary function study is determined to be qualifying for total disability if it yields an FEV1 value that is qualifying "for an individual of the miner's age, sex, and height," *and* yields either an FVC or an MVV value that is qualifying, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge found that for claimant's height and age at the time of the study, the qualifying FEV1 value is 1.85, the qualifying FVC value is 2.39, and the qualifying MVV value is 74. Decision and Order at 13. This study did not include any MVV values. Director's Exhibit 15. The pre-bronchodilator portion of the study produced a qualifying FVC value of 2.03, but a non-qualifying FEV1/FVC ratio of 66. *Id*. As discussed above, however, the administrative law judge found that the pre-bronchodilator FVC result is invalid. Decision and Order at 13-14. The post-bronchodilator portion of this study produced a non-qualifying FVC value of 2.40 and non-qualifying FEV1/FVC ratio of 79. Director's Exhibit 15. Thus, although the study produced qualifying FEV1 results, it did not include qualifying FVC, MVV, or FEV1/FVC results. Therefore, when weighing the pulmonary function study evidence on remand, the administrative law judge should consider the December 17, 2013 study to be a non-qualifying study.

3. July 8, 2014 Pulmonary Function Study

The administrative law judge did not err in addressing the validity of the July 8, 2014 pulmonary function study, however. He found that this study is valid because Dr. Tuteur opined that "the July 8, 2014 test was the only valid pulmonary function study" and because Dr. Chavda opined that "the tracings showed the test was valid." Decision and Order at 13. Thus, substantial evidence supports the administrative law judge's determination that the July 8, 2014, qualifying pulmonary function study was a technically valid study. That finding is therefore affirmed.

However, as we will set forth below, when the administrative law judge on remand weighs the pulmonary function studies against the medical opinions, he should consider Dr. Tuteur's opinion in its entirety. *See Rowe*, 710 F. 2d at 255. Although Dr. Tuteur opined that the July 8, 2014 study met the ATS/ERS criteria, he concluded that the "true validity" of this study is "unconvincing." Employer's Exhibit 3 at 7. Specifically, he explained that this study is not "representative of [claimant's] maximum [lung] function since six weeks later" there was a thirty-five percent improvement on the August 22, 2014 pulmonary function study's pre-bronchodilator values.[14] *Id*. at 5.

Finally, we agree with employer that the administrative law judge did not adequately set forth his rationale for resolving the conflict in the pulmonary function study evidence. Employer's Brief at 15-17 (unpaginated). Specifically, he did not explain why the qualifying pulmonary function studies outweigh the non-qualifying studies. Where the record contains mixed pre-bronchodilator and post-bronchodilator results such as these, the administrative law judge must weigh all of the pulmonary function study values and explain which results he credits and why he credits them. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480-81 (6th Cir. 2011); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). The administrative law judge set forth no such analysis at 20 C.F.R. §718.204(b)(2)(i), as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Based on the foregoing errors, we vacate the administrative law judge's finding that the new pulmonary function study evidence 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 must reconsider the validity of the May 30, 2013 and December 17, 2013 pulmonary function studies. In weighing the medical opinions that address the validity of these studies, the administrative law judge must fully explain the reasons for his credibility determinations in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of,

[14] Dr. Tuteur opined that only the pre-bronchodilator portion of the August 22, 2014 pulmonary function study was valid. Employer's Exhibit 3 at 4, 7.

and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255. Moreover, when reconsidering whether the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), he must fully explain his basis for resolving the conflict in this evidence. *See Wojtowicz*, 12 BLR at 1-165.

B. Medical Opinion Evidence

Employer next argues that the administrative law judge erred in his consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Baker, Chavda, Houser and Tuteur. The administrative law judge credited the opinions of Drs. Baker and Chavda that claimant is totally disabled from a respiratory or pulmonary impairment, finding that their opinions are well-reasoned and documented. Decision and Order at 14-15; Director's Exhibit 14; Employer's Exhibit 2; Claimant's Exhibit 6.

Conversely, the administrative law judge noted that Dr. Houser "could not determine if there was any impairment, because he thought [that claimant] appeared to be unwilling to cooperate on the pulmonary function studies." Decision and Order at 14; *see* Director's Exhibit 15. Because Dr. Houser did not address the qualifying, valid pulmonary function studies, the administrative law judge assigned his opinion diminished weight. Decision and Order at 14. Finally, the administrative law judge discredited Dr. Tuteur's opinion that claimant is not totally disabled by a respiratory or pulmonary impairment, because he found that the opinion was "not well-reasoned or supported by objective medical evidence" of record. Decision and Order at 14; *see* Employer's Exhibit 3. The administrative law judge therefore found that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14-15.

As the administrative law judge's evaluation of the medical opinions relies upon his finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), a finding we have vacated, we must also vacate the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We instruct the administrative law judge on remand to reconsider the medical opinion evidence after he has reconsidered whether the pulmonary function studies establish total disability. As we discussed above, when the administrative law judge considers the medical opinion evidence along with the pulmonary function studies, he should consider Dr. Tutuer's opinion that, although the July 8, 2014 pulmonary function study was valid, it did not represent claimant's maximum lung function because the later study of August 22, 2014 revealed a thirty-five percent improvement in claimant's pre-bronchodilator values.

In light of the foregoing analysis, we must also vacate the administrative law judge's finding that the new evidence, overall, established total disability at 20 C.F.R.

§718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption, and vacate the award of benefits. 30 U.S.C. §921(c)(4). Further, we decline to address employer's challenge to the administrative law judge's determination that it failed to rebut 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 findings on rebuttal in a future appellate proceeding. If the administrative law judge finds that claimant has not established total disability, he must deny benefits based on claimant's failure to establish an essential element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge