U.S. Department of Labor

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

BRB No. 18-0526 BLA

JOHN OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/29/2019
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2011-BLA-05993) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 3, 2009, and is before the Board for the second time.

In his initial decision and order, the administrative law judge found claimant established 14.63 years of coal mine employment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C §921(c)(4) (2012). Considering whether claimant was entitled to benefits without the presumption, the administrative law judge found he failed to establish pneumoconiosis, a requisite element of entitlement, and denied benefits.[2]

Pursuant to claimant's appeal, the Board vacated the administrative law judge's length of coal mine employment determination. Consequently, the Board vacated his finding that claimant could not invoke the Section 411(c)(4) presumption and remanded the case for further consideration. *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016).

In the interest of judicial economy, the Board also evaluated the administrative law judge's finding that claimant did not establish entitlement without the presumption. *Id.* at

[1] Under Section 411(c)(4) of the Act, 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); *see* 20 C.F.R. §718.305. Because claimant did not establish the requisite fifteen years of qualifying coal mine employment to invoke the presumption, the administrative law judge did not consider whether claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) in his initial decision and order.

[2] To establish entitlement without the benefit of the Section 411(c)(4) presumption, 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

205-08. The Board affirmed his determination that claimant did not establish clinical pneumoconiosis but vacated his finding that claimant did not establish legal pneumoconiosis. *Id*.

On remand, the administrative law judge determined claimant did not establish total disability and, therefore, did not invoke the Section 411(c)(4) presumption. Because claimant did not establish total disability, an essential element of entitlement, the administrative law judge found it unnecessary to reconsider claimant's length of coal mine employment or the other elements of entitlement.

On appeal, claimant argues the administrative law judge erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability can be established by pulmonary function or 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 the evidence supporting total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988). Claimant contends the administrative law judge erred in his evaluation of the blood gas study and medical opinion evidence.[4] *See* 20 C.F.R. §718.204(b)(2)(ii), (iv); Claimant's Brief at 17-27.

[3] 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability through pulmonary function studies or with evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R.

Blood Gas Study Evidence

The administrative law judge considered three blood gas studies. Decision and Order at 5. Dr. Dahhan conducted a February 6, 2010 study[5] which produced qualifying resting and exercise values.[6] Director's Exhibit 13. Dr. Rasmussen conducted a March 31, 2010 study, which produced non-qualifying resting and exercise values. Director's Exhibit 11. Dr. Jarboe conducted a November 21, 2013 study which also produced non-qualifying values at rest; exercise studies were not conducted. Employer's Exhibit 1. Relying on the more recent studies the administrative law judge concluded claimant did not establish total disability. Decision and Order at 5; *see* 20 C.F.R. §718.204(b)(2)(ii).

We reject claimant's contentions that the administrative law judge "automatically" accorded greatest weight to the more recent studies and erred in failing to find the exercise studies the most probative. Claimant's Brief at 20-22. While the administrative law judge may give greater weight to exercise studies, he is not required to do so. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the administrative law judge's discretion to find a particular study more probative than another study). Moreover, the administrative law judge did not simply accord the greatest weight to the most recent studies. Instead, he noted:

> There is nothing in the record to suggest that the later, non-qualifying [blood gas studies] did not accurately reflect the Miner's respiratory condition at the time the testing was taken. Thus the more recent studies support the

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§718.204(b)(2)(i), (iii); *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

[5] The administrative law judge considered Dr. Rasmussen's opinion that Dr. Dahhan's blood gas study may have been performed incorrectly based on claimant's testimony that his blood was drawn after exercise, not during exercise. Decision and Order at 5 n.16; Claimant's Exhibit 1 at 17-18. Dr. Rasmussen emphasized, however, that the study would have produced even lower values if the technician had timely drawn claimant's blood. Claimant's Exhibit 1 at 18. Noting that Dr. Dahhan did not identify any issues with the way the testing was performed, the administrative law judge permissibly declined to discredit the study. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 5 n.16; Director's Exhibit 13.

[6] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

> conclusion that whatever caused the qualifying testing in February 2010, his condition had improved by March 2010, and was still improved to a non-qualifying level in November 2013.

Decision and Order at 5. Contrary to claimant's argument, the administrative law judge thus accurately noted a trend in the results of valid studies conducted over a significant period of time. *See id*. Having evaluated the validity of the of the individual tests, and having performed a qualitative analysis that also recognized a greater number of more recent nonqualifying tests, the administrative law judge acted within his discretion in finding they do not establish disability. *See, e.g., Sunny Ridge Min. Co., Inc. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014)(consideration of quantitative and temporal differences in evidence permitted so long as qualitative differences also considered); *Woodward v. Director*, 991 F.3d 314, 319 (6th Cir. 1993) (rejecting mechanical application of the "later evidence rule"); *Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th Cir. 1991) (given the slowly-progressing nature of pneumoconiosis, significant period of time has to separate test results to add weight to newer results). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 5.

Medical Opinion Evidence

The administrative law judge considered the opinions of Drs. Rasmussen, Dahhan, and Jarboe. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 6-9. Dr. Rasmussen diagnosed a totally disabling respiratory impairment, Dr. Dahhan opined claimant has no evidence of pulmonary disability caused or related to coal mine dust exposure, and Dr. Jarboe opined claimant is not disabled from a pulmonary standpoint. Director's Exhibits 11, 13; Employer's Exhibit 1. The administrative law judge discredited Dr. Rasmussen's opinion as inadequately reasoned, and credited the opinions of Drs. Dahhan and Jarboe to conclude claimant failed to establish total disability through medical opinion evidence. Decision and Order at 9.

We agree with claimant that the administrative law judge erred in evaluating the medical opinions of Drs. Rasmussen and Dahhan. Claimant's Brief at 17-18, 22-27. Dr. Rasmussen relied on the March 31, 2010 non-qualifying exercise blood gas study he performed to diagnose total disability. Director's Exhibit 11; Claimant's Exhibit 1 at 22-26. He stated the study demonstrated a "minimal to moderate impairment in oxygen transfer," and explained that while claimant could perform moderate or possibly heavy

exercise with this impairment, he could not perform the "very heavy exercise" his regular coal mine employment required.[7] Director's Exhibit 11; Claimant's Exhibit 1 at 22-26.

The administrative law judge found Dr. Rasmussen did not explain his opinion in light of the "vast[ly] differen[t]" qualifying blood gas study performed a month earlier on February 6, 2010. Decision and Order at 8. The administrative law judge did not, however, explain why a qualifying blood gas study, reflecting a worse impairment than Dr. Rasmussen's test, undermines his opinion that even the non-qualifying exercise values from March 31, 2010 are totally disabling.[8] The administrative law judge also found Dr. Rasmussen's opinion unexplained in light of the fact that the November 21, 2013 resting values were "closer" to the resting values from Dr. Rasmussen's March 31, 2010 test. Decision and Order at 8. He did not explain, however, how this similarity undermines Dr. Rasmussen's opinion, particularly since the November 21, 2013 test was conducted only at rest, while Dr. Rasmussen based his opinion on the results of exercise testing.[9] We note further that the administrative law judge previously found there is nothing to suggest the non-qualifying blood gas studies, including those Dr. Rasmussen conducted, did not accurately reflect claimant's condition at the time the tests were performed. Decision and Order at 5. Because the administrative law judge's determination to discredit Dr.

[7] Dr. Rasmussen stated very heavy exercise would require almost double the oxygen consumption claimant achieved. Director's Exhibit 11.

[8] As the administrative law judge correctly observed, a physician may conclude a miner is totally disabled based on non-qualifying objective studies if the studies nonetheless demonstrate sufficient impairment to preclude the miner's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Decision and Order at 7-8.

[9] Dr. Rasmussen opined that Dr. Jarboe's testing was "not sufficient to determine whether a pulmonary impairment is present" because he did not conduct an exercise study which is "the best test of whether someone performing manual labor, such as a coal miner, can perform that type of labor[.]" Claimant's Exhibit 1 at 21-22. Dr. Rasmussen acknowledged that claimant's March 31, 2010 resting values were "normal" but concluded that the abnormality reflected on the exercise study "clearly indicates that he would not be capable of performing the last coal mine job that he performed." *Id*. at 22-24.

Rasmussen's opinion does not comport with the Administrative Procedure Act (APA), we vacate that finding.[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with claimant that the administrative law judge erred in evaluating Dr. Dahhan's opinion. Based on the results of his examination and testing, Dr. Dahhan opined there is "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by inhalation of coal dust." Decision and Order at 8, *quoting* Director's Exhibit 13. The administrative law judge found Dr. Dahhan's opinion "well-reasoned and well-documented on the issue of total disability" based in part on his explanation that the qualifying blood gas study results he obtained were attributable to non-pulmonary causes such as claimant's coronary artery disease and lower back pain.[11] Decision and Order at 8. As claimant correctly contends, however, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is solely whether a totally disabling respiratory or pulmonary impairment is, or was, present. Claimant's Brief at 17-18. The cause of that impairment is relevant to the issue of disability causation at 20 C.F.R. §718.204(c). We therefore vacate the administrative law judge's determination to credit Dr. Dahhan's opinion relevant to total disability. *See* Director's Exhibit 13.

Because we vacate the administrative law judge's credibility determinations with respect to Drs. Rasmussen and Dahhan, we must vacate his finding that claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Thus, we also vacate the administrative law judge's denial of benefits.

On remand, in considering whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must initially determine the exertional

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[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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).

[11] Dr. Dahhan's February 6, 2010 blood gas studies produced qualifying results at rest and exercise. Director's Exhibit 13 at 4. He interpreted the studies as demonstrating moderate hypoxemia at rest and minimum hypoxemia at peak exercise. *Id.* He explained the fact that the abnormalities in the blood gas exchange mechanism improved with exercise in the face of normal respiratory mechanics indicated the results were due to non-pulmonary causes. *Id.* Dr. Dahhan did not address whether claimant has a totally disabling respiratory impairment regardless of cause. *Id.*

requirements of claimant's usual coal mine work[12] and then consider them in conjunction with the medical opinions assessing disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). He must also consider the qualifications of the respective physicians, the documentation and reasons underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If the administrative law judge determines the medical opinions demonstrate total disability, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record and determine whether claimant is totally disabled. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

If claimant establishes total disability, the administrative law judge must evaluate whether he established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and, if not, whether he can establish entitlement to benefits without the presumption. *See Osborne*, 25 BLR at 1-204-05. If claimant does not establish total disability, however, the administrative law judge may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). On all issues, the administrative law judge must set forth his findings in detail and explain his underlying rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

[12] Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge