U.S. Department of Labor

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

BRB No. 18-0398 BLA

SONNY BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK MINING	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/31/2019
	)	
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 a Subsequent Claim of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Sonny Brock, Flat Lick, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits in a Subsequent Claim (2013-BLA-05251) of Administrative Law Judge Peter B. Silvain, Jr., on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] This case involves a subsequent claim filed on February 17, 2012.[3]

After crediting claimant with 20.46 years of coal mine employment,[4] the administrative law judge found he failed to establish he is totally disabled and could not invoke the rebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C.

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf 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] On July 25, 2019, the Board sent a letter to claimant giving him the opportunity to have his case reviewed to determine whether it should be remanded for a new hearing before a new administrative law judge. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). Claimant was directed to make his request for *Lucia* review by August, 4, 2019. Having not received a reply from claimant to the Board's letter, we will review only the merits of claimant's appeal.

[3] Claimant filed five prior claims. Director's Exhibits 1, 2. The district director denied his most recent prior claim on August 25, 2004, for failure to establish total disability. Director's Exhibit 2.

[4] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 12. 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).

§921(c)(4) (2012),[5] or establish entitlement under 20 C.F.R. Part 718.[6] The administrative law judge further found claimant did not establish complicated pneumoconiosis and could not invoke the irrebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(3), and therefore denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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. *See 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 meeting these elements when certain conditions are met.

Change in an Applicable Condition of Entitlement

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative

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

[6] Because the new evidence did not establish total disability, the administrative law judge also found claimant did not establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c).

law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing he is totally disabled. 20 C.F.R. §§718.204(b)(2), 725.309(c).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[7] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function or 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 weigh all relevant supporting 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 considered four new pulmonary function studies conducted on January 16, 2012, May 16, 2012,[8] January 10, 2013, and May 13, 2014. While the January 16, 2012 pulmonary function study produced non-qualifying values,[9] the next two studies conducted on May 16, 2012 and January 10, 2013 produced qualifying

[7] The administrative law judge correctly found claimant cannot establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 19.

[8] Dr. Habre, the physician who conducted the Department of Labor (DOL)-sponsored pulmonary evaluation, administered a pulmonary function study on March 8, 2012. Director's Exhibit 23. However, because Dr. Gaziano invalidated the study due to less than optimal effort, cooperation and comprehension, the DOL provided claimant with a second pulmonary function study on May 16, 2012. *Id.*; *see* 20 C.F.R. §725.406(c).

[9] 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).

values. Director's Exhibits 23, 24; Claimant's Exhibit 2. The most recent pulmonary function study, conducted on May 13, 2014, produced non-qualifying values. Employer's Exhibit 5.

Citing to the Sixth Circuit Court's holding in *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), the administrative law judge noted that because "*pneumoconiosis is progressive* and irreversible, I find that the most recent evidence of record is more probative with regard to the Claimant's *current condition*." Decision and Order at 23 n.68 (emphasis added). Thus, he accorded "more weight" to the non-qualifying May 13, 2014 pulmonary function study as it was the most recent study of record and, therefore, found the new pulmonary function studies did not establish total disability. Decision and Order at 23.

But the administrative law judge misapplied the Sixth Circuit Court's holding in *Woodward*. In *Woodward*, the Sixth Circuit Court held that it is not logical or rational to rely solely on the fact that pneumoconiosis is a progressive and irreversible disease to credit x-ray evidence on the basis of its recency where the evidence indicates "improvement in [the miner's] physical condition, which is inconsistent with the normal course of the disease." *Woodward*, 991 F.2d at 314, 319-20 (6th Cir. 1993), quoting *Adkins*, 958 F.2d at 51-52.

On the other hand, it may be reasonable for an administrative law judge to rely on the more recent evidence, such as a qualifying or a non-qualifying pulmonary function study, if the administrative law judge finds that it more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *see also Schetroma v. Director, OWCP*, 18 BLR 1-17, 1-22 (1993); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc). But the administrative law judge must provide some rationale for why it more accurately reflects claimant's current condition. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (*Woodward* requirements would be met because the administrative law judge considered qualitative, as well as quantitative, differences); *Woodward*, 991 F.2d at 319-20 (rejecting mechanical application of the "later evidence rule" to x-ray evidence); *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). The administrative law judge did not address the significance of the time that elapsed between the most recent non-qualifying study administered on May 13, 2014 and the prior qualifying study administered on January 10, 2013. *See Keathley*, 773 F.3d at 740.

Because the administrative law judge did not provide an adequate rationale for assigning controlling weight to the May 13, 2014 non-qualifying pulmonary function study, we vacate his finding that claimant did not establish total disability based on the pulmonary function study evidence. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §718.204(b)(2)(ii); *see Keathley*, 773 F.3d at 740.

Additionally, we agree with employer that the administrative law judge erred in assessing the validity of the qualifying pulmonary function studies.[10] Employer's Response Brief at 10-13. In finding the May 16, 2012 and January 10, 2013 pulmonary function studies valid, the administrative law judge rejected the invalidations of Drs. Vuskovich and Rosenberg because they did not "identify any specific non-compliance with technical aspects of the test[s]." Decision and Order at 21-23. Contrary to the administrative law judge's characterization, both physicians provided explanations for finding the studies unreliable, opining claimant either failed to provide maximal effort or was hesitant during the studies.[11] The standards for the administration and interpretation of pulmonary function studies provide that a subject's effort shall be judged unacceptable when he "[h]as not used maximal effort during the entire forced expiration" or has "an unsatisfactory start of expiration, one characterized by excessive hesitation . . . ." 20 C.F.R.

[10] Employer's contention, raised in its response brief, is in support of another method by which the administrative law judge may reach the same result and deny benefits. Employer's Response Brief at 10-13. Therefore, this argument is properly before the Board. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

[11] Dr. Rosenberg opined claimant's effort during the May 16, 2012 study was "incomplete based on the shape of the flow-volume and volume-time curves." Employer's Exhibit 7 at 4. Similarly, Dr. Vuskovich opined that during the study, claimant "did not put forth the effort required to generate valid spirometry results," noting that his "deep breath efforts were not maximum efforts which artificially lowered his FEV1 and FVC results." Employer's Exhibit 8 at 7-8. Dr. Vuskovich also opined claimant's "initial efforts were not maximum efforts which artificially lowered his FEV1 results." *Id.* Dr. Rosenberg opined claimant's efforts during the January 10, 2013 study "were not maximal based on the shape of the flow-volume curves." Employer's Exhibit 9 at 1. Dr. Rosenberg further noted "[h]esitation was evident." *Id.* Similarly, Dr. Vuskovich opined claimant "did not put forth the effort required to generate . . . valid FEV1 results. His initial efforts were not maximum efforts which artificially lowered his FEV1 result." Employer's Exhibit 8 at 5-6.

Part 718 App. B(2)(ii)(B), (F). Because the administrative law judge did not discuss the physicians' explanations for discrediting the studies, we cannot affirm his determination that the May 16, 2012 and January 10, 2013 pulmonary function studies are valid.[12] *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In light of the above-referenced errors,[13] we vacate the administrative law judge's finding the pulmonary function studies did not establish total disability and remand the

[12] The administrative law judge noted that if he found the May 16, 2012 pulmonary function study invalid, he would remand the case to the district director to allow claimant to undergo a "second Department-sponsored [pulmonary function study]." Decision and Order at 21 n.65. Employer, however, asserts that the May 16, 2012 pulmonary function study constitutes claimant's second DOL-provided pulmonary function study and the regulations do not allow a third opportunity. Employer's Brief at 11 n.2. The regulations provide that where deficiencies are the result of a lack of effort on the miner, he will be afforded "one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c). As noted, *supra*, the DOL provided claimant with the opportunity to undergo a pulmonary function study on March 8, 2012. When that study was invalidated due to a lack of effort, the DOL provided claimant with "one additional opportunity to produce a satisfactory result," 20 C.F.R. §725.406(c), which was the pulmonary function study conducted on May 16, 2012.

[13] Dr. Rosenberg and Vuskovich also invalidated the January 16, 2012 non-qualifying pulmonary function study because they found claimant did not provide maximal effort. Employer's Exhibits 7, 8. The administrative law judge, however, noted that even with incomplete effort, claimant still produced non-qualifying values. Decision and Order at 21. Thus, the administrative law judge reasoned that had claimant cooperated more fully, the results would only have been higher. Decision and Order at 21. Therefore, the administrative law judge permissibly determined the January 16, 2012 pulmonary function study was probative evidence of claimant's pulmonary condition. *See Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983). Dr. Rosenberg and Vuskovich also reviewed the May 13, 2014 pulmonary function study. Employer's Exhibit 7, 8. Dr. Rosenberg opined claimant's effort wat "not maximal" and the results "could have been greater." Employer's Exhibit 7 at 9. Dr. Vuskovich opined claimant "put forth the effort to generate valid FVC and FEV1 results, but not the MVV result. Employer's Exhibit 8 at 9. Again, noting that if claimant had provided better effort, the results only would have been higher, the administrative law judge permissibly determined this pulmonary function study was probative evidence of claimant's pulmonary condition. *See Crapp*, 6 BLR at 1-478-79; Decision and Order at 22-23.

case for further consideration.[14] 20 C.F.R. §718.204(b)(2)(i). As the administrative law judge's findings with regard to the new pulmonary function study evidence affected his weighing of the new medical opinion evidence on the issue of total respiratory disability, we also vacate his finding at 20 C.F.R. §718.204(b)(2)(iv).[15]

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish total disability, we vacate his finding that claimant did not establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). If, on remand, the administrative law judge finds that either the new pulmonary function studies or the medical opinions establish total disability, he must weigh all the relevant new evidence together to determine whether claimant has established total disability. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 198; 20 C.F.R. §718.204(b)(2). Should the administrative law judge find the new evidence establishes total disability, claimant will have established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge would then be required to consider claimant's 2012 claim on the merits, based on a weighing of all of the evidence of record, including the evidence submitted in connection with claimant's prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). If the administrative law judge finds the evidence does not establish total disability, he must deny benefits. *See Trent*, 11 BLR at 1-27.

[14] On remand, the administrative law judge must reconsider the validity of the May 16, 2012 and January 10, 2013 qualifying pulmonary function studies. He must address all the evidence relevant to the validity of the pulmonary function studies, including direct observations medical personnel present at the study made, whether a physician or a technician, and the opinion of any physician who assessed claimant's effort by reviewing the results of the study, including the tracings. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157. If the administrative law judge accords greater weight to the opinion of a consulting physician as to the validity of a particular pulmonary function study, he must set forth his rationale. *See Siegel*, 8 BLR at 1-157.

[15] The administrative law judge correctly noted both of the new arterial blood gas studies, conducted on March 8, 2012 and May 13, 2014, are non-qualifying. Decision and Order at 23; Director's Exhibit 24; Employer's Exhibit 6. Therefore, we affirm his finding the blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge also accurately found no evidence of cor pulmonale with right-sided congestive heart failure, thereby precluding a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

If the administrative law judge finds claimant is totally disabled, he must consider whether claimant can invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). To invoke the Section 411(c)(4) presumption, claimant must also establish he worked for at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i).

The administrative law judge credited claimant with 20.46 years of surface coal mine employment. Employer contends the administrative law judge, as part of his calculation, erred in crediting claimant with 12.75 years of coal mine employment before 1978, but employer only specifically identifies three quarters of coal mine employment that it alleges were improperly credited. Employer's Brief at 13-14. Any error by the administrative law judge in crediting claimant with three quarters of coal mine employment is harmless because, even if that time is excluded, it would not result in a finding of less than fifteen years of surface coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because employer does not allege any additional error, we affirm the administrative law judge's determination of at least fifteen years of surface coal mine employment.

On remand, the administrative law judge would be required to address whether claimant's surface coal mine work occurred in conditions that were "substantially similar to conditions in an underground mine."[16] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2). If the administrative law judge so finds, claimant would invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The burden of proof would then shift to employer to establish rebuttal of the presumption. 20 C.F.R. §718.305(d)(1).

If the administrative law judge determines claimant established total disability but cannot invoke the Section 411(c)(4) presumption, he must determine whether claimant can establish all elements of entitlement under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-26.

[16] Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Subsequent Claim 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge