U.S. Department of Labor

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

BRB No. 15-0007 BLA

RALPH W. ROSS Claimant-Petitioner v. CONSOLIDATION COAL COMPANY/ CONSOL ENERGY, INCORPORATED, c/o WELLS FARGO DISABILITY MANAGEMENT Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/20/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey, Swanson & Allman), Indianapolis, Indiana, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5145) of Administrative Law Judge Stephen R. Henley (the administrative law judge), 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). The administrative law judge credited claimant with at least fifteen years of coal mine employment in underground mines or in surface mines under substantially similar conditions, and adjudicated this claim, filed on January 19, 2012, pursuant to the regulatory provisions at 20 C.F.R. Part 718. Considering amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge found that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant, therefore, was not entitled to invoke the rebuttable presumption at Section 411(c)(4). The administrative law judge further found that claimant was unable to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, consequently, was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[2] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge improperly weighed the evidence of record at 20 C.F.R. §718.204(b) to find that total respiratory disability was not established. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds,

[1] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[2] Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

asserting that the administrative law judge conflated the issues of total disability and disability causation, and erred in weighing the medical opinion evidence. The Director asks the Board to vacate the denial of benefits and remand the case for further consideration of whether claimant can invoke the rebuttable presumption set forth in amended Section 411(c)(4) of the Act. Employer has filed a response to the Director's brief in support of its position. Employer has also filed a Motion to Strike Director's Brief, arguing that the brief is not responsive to the arguments raised in claimant's brief, as required under 20 C.F.R. §802.212(b). The Director has filed an objection to employer's Motion to Strike, arguing that he has not impermissibly expanded the scope of issues in this case. Employer has filed a reply to the Director's brief.[3]

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.[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).

Initially, we address employer's Motion to Strike Director's Brief as not responsive to claimant's arguments, as required by Section 802.212.[5] Employer asserts that the Director's brief fails to address the allegations of error raised by claimant, argues issues not raised by claimant, and presents arguments that were never presented before the administrative law judge. Employer's arguments lack merit. In the present appeal, claimant challenges the administrative law judge's weighing of the medical opinion evidence and all contrary probative evidence in finding that claimant does not have a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The Director's brief responds to claimant's general allegations of error on that issue and, thus, we will address the Director's contentions and deny employer's Motion to Strike.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of qualifying coal mine employment, and his finding that claimant is unable to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant's last coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

[5] Pursuant to 20 C.F.R. §802.212(b), arguments in response briefs must be limited to those that respond to issues raised in petitioner's brief or those in support of the decision below. Other arguments will not be considered by the Board.

See 20 C.F.R. §802.212(b); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(en banc) (Smith, J., dissenting), *modifying on recon.*, 18 BLR 1-55 (1994).

Turning to the merits of the case, in order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *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).

Claimant challenges the administrative law judge's weighing of the evidence relevant to total respiratory disability pursuant to 20 C.F.R. §718.204(b). Claimant contends that the administrative law judge erred in according greater weight to the medical opinions of Drs. Tuteur and Selby, who opined that claimant's exercise blood gas study does not indicate the presence of a respiratory or pulmonary problem but, rather, shows that claimant has a right to left shunt in his heart, over the contrary opinion of Dr. Tazbaz, that claimant does not retain the pulmonary capacity to perform his usual coal mine work. The Director maintains that the administrative law judge improperly conflated the issue of disability with the issue of disability causation, and argues that the administrative law judge failed to recognize the "infirmities" in the opinions of Drs. Tuteur and Selby, and mischaracterized Dr. Tazbaz's opinion. Some of these allegations of error have merit.

At Section 718.204(b)(2)(i), the administrative law judge determined that the pulmonary function study conducted by Dr. Tazbaz on February 13, 2012 produced qualifying values, pre-bronchodilation, and that the study conducted on June 28, 2012 by Dr. Tuteur produced non-qualifying values, both pre-bronchodilation and post-bronchodilation.[6] Noting that the tests were performed just four months apart and that spurious low volumes can result, but spurious high volumes are not possible, the administrative law judge credited the higher and more recent results as the best indicator of claimant's pulmonary condition. Thus, the administrative law judge found that the pulmonary function study evidence of record failed to establish total respiratory disability. Decision and Order at 10-11.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed the requisite table values.

Turning to the blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge accurately determined that the February 12, 2012 study administered by Dr. Tazbaz and the June 28, 2012 study administered by Dr. Tuteur both produced non-qualifying values at rest and qualifying values after exercise. Director's Exhibit 10; Employer's Exhibit 4; Decision and Order at 11. Noting that claimant's PCO_2 increased and his PO_2 decreased after exercise and that qualifying values were produced, the administrative law judge found that the blood gas values after exercise indicate that claimant becomes disabled with exertion and that the blood gas studies of record support a finding of total respiratory disability. Decision and Order at 11.

After determining that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge summarized the medical opinions of Drs. Tazbaz, Tuteur, and Selby at Section 718.204(b)(2)(iv). The administrative law judge initially noted that all three physicians are Board-certified in internal and pulmonary medicine, and determined that claimant's usual coal mining position required "heavy lifting and climbing stairs." Decision and Order at 15. The administrative law judge noted that only Dr. Tazbaz[7] opined that claimant was totally disabled from a pulmonary standpoint, based on claimant's hypoxemia on the February 22, 2012 qualifying exercise blood gas study, while Drs. Tuteur[8] and Selby determined that the results of claimant's testing indicate cardiac disease and that, from a pulmonary standpoint, claimant is able to perform his usual coal mine employment. Decision and Order at 15, Director's Exhibit 10; Employer's Exhibit 4, 5, 7, 8. The administrative law judge accorded less weight to Dr. Tazbaz's opinion,

[7] Dr. Tazbaz performed the Department of Labor examination on February 22, 2012. He diagnosed a moderately severe obstructive defect, based on the pulmonary function study results, and hypoxemia, based on claimant's exercise blood gas study. Dr. Tazbaz opined that, based on claimant's hypoxemia with exercise, claimant has a "severe [respiratory or pulmonary] impairment with desaturation on exercise test," and that "he cannot do his activities in last year of employment." Director's Exhibit 10.

[8] Dr. Tuteur diagnosed a minimal obstructive abnormality and some air trapping, based on claimant's pulmonary function study results, which "in and of itself is not clinical[ly] meaningful" and is in no way associated with any disability or reduced function. He noted that the worsening of the "DA-aO_2 gradient" and oxygen tension on the blood gas testing, which he termed a "substantial finding" in the face of only a minimal obstructive abnormality, demonstrated a right-to-left intracardiac shunt that is "consistent with complications of coronary artery disease, myocardial infarctions, surgical treatment and their sequelae." He opined that claimant does not have a pulmonary problem, but is totally disabled due to advanced coronary artery disease. Employer's Exhibits 4, 7 at 27.

finding that the physician failed to consider claimant's severe cardiac issues as a potential cause of impairment and that the opinion was based solely on the doctor's own test results. The administrative law judge found Dr. Tazbaz's "very minimal report" to be insufficiently documented and, therefore, entitled to less weight. Decision and Order at 15.

In contrast, the administrative law judge accorded great weight to the opinions of Drs. Tuteur and Selby, who determined that claimant was not disabled from a respiratory or pulmonary standpoint. The administrative law judge was persuaded by Dr. Tuteur's explanation, as supported by the opinion of Dr. Selby,[9] that "claimant's hypoxemia and blood gas results are 'most likely due to a right to left intracardiac shunt[10] . . . consistent with complications of the coronary artery disease, myocardial infarctions, surgical treatment and their sequelae.'" Decision and Order at 13; Employer's Exhibit 4. Because claimant was given 100% oxygen for over twenty minutes and his desaturation problem was not "corrected," as would be expected with a lung-related defect, Dr. Tuteur concluded that "claimant's blood is bypassing/shunting the lungs" due to a cardiac defect. *Id.*; Employer's Exhibit 7 at 13, 25-27. The administrative law judge found that the reports of Drs. Selby and Tuteur were "well-reasoned, documented, and supported by the totality of the medical evidence." Decision and Order at 15. Thus, the administrative law judge concluded that the medical opinion evidence, standing alone, does not support a finding of total respiratory disability. Decision and Order at 15.

[9] Dr. Selby provided a consulting opinion after reviewing the medical opinions and treatment records, and agreed with Dr. Tuteur that claimant does not have a pulmonary impairment. He opined that claimant is not totally disabled from a respiratory standpoint. He attributed the drop in PO_2 to a cardiac problem, but could not determine the extent of disability due to cardiac issues, which might improve. Employer's Exhibits 5, 8 at 15.

[10] Dr. Tuteur described a shunt of blood as blood returning from the body after having the oxygen removed by the tissue and instead of going through the lungs and getting re-oxygenated, it bypasses or shunts past the lung within the heart. Employer's Exhibit 7 at 13. Dr. Tuteur stated that the two possible lung-related reasons for claimant's desaturation were eliminated, because claimant was given 100% oxygen for over 20 minutes and the problem was not "corrected" as would be expected, because the body was shunting it away. Dr. Tuteur explained that the basic rule of thumb is that the PO_2 has to go higher than 600, but in this case it was far below at 541. Employer's Exhibit 7 at 25-28. Dr. Tuteur stated that "if further evaluation is required, echocardiogram with a bubble study may be helpful." Employer's Exhibit 4 at 3.

Considering all contrary probative evidence, the administrative law judge found that, although claimant's exercise arterial blood gas values demonstrated disability, the disability is due to claimant's cardiac condition, and not a respiratory impairment. *Id.* The administrative law judge found that, while claimant's ability to perform yard work is limited, he is still able to perform such tasks and performs volunteer work of mowing lawns, putting up hay, and cutting wood, and that claimant failed to prove that he is disabled from a pulmonary or respiratory standpoint. Decision and Order at 15-16. Thus, based on his review of the evidence, the administrative law judge found that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2).

We agree with the Director that the administrative law judge erred in combining his analysis of the issue of total disability with his analysis of the issue of disability causation. The cause of claimant's disabling hypoxemia, manifested by his qualifying post-exercise blood gas study results, is properly addressed at 20 C.F.R. §718.204(c), or in consideration of whether the amended Section 411(c)(4) presumption has been rebutted with proof that no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii). Furthermore, we agree with the Director that the administrative law judge mischaracterized Dr. Tazbaz's opinion in determining that the physician's "very minimal report did not consider [] Claimant's severe cardiac issues as a potential causes [sic] of his impairment." Decision and Order at 15. The record reflects that Dr. Tazbaz noted claimant's aortic valve replacement and triple bypass surgery, questioned a diagnosis of congestive heart failure, performed an electrocardiogram which revealed normal sinus rhythm and no S or T wave abnormalities, and diagnosed, *inter alia*, coronary artery disease. Director's Exhibit 10. We also agree that the administrative law judge erred in finding that Dr. Tazbaz's opinion is "not sufficiently documented," as the doctor relied on his own results from a physical examination, chest x-ray, pulmonary function study, blood gas study, and echocardiogram (ECG), and he considered claimant's smoking and work histories, and surgeries. Decision and Order at 15; Director's Exhibit 10. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893, 13 BLR 2-348, 2-355 (7th Cir. 1990), *citing Peabody Coal Co. v. Helms*, 859 F.2d 486 (7th Cir. 1988)(report based on physical examination, symptoms and patient's medical and work histories is adequately documented). We further agree with the Director that the administrative law judge failed to explain how the reports of Drs. Selby and Tuteur are better supported by the totality of the medical evidence, when: claimant's treatment records did not reveal the existence of a right-to-left shunt on extensive cardiac testing; Dr. Tutuer did not include the complete results of claimant's blood gas study conducted on 100% oxygen; and neither physician conducted an ECG.[11]

[11] The Director additionally maintains that Dr. Tuteur failed to address claimant's medical records documenting continuous treatment for chronic obstructive pulmonary

Accordingly, we vacate the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that the totality of the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and remand the case to the administrative law judge for further consideration of the relevant evidence. We also vacate, therefore, the administrative law judge's finding that claimant failed to invoke the amended Section 411(c)(4) presumption.

On remand, if claimant is unable to establish total respiratory disability, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). However, if the administrative law judge finds that claimant has proven that he suffers from a totally disabling respiratory or pulmonary impairment, claimant will have established invocation of the amended Section 411(c)(4) presumption, and the burden will shift to employer to establish rebuttal of the presumption.

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disease between 2005 and 2012. Further, the Director notes that the administrative law judge did not reconcile Dr. Tuteur's original interpretation of claimant's diffusing capacity study as showing a moderate impairment of gas exchange caused by pulmonary fibrosis, altered V/Q relationship, pulmonary vascular disease, emphysema, or interstitial pneumonitis, Employer's Exhibit 4, with his later statement that the impairment was mild and related to claimant's weight. Director's Brief at 4-5.

Accordingly, the administrative law judge's Decision and Order Denying 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.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge