U.S. Department of Labor

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

BRB No. 18-0545 BLA

CHARLES SPECK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOX KNOB COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/13/2019
Employer-Respondent	)	
	)	
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Charles Speck, Jonesville, Virginia.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC) Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2016-BLA-05579) of Administrative Law Judge William T. Barto, rendered on a claim filed on October 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with twenty-nine years of coal mine employment,[2] the administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore claimant could not 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). The administrative law judge further found claimant failed to establish total disability and thus did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response arguing that the administrative law judge erred in finding claimant did not establish complicated pneumoconiosis or total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are 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).

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[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. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Decision and Order at 2; Hearing Transcript at 6. Accordingly, the Board 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where claimant establishes at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

To be entitled to benefits under the Act, 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. 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). Presumptions aid claimants in establishing these elements when certain conditions are met.

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

We agree with the Director that the administrative law judge erred in finding the record lacks any evidence of complicated pneumoconiosis. Decision and Order at 5; Director's Brief at 4 n.2. Dr. Alexander interpreted a March 9, 2015 x-ray as positive for a Category A large opacity. Director's Exhibit 16. Because the administrative law judge did not consider this relevant evidence, we vacate his finding that claimant did not establish complicated pneumoconiosis based on the x-ray evidence, and the denial of benefits. 30 U.S.C. §923(b); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480-81 (6th Cir. 2011); 20 C.F.R. §718.304(a). On remand, the administrative law judge must reconsider whether the x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a). He must also determine whether the relevant evidence in the other categories under 20 C.F.R. §718.304(b), (c) establishes complicated pneumoconiosis, and then must weigh the evidence at subsections (a)-(c) together before determining whether invocation of the irrebuttable presumption has been established. *Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33; 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption - Total Disability

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 first considered three pulmonary function studies conducted on September 24, 2014, March 9, 2015, and August 26, 2015.[4] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5; Director's Exhibits 11, 17; Claimant's Exhibit 3. He found the September 24, 2014 study produced qualifying[5] values for total disability before the administration of a bronchodilator,[6] the March 9, 2015 study produced qualifying values before and after the administration of a bronchodilator, and the August

[4] Before determining whether the pulmonary function studies were qualifying for total disability, the administrative law judge noted a discrepancy in the measurements of claimant's height. Decision and Order at 5-6. Claimant's height was measured as sixty-seven inches for the September 24, 2014 and August 26, 2015 studies and as sixty-seven and one-half inches for the March 9, 2015 study. Director's Exhibits 11, 17; Claimant's Exhibit 3. The administrative law judge permissibly resolved the evidentiary conflict by finding claimant's correct height is sixty-seven inches, the recorded height for two of the three studies. *Island Creek Coal Co. v. Bryan*, F.3d , Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871 at *20 (6th Cir. Sept. 11, 2019); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 5-6. The administrative law judge then applied the closest height listed above this figure in the table at 20 C.F.R. Part 718, Appendix B, which he noted was 67.3 inches. Decision and Order at 6 n. 30.

[5] A "qualifying" pulmonary function study or arterial 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).

[6] The September 24, 2014 pulmonary function study did not include any post-bronchodilator testing. Claimant's Exhibit 3.

26, 2015 study produced non-qualifying values before and after the administration of a bronchodilator. Decision and Order at 5.

The administrative law judge found the March 9, 2015 qualifying study invalid because Drs. Vuskovitch and Ajjarapu questioned its reliability in light of the fact it was taken shortly after claimant underwent open heart surgery.[7] Decision and Order at 7; Director's Exhibits 11, 15. He found the August 26, 2015 non-qualifying study entitled to "somewhat less weight" based on the comments of the technician who conducted the study.[8] *Id*. He assigned "the greatest weight" to the September 24, 2014 qualifying study because "no physician has challenged its validity." *Id*. Notwithstanding these findings, the administrative law judge concluded the pulmonary function studies "cannot be reconciled." *Id*. at 7-8. He explained that because the August 26, 2015 study was taken most recently, it is more probative of claimant's current condition. *Id*. Thus he found the pulmonary function study evidence is in equipoise on the issue of total disability. *Id*.

[7] The miner had open heart surgery in November 2014, Hearing Transcript at 21, which Dr. Vuskovich characterized as "a major surgical procedure that involved cutting through [the miner's] thoracic cage." Director's Exhibit 15 at 6. Dr. Vuskovich questioned the reliability of the March 9, 2015 pulmonary function study because a "major spirometry contraindication is recent surgery, especially recent thoracic surgery." *Id*. Thus he concluded it is "likely that [claimant] could not generate valid spirometry results due to his recent open heart surgery." *Id*. Dr. Ajjarapu agreed with Dr. Vuskovich that claimant "may not have given adequate effort to generate valid spirometry" and this study may not be "accurate" because it was taken after claimant's thoracic surgery. Director's Exhibit 11 at 3. The administrative law judge permissibly rejected the March 9, 2015 pulmonary function study because Drs. Vuskovitch and Ajjarapu questioned its reliability in light of the fact that it was taken shortly after claimant underwent open heart surgery. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7; Director's Exhibits 11, 15.

[8] The administrative law judge permissibly found the August 26, 2015 study was entitled to diminished weight because the technician who conducted the study indicated claimant "was unable to produce [a]cceptable and [r]eproducible [s]pirometry data, [with the] best effort reported," and because Dr. Sargent, who conducted the study, "did not address this comment in his opinion." Decision and Order at 7, *quoting* Director's Exhibit 17 at 15; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185.

The administrative law judge's findings with respect to the pulmonary function studies are contradictory and thus do not satisfy the Administrative Procedure Act (APA).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Specifically, he did not explain why the evidence is in equipoise in light of the fact that he assigned greatest weight to the qualifying September 24, 2014 study and "somewhat less weight" to the August 26, 2015 non-qualifying study based on his findings with respect to the validity of each study. Decision and Order at 7-8; *see Wojtowicz*, 12 BLR at 1-165.

We also agree, in part, with the Director that the administrative law judge did not provide an adequate explanation for finding the August 26, 2015 non-qualifying study is more probative of claimant's condition based on the date it was conducted. Director's Brief at 5. A more recent non-qualifying study may not provide the most accurate information regarding a miner's current pulmonary condition if the testing is not separated by a significant amount of time. *See Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309, 1-312 (1984). Here, the administrative law judge did not address "whether the eleven month difference between the oldest and newest tests was significant." Director's Brief at 5; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *see also Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (two months is insignificant when evaluating miner's entitlement and thus court would not apply "later in time" rationale).[10] Because the administrative law judge did not adequately explain how he resolved the conflict in the evidence and address the significance of the time that elapsed between the pulmonary function studies, we vacate his determination that claimant did not establish total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); *see*

[9] 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).

[10] Our colleague cites *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *quoting Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992). In *Woodward*, the United States Court of Appeals for the Sixth Circuit rejected the mechanical application of the "later evidence rule" specifically as to the weighing of x-ray evidence. While an earlier positive x-ray reading and a later negative x-ray reading cannot both be right (unless the pneumoconiosis seen has been excised), it may be reasonable for an administrative law judge to rely on a more recent credible pulmonary function study or blood gas study if the administrative law judge adequately explains why it more accurately reflects claimant's current condition.

Wojtowicz, 12 BLR at 1-165. The administrative law judge on remand must reconsider whether claimant established total disability based on the pulmonary function studies and render findings that satisfy the APA. *Id*.

In considering the medical opinion evidence,[11] the administrative law judge noted that Dr. Ajjarapu diagnosed claimant as totally disabled, while Dr. Sargent opined that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7-8; Director's Exhibits 11, 17. The administrative law judge found that neither physician adequately explained their opinions other than referencing claimant's pulmonary function and arterial blood gas studies. Decision and Order at 8. Because we have vacated the administrative law judge's weighing of the pulmonary function studies, we vacate his rejection of the medical opinions[12] and his determination that claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge law also erred in failing to render a finding as to the exertional requirements of claimant's usual coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). On remand he must determine the exertional requirements of claimant's usual coal mine employment. *Id*. He must then consider the physicians' opinions regarding total disability in light of those requirements and their understanding of

[11] The administrative law judge considered two arterial blood gas studies dated March 9, 2015 and August 26, 2015. Decision and Order at 7; Director's Exhibits 11, 17. He correctly found that both studies are non-qualifying. *Id*. Thus we affirm his finding that claimant did not establish total disability based on the arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). He also correctly found there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5. Thus we affirm his finding that claimant did not establish total disability based on this evidence. 20 C.F.R. §718.204(b)(2)(iii).

[12] The administrative law judge's other basis for rejecting Dr. Ajjarapu's opinion was also error. He noted that "Dr. Ajjarapu concluded that [c]laimant's coal dust exposure has a compounding effect on his pulmonary function, but she failed to further explain that conclusion." Decision and Order at 8-9. The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether claimant's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. The etiology of the miner's pulmonary impairment concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1). Thus he erred in requiring Dr. Ajjarapu to adequately explain the etiology of claimant's disabling impairment when weighing her opinion on total disability. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

those requirements. *Id*. In determining whether the physicians' opinions are reasoned, he must take into account the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgments, and the sophistication and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). If the administrative law judge finds total disability established based on the pulmonary function studies or medical opinions or both, considered in isolation, he must determine whether claimant is totally disabled taking into account the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Remand Instructions

The administrative law judge should first address whether claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) by establishing complicated pneumoconiosis. If claimant cannot establish complicated pneumoconiosis, the administrative law judge should address whether claimant has established total disability and at least fifteen years of underground or substantially similar coal mine employment.[13] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b). If claimant establishes total disability and fifteen years of qualifying coal mine employment, he invokes the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted the presumption.[14] *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If the administrative law judge finds that claimant is not totally disabled, he may reinstate the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. If claimant establishes total disability but not fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has established the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. In rendering all of his credibility determinations on remand, the administrative

[13] The administrative law judge did not render a finding as to whether claimant established at least fifteen years of *qualifying* coal mine employment.

[14] We decline to hold, as the Director requests, that employer is unable to rebut the Section 411(c)(4) presumption based on the evidence employer submitted. Director's Brief at 6-7. The Board is not empowered to engage in de novo review proceedings. 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986). It is the role of the administrative law judge to make credibility determinations and render findings of fact. *Napier*, 301 F.3d at 713-14. Whether a physician's opinion is sufficiently reasoned is essentially a credibility matter left to the administrative law judge. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002).

law judge must explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues that the administrative law judge's weighing of the pulmonary function studies requires remand. 20 C.F.R. §718.204(b)(2)(i). I would further instruct the administrative law judge, however, that in resolving the conflict between the studies he cannot credit the non-qualifying study over the qualifying study based solely on recency under these circumstances, even if the administrative law judge finds they are separated by a significant period of time.

The United States Court of Appeals for the Sixth Circuit has held it irrational to credit evidence solely because of recency where the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence

rule," the Court reasoned that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id*. An administrative law judge must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship."[15] *Id*.

It thus would be error to mechanically credit the August 26, 2015 non-qualifying study over the September 24, 2014 qualifying study for no other reason than the dates they were performed. Regardless of the amount of time that has passed between the tests, if all things were equal, it would be just as likely that the single later result was wrong as the single earlier result. More importantly, however, all things are decidedly unequal: the administrative law judge found the later study unreliable based on its lack of tracings, and the earlier study entitled to the "greatest weight" because no physician questioned its validity. Decision and Order at 7-8. The administrative law judge therefore must give some reasoned explanation why the more reliable study does not carry the day. *Woodward*, 991 F.2d at 319-20; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (*Woodward* requires qualitative analysis of conflicting pulmonary function tests when they indicate a miner's condition has improved); *Adkins*, 958 F.2d at 52 ("'Later is better' is not a reasoned explanation").

JONATHAN ROLFE
Administrative Appeals Judge

[15] While the majority is correct that the *Woodward* court rejected an application of the later evidence rule with regard to x-rays, the plain language of the decision, as well as the rationale behind it, apply equally to pulmonary function and arterial blood gas tests, which similarly measure a miner's condition. *See, e.g.*, *Woodward*, 991 F.2d at 320 (noting that evidence that shows an improvement in a miner's condition "is inconsistent with the normal course of the disease.").