U.S. Department of Labor

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

BRB No. 17-0050 BLA

WOODY L. RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXCEL MINING, LLC	)	
	)	DATE ISSUED: 10/31/2017
Employer-Petitioner	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05310) of Administrative Law Judge Paul C. Johnson, Jr., 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 miner's claim filed on February 24, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with thirty-three years of underground coal mine employment[2] and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response 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).

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] The administrative law judge noted that claimant worked for an additional seven years as a coal truck driver at a strip mine. Decision and Order at 4-5; Director's Exhibit 3.

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

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

Invocation of the Section 411(c)(4) Presumption-Total Disability

A claimant is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 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). Here, employer contends that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and the evidence, overall, in finding total disability established.

The administrative law judge initially considered the results of five pulmonary function studies, pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9, 20-22; Director's Exhibits 9, 13; Claimant's Exhibit 7; Employer's Exhibit 1. Noting that only three of the five studies are qualifying,[5] and that the qualifying studies are "intermixed over time"[6] with the non-qualifying studies, the administrative law judge concluded that the pulmonary function study evidence does not establish total respiratory disability.[7] Decision and Order at 22.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge found that the March 22, 2012, June 19, 2012, and April 24, 2013 pulmonary function studies produced qualifying results, while the August 2, 2012 and April 14, 2016 pulmonary function studies produced non-qualifying results. Decision and Order at 9, 20-22; Director's Exhibits 9, 13; Claimant's Exhibit 7; Employer's Exhibit 1.

[7] The administrative law judge noted that Dr. Jarboe invalidated all of the qualifying pulmonary function studies for suboptimal effort, including the study performed in conjunction with his own April 24, 2013 examination. Decision and Order at 9, 20-22; Employer's Exhibit 1. Dr. Jarboe also stated that claimant gave suboptimal effort on both of the non-qualifying pulmonary function studies. Crediting the observations of claimant's effort by the physicians and technicians who conducted the

The administrative law judge also found that because all of the arterial blood gas studies are non-qualifying and there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure, claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 10, 22; Director's Exhibits 9, 13; Employer's Exhibit 1.

The administrative law judge next considered the medical opinions of Drs. Potter, Alam, Broudy, and Jarboe, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Potter and Alam opined that claimant has a totally disabling respiratory impairment. Claimant's Exhibit 2; Director's Exhibit 9. In contrast, Drs. Broudy and Jarboe opined that claimant is able to perform his previous coal mine work from a respiratory standpoint. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge credited the opinions of Drs. Potter and Alam, as reasoned, and discredited the opinions of Drs. Broudy and Jarboe, as inadequately explained, and concluded that the medical opinion evidence supported a finding of total disability. Decision and Order at 24.

Employer maintains that the administrative law judge failed to provide valid reasons for rejecting the medical opinions of Drs. Broudy and Jarboe.[8] We agree. Dr. Broudy concluded that claimant is not disabled based on the results of his August 2, 2012 physical examination and objective testing. Director's Exhibit 13. Dr. Broudy noted that while the pulmonary function study "reveal[ed] abnormal results," claimant's effort was "not optimal" and the results "still exceed[ed] the minimum Federal criteria for disability in coalworkers in spite of the less than maximal effort." *Id.* at 6. Dr. Broudy also stated that the results of the blood gas study he performed were normal. *Id.* The administrative law judge correctly noted that Dr. Broudy conceded that claimant has some interstitial lung disease which may be causing some respiratory impairment. Director's Exhibit 13 at 7. Decision and Order at 23-24, *referencing* Director's Exhibit 13 at 7. Dr. Broudy added, however, that the severity of the impairment was hard to judge because of claimant's suboptimal effort on the August 2, 2012 pulmonary function study. *Id.* The administrative law judge discredited Dr. Broudy's opinion as unexplained, because Dr. Broudy "still opined [c]laimant was not totally disabled, despite having no clear evidence as to [c]laimant's level of impairment." Decision and Order at 24.

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studies over Dr. Jarboe's review of the tracings, the administrative law judge found all three qualifying pulmonary function studies to be valid. *Id.* at 21-22.

[8] Employer does not challenge the administrative law judge's determinations to credit the opinions of Drs. Alam and Potter, that claimant is totally disabled. These findings are therefore affirmed. *Skrack*, 6 BLR at 1-711.

We hold that the administrative law judge has mischaracterized Dr. Broudy's opinion. Dr. Broudy stated that while the severity of claimant's impairment is unclear, it is not severe enough to be disabling. Specifically, as employer asserts, Dr. Broudy explained that the fact that the pulmonary function study was non-qualifying, despite claimant's less than maximal effort, supported the conclusion that claimant retains the respiratory capacity to perform his usual coal mine work.[9] Employer's Brief at 6; Director's Exhibit 13 at 7. Moreover, as the administrative law judge acknowledged, the fact the claimant's effort may have been suboptimal did not undermine the reliability of Dr. Broudy's non-qualifying pulmonary function study results.[10] Decision and Order at 21. Rather, claimant's level of effort was immaterial in this instance because better effort could have only produced higher, not lower, results. *See Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984) (holding that a non-qualifying pulmonary function study that represents poor effort is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983); Employer's Brief at 6. By focusing only on Dr. Broudy's statement that he could not determine the exact level of claimant's impairment, the administrative law judge engaged in an impermissible selective analysis of Dr. Broudy's opinion. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

The administrative law judge also erred in his analysis of Dr. Jarboe's opinion. Dr. Jarboe examined claimant and performed objective testing on April 25, 2013, and also reviewed claimant's medical records.[11] Employer's Exhibits 1, 5, 8. Dr. Jarboe opined that claimant has simple pneumoconiosis, chronic asthma, and chronic bronchitis,

[9] Dr. Broudy stated: "In spite of the less than maximal effort, the results of [the pulmonary function studies] do exceed the minimum Federal criteria for disability in coal workers. I do believe this gentleman would retain the respiratory capacity to do his previous work, or similar work in a dust-free environment." Director's Exhibit 13 at 7.

[10] In weighing the pulmonary function studies, at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge stated: "The [August 2, 2012] study conducted by Dr. Broudy was non-qualifying. Therefore, if Claimant did exhibit suboptimal effort, it did not affect whether the results were qualifying in Dr. Broudy's study. As a result, for purposes of analyzing Claimant's total disability, his level of effort on this test is irrelevant." Decision and Order at 21.

[11] Dr. Jarboe opined that while the results of his April 25, 2013 pulmonary function study are qualifying, they are invalid due to suboptimal effort. Employer's Exhibit 1. Dr. Jarboe also opined that all of the pulmonary function studies he reviewed are invalid due to suboptimal effort. Employer's Exhibits 1, 5, 8.

but does not have a disabling respiratory impairment. *Id.* In discrediting Dr. Jarboe's opinion, the administrative law judge stated:

> Dr. Jarboe also opined [claimant] could return to his previous employment because he did not give optimal effort on his pulmonary function study and because the arterial blood gas study was non-qualifying. However, Dr. Jarboe fails to reconcile this opinion with his diagnosis of [claimant] with simple coal workers' pneumoconiosis, chronic asthma, and chronic bronchitis. He does not explain how [claimant] would be able to work in the coal mines while suffering from these conditions.

Decision and Order at 24. As employer asserts, however, a mere diagnosis of pneumoconiosis or chronic bronchitis does not establish the existence of an impairment. *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52, 1-54 (1986) (Brown, J., concurring and dissenting); Employer's Brief at 6. Nor does the existence of an impairment establish to what extent, if any, the impairment is disabling. *See Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983). Thus, the fact that Dr. Jarboe diagnosed several pulmonary or respiratory conditions is not necessarily inconsistent with his conclusion that claimant is not disabled from a respiratory standpoint, and the administrative law judge erred in discrediting Dr. Jarboe's opinion on that basis. *See Jarrell*, 9 BLR at 1-54. Moreover, in his May 15, 2013 report, Dr. Jarboe explained that while, in his opinion, claimant's suboptimal effort rendered all of the pulmonary function studies invalid, other evidence, including claimant's normal total lung capacity studies and normal blood gas studies, supported his conclusion that claimant is not disabled.[12] Employer's Exhibit 5 at 7.

As the administrative law judge provided no other reasons for discrediting the opinions of Drs. Broudy and Jarboe, we must vacate the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge must consider all of the relevant evidence, weigh the medical opinions in light of their reasoning and documentation, and determine whether the weight of the evidence, like and unlike, establishes total

[12] In his supplemental reports dated May 23, 2016 and June 21, 2016, Dr. Jarboe reviewed additional medical evidence and stated that it did not change his original opinion. Employer's Exhibits 5, 8. Dr. Jarboe acknowledged, however, that claimant's most recent total lung capacity studies suggested the possible presence of a restrictive ventilatory defect. Employer's Exhibit 8 at 3.

respiratory disability at 20 C.F.R. §718.204(b)(2). *Tenn. Consol. Coal Co. v. Crips*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Rafferty*, 9 BLR at 1-232.

Because we have vacated the administrative law judge's finding that the evidence established total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address the issue of whether employer established rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. If, on remand, claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[13] or by establishing that "no part of the miner's 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). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer generally contends that it "has rebutted the fifteen year presumption by establishing that the Claimant did not have pneumoconiosis both clinical and legal." Employer's Brief at 7. Employer, however, has not identified any specific error of law or fact in the administrative law judge's weighing of the evidence relevant to rebuttal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a). Because employer provides the Board with no basis upon which to review the administrative law judge's rebuttal findings, we affirm the administrative law judge's determination that employer failed to rebut the Section

[13] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

411(c)(4) presumption. Decision and Order at 31-36; *see* 20 C.F.R. §718.305(d)(1)(i), (ii).

In summary, if the administrative law judge finds on remand that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant would be entitled to benefits.

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge