U.S. Department of Labor

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

BRB No. 18-0574 BLA

MILTON CONLEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	DATE ISSUED: 10/28/2019
	)	
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 on Remand of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2013-BLA-05749) of Administrative Law Judge Jennifer Gee, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on February 6, 2012 and is before the Board for the second time.

In its previous decision, the Board vacated Administrative Law Judge William J. King's finding claimant established total disability, holding Judge King did not fully consider the validity of the September 22, 2014 blood gas study, and did not adequately

explain his finding that it and claimant's testimony established total disability. The Board also vacated his determination claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4),[1] but affirmed as unchallenged on appeal his finding employer did not rebut the presumption. The Board therefore vacated the award of benefits and remanded the case for further consideration. *Conley v. ICG Knott County, LLC*, BRB No. 16-0581 BLA, slip op. at 6-7 (Aug. 18, 2017) (unpub.).

On remand, Administrative Law Judge Jennifer Gee (the administrative law judge)[2] found the September 22, 2014 blood gas study, when considered with claimant's lay testimony, established total disability and invocation of the Section 411(c)(4) presumption. The administrative law judge reinstated the finding employer failed to rebut the presumption and awarded benefits.

Employer asserts the administrative law judge erred in finding the September 22, 2014 blood gas study a reliable indicator of total disability. Employer also argues the administrative law judge erred in discrediting the medical opinions that claimant is not totally disabled and in relying on claimant's lay testimony. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

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 and 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 was totally disabled due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

[2] This case was reassigned to Administrative Law Judge Jennifer Gee on remand, without objection, because Administrative Law Judge William J. King was no longer with the Office of Administrative Law Judges. *See* Decision and Order on Remand at 2.

[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.

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting 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).

Employer initially asserts that there is no evidence of record to support the administrative law judge's finding that the qualifying September 22, 2014 blood gas study is sufficiently reliable to establish total disability. Employer further maintains the administrative law judge erred in relying on that study when it does not conform to the quality standards and as the preponderance of the blood gas studies are non-qualifying. We disagree.

As the Board explained in its prior decision, the quality standards do not apply to the September 22, 2014 blood gas study as it was performed in the course of treatment. *Conley*, BRB No. 16-0581 BLA, slip op. at 7 n.16, *citing* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Nevertheless, the administrative law judge must be persuaded the study is sufficiently reliable to support a finding of total respiratory or pulmonary disability.[5] *Id*. The administrative law judge acted within her discretion in determining no medical evidence calls into question its reliability. She accurately found although Dr. Rosenberg commented on the variability of claimant's blood gas study results, he "did not comment

[4] The administrative law judge found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), as she found the pulmonary function studies are in equipoise and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 6, 9.

[5] The record contains six blood gas studies dated December 9, 2011, February 22, 2012, May 22, 2012, December 13, 2012, December 10, 2013, and September 22, 2014. Director's Exhibits 12, 13; Claimant's Exhibits 5, 6; Employer's Exhibit 3. The studies performed on December 9, 2011, February 22, 2012 and September 22, 2014 produced qualifying values. The administrative law judge determined the December 9, 2011 and February 22, 2012 studies are invalid based on the opinions of Drs. Mettu, Fino, and Vuskovich. Decision and Order on Remand at 7. Accordingly, she considered the three non-qualifying studies dated May 22, 2012, December 13, 2012 and December 10, 2013, and the qualifying study dated September 22, 2014. *Id*. at 7-9.

specifically" on the validity of the September 22, 2014 study.[6] Decision and Order on Remand at 8; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). In addition, the administrative law judge permissibly found Dr. Fino "merely speculate[d]" that certain conditions "which would tend to invalidate the study could be present because contrary information is not reported with the test results" and did not "provide reasons to believe these invalidating conditions" were present.[7] Decision and Order at 8-9; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013).

Because it is rational and supported by substantial evidence, we affirm the administrative law judge's determination that the September 22, 2014 study was sufficiently reliable to support a finding of total disability. *See Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984) (in the absence of qualified medical testimony that objective test results are unreliable, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination). The administrative law judge also permissibly found the span of "slightly more" than nine months between the non-qualifying study dated December 10, 2013 and the qualifying September 22, 2014 study to be "significant for purposes of determining [c]laimant's most recently ascertainable pulmonary condition." Decision and Order on Remand at 9; *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). She therefore acted within her discretion in according

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[6] Dr. Rosenberg submitted a supplementary report dated November 30, 2015, based on a review of objective studies in addition to the ones he obtained during his examination of claimant. These studies included the qualifying but invalidated blood gas study performed on September 9, 2011 and the qualifying September 22, 2014 blood gas study. Employer's Exhibit 10. Regarding the blood gas studies, he commented "[claimant] has preserved oxygenation" and "while some decreased oxygen levels have been measured at times, when [claimant] was evaluated by myself, normal gas exchange was found." *Id.*

[7] Dr. Fino stated:

> [B]lood gases should be done in the sitting position, and there is no mention whether [Claimant] was sitting or lying down. Additionally, there is no mention as to why the blood gas was performed. Furthermore, there is no mention as to whether [Claimant] was acutely ill or in his normal state. Acute illness can lower the blood gas. For these reasons, this blood gas cannot be used to determine disability according to the Federal Black Lung standards.

Employer's Exhibit 13 at 3. The record of the September 22, 2014 blood gas study shows Dr. Baker administered it on room air at Saint Joseph Martin hospital and it produced a pO2 of 60 and a pCO2 of 36. Claimant's Exhibit 5.

greatest weight to the September 22, 2014 study and in finding it established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004).

The administrative law judge then considered the medical opinions of Drs. Alam, Fino, and Rosenberg. Dr. Alam examined claimant at the request of the Department of Labor on February 22, 2012, and diagnosed a totally disabling pulmonary impairment based on the pulmonary function and blood gas studies he administered. Director's Exhibit 12. He submitted a supplemental report dated August 29, 2015, in which he reviewed pulmonary function and blood gas studies other physicians administered. Director's Exhibit 51. Without specifically identifying claimant's objective test results, Dr. Alam stated they "improved and are not meeting the disability levels now." *Id*. Dr. Fino examined claimant on December 13, 2012 and opined he "retains the physiologic capacity from a respiratory standpoint to perform all the requirements of his last job . . . assum[ing] his last job required heavy sustained labor." Director's Exhibit 13. Dr. Fino also submitted reports dated September 18, 2013 and November 20, 2015, in which he reviewed additional evidence, including the qualifying September 22, 2014 blood gas study. Employer's Exhibits 5, 13. He stated the study is invalid and indicated his opinion that claimant is not totally disabled remained unchanged. *Id*. Dr. Rosenberg examined claimant on December 10, 2013, and reviewed the results of the examinations of Drs. Alam and Fino. *Id*. He concluded claimant was "not disabled from a pulmonary perspective." *Id*. At his deposition, taken on June 9, 2014, and in a second medical report dated November 30, 2015, Dr. Rosenberg indicated that his review of the additional medical evidence did not change his opinion that claimant is not totally disabled. Employer's Exhibits 4 (at 10), 5.

The administrative law judge gave Dr. Alam's opinion "little probative weight" because he "did not clearly identify the additional medical information" he relied on, and "did not review the September 22, 2014 [blood gas study] (which I have found to be entitled to probative weight in support of a finding that [c]laimant is disabled)." Decision and Order on Remand at 14. She also gave "little probative weight" to Dr. Rosenberg's opinion as his "explanation for disregarding the most recent test does not take into account the progressive nature of pneumoconiosis, or the possibility that while [c]laimant's earlier test results were not the product of that progression, his more recent tests are the product of a progressive disease." *Id*. Finally, she stated "[b]ecause Dr. Fino's conclusion that [c]laimant is not totally disabled relied on his opinion that the September 22, 2014 [blood gas study] was invalid, I find that his opinion on this issue is likewise entitled to little probative weight." *Id*.

The administrative law judge further considered claimant's testimony and found it "provides context to the objective medical evidence and suggests that his most recently

ascertainable respiratory or pulmonary condition is in decline." Decision and Order at 14-15. She specifically relied on his responses "[w]hen asked how his breathing difficulties affected his daily life," that "I just can't do a lot of things that I used to do. I have to hire somebody for weed eating and so on, just simple jobs around the home, I can't do anymore." Hearing Transcript at 13; Decision and Order on Remand at 14. She also noted claimant's response when asked if his breathing problems are worse in the morning or at night: "It's usually in the morning when I first get up because I'd been on oxygen all night and if I get up and walk through the house, I start smothering." Hearing Transcript at 14; Decision and Order on Remand at 14.

Weighing all relevant evidence together, she found the qualifying blood gas study dated September 22, 2014 and claimant's testimony establish he has a totally disabling respiratory or pulmonary impairment. *Id*. at 15. Thus, she determined claimant invoked the Section 411(c)(4) presumption. *Id*.

Employer contends the administrative law judge erred in discrediting the opinions of Drs. Alam, Fino, and Rosenberg. Employer further argues the administrative law judge improperly substituted her opinion for that of the medical experts in finding the September 22, 2014 blood gas study and claimant's testimony establishes total disability. These contentions are without merit.

The administrative law judge acted within her discretion in giving diminished weight to Dr. Alam's revised opinion on total disability, as she accurately determined he did not identify the evidence he relied on in concluding claimant is not totally disabled and did not specifically discuss the qualifying blood gas study dated September 22, 2014.[8] *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); Director's Exhibit 51. She also permissibly found Dr. Fino's opinion entitled to little weight because he declined to attach any significance to the results of the September 22, 2014 blood gas study she found reliable to establish total disability. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002). Finally, she acted within her discretion in finding Dr. Rosenberg's opinion entitled to little weight as he did not adequately explain why the qualifying values on the most recent blood gas study from September 22, 2104 are

[8] Contrary to employer's contention, absent a summary of the evidence Dr. Alam reviewed contained in his report, the administrative law judge was not required to assume that because the material Dr. Alam purportedly reviewed "all came from the [Department of Labor]," he based his opinion on the pulmonary function and blood gas studies the parties submitted. Employer's Brief at 11; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

not indicative of a total respiratory or pulmonary disability.[9] *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). We therefore affirm the administrative law judge's determination that "none of the medical opinions of record are entitled to significant probative weight for or against a finding that [c]laimant is totally disabled by a respiratory or pulmonary impairment." Decision and Order on Remand at 14.

Based on our affirmance of the administrative law judge's weighing of the medical opinions, she rationally determined that this evidence does not constitute probative evidence contrary to the qualifying September 22, 2014 blood gas study. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order on Remand at 15. Similarly, she rationally found the non-qualifying pulmonary function studies are not contrary to the September 22, 2014 blood gas study, based on her permissible determination that the pulmonary function studies do not weigh for or against a finding of total respiratory or pulmonary disability.[10] *See Crisp*, 866 F.2d at 179; Decision and Order on Remand at 15.

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[9] Dr. Rosenberg's initial report and deposition testimony predate the September 22, 2014 blood gas study. When asked at his deposition to explain the "wax[ing] and wan[ing]" of claimant's earlier blood gas study results, Dr. Rosenberg responded:

> You could have some obesity, depending on position. He does have a history of sleep apnea so there is a component of overweight, obese component to his respiratory condition. You can get like an asthmatic component that will wax and wane. You could have aspiration, [gastroesophageal reflux disease] and some aspiration could cause that kind of thing.

Employer's Exhibit 4 at 13. He responded "[y]eah" when asked if these conditions can "cause abnormalities that really are there some days and not there other days." *Id*. In his supplemental report, Dr. Rosenberg indicated he reviewed additional medical records including the September 22, 2014 study and stated, "[w]hile some decreased oxygen levels have been measured at times, when he was evaluated by myself, normal gas exchange was found." Employer's Exhibit 10. He concluded, "[b]ased on a review of the above information, my previously reached conclusions remain intact. . . . Also, [claimant] has preserved oxygenation." *Id*.

[10] We further note non-qualifying pulmonary function studies do not call into question qualifying arterial blood gas studies because pulmonary function studies and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal*

Finally, we reject employer's assertion that the administrative law judge erred in relying on claimant's lay testimony to find total disability established. She correctly recognized that "[a]ccording to the regulations, [c]laimant's testimony, standing alone, cannot support a finding of total disability[.]" Decision and Order on Remand at 14, *citing* 20 C.F.R. §718.305(b)(3) ("In a claim involving a living miner, a miner's affidavit or testimony . . . may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment."); *see also* 20 C.F.R. §718.204(d)(5); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987) (lay testimony is insufficient to establish total respiratory or pulmonary disability unless at least a quantum of medical evidence indicating a respiratory or pulmonary impairment corroborates it). She then rationally determined that when claimant's testimony is considered with the September 22, 2014 blood gas study, it "provide[s] additional support for giving the most recent [blood gas study] controlling weight over the earlier [blood gas studies] because it suggests that [c]laimant's current state of pulmonary health is poor, and has had noticeable effects on his physical capabilities." Decision and Order on Remand at 15; *see Trent*, 11 BLR at 1-28.

Because the administrative law judge permissibly weighed claimant's testimony in conjunction with the qualifying September 22, 2014 blood gas study, we reject employer's assertion the administrative law judge erred in relying on claimant's testimony to assess whether claimant was totally disabled. *See Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999). We therefore affirm her findings claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the Section 411(c)(4) presumption. In light of the Board's prior affirmance of Judge King's determination that employer is unable to rebut the presumption, the administrative law judge appropriately reinstated this finding and awarded benefits. Decision and Order on Remand at 15.

Co., 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

Accordingly, the Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge