U.S. Department of Labor

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

BRB No. 16-0636 BLA

JACK W. STEELE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED	)	
	)	DATE ISSUED: 09/21/2017
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (14-BLA-5940) of Administrative Law Judge Richard A. Morgan awarding benefits 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 subsequent claim filed on November 29, 2013.[1]

After crediting claimant with at least 29.67 years of qualifying coal mine employment,[2] the administrative law judge found that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence 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. Employer also argues that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the administrative law judge's

[1] Claimant filed previous claims in 2003 and 2009. Director's Exhibits 1, 2. The administrative law judge denied claimant's most recent prior claim because the evidence did not establish that claimant suffered from a totally disabling respiratory or pulmonary impairment. Upon review of claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Steele v. Addington, Inc.*, BRB No. 12-0141 BLA (Nov. 28, 2012) (unpub.).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, the Board will apply the law 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).

[3] Because the administrative law judge determined that the evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he also found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 25.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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. 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).

Employer argues that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

After finding that the pulmonary function study evidence in the case is not "a reliable method to determine whether [claimant] is totally disabled" pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 35-36. Because the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure, he also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 34.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Forehand, Rosenberg, and Castle. Dr. Forehand conducted the Department of Labor (DOL)-sponsored pulmonary evaluation on January 9, 2014. Although the January 9, 2014 pulmonary function study was non-qualifying for total disability, Dr. Forehand opined that Claimant was totally disabled based on the FEV1 value obtained which was 52% of predicted. Director's Exhibit 17.

However, after Dr. Ranavaya invalidated the January 9, 2014 pulmonary function study based on less than optimal effort, cooperation, and comprehension,[6] the DOL provided claimant with an opportunity to undergo a second pulmonary function study.

[5] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant had at least 29.67 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Drs. Rosenberg and Castle also opined that the January 9, 2014 pulmonary function study is invalid. Dr. Rosenberg invalidated the study for incomplete effort, while Dr. Castle invalidated the study for less than maximal effort. Employer's Exhibits 1, 5.

The second study, administered by Dr. Forehand on February 28, 2014, produced higher non-qualifying results, including an FEV1 value that was 74% of the predicted value.[7] Director's Exhibit 17. Although Dr. Forehand interpreted the second pulmonary function study as revealing an "irreversible obstructive ventilatory pattern," he did not reassess whether claimant was totally disabled from a respiratory standpoint. *Id.*

The administrative law judge noted that "Dr. Forehand initially found [claimant] totally disabled based on invalid [pulmonary function study] results and then conducted a second [pulmonary function study] but did not re-evaluate his earlier opinion *which presumably remained unchanged*." Decision and Order at 36 (emphasis added). Employer contends that there is no evidence to support the administrative law judge's presumption that Dr. Forehand's assessment of claimant's pulmonary capacity did not change after he reviewed the higher, non-qualifying pulmonary function study results obtained during the second study. We agree. Dr. Forehand's only assessment of claimant's pulmonary function was based upon invalidated pulmonary function study results. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Because Dr. Forehand did not provide a disability assessment after he administered the second pulmonary function study, which produced a higher FEV1 value, the administrative law judge's determination that the doctor's disability assessment presumably "remain[ed] unchanged" is no more than speculation.

We also agree with employer that the administrative law judge selectively analyzed Dr. Rosenberg's opinion. The administrative law judge found that Dr. Rosenberg's comment that claimant has the respiratory capacity to perform his last coal mine work "at certain points in time" "equate[d] to a [finding of] total disability." Decision and Order at 36. In his December 10, 2014 report, Dr. Rosenberg opined that claimant had "no clinically significant respiratory impairment and [was] not disabled from a pulmonary perspective." Employer's Exhibit 1 at 4. During a March 23, 2016 deposition, Dr. Rosenberg noted that claimant was able, at times, to achieve non-

[7] There is no indication that Dr. Ranavaya assessed the validity of the second pulmonary function study provided by the Department of Labor. Dr. Rosenberg, however, reviewed the February 28, 2014 study and opined that it was invalid, noting that claimant "could have provided more consistent and better efforts." Employer's Exhibit 6 at 15. Although Dr. Castle also opined that the study is invalid, he indicated that it nevertheless provided useful information. Because the FVC value was normal and the FEV1 value was "well above federal disability levels," Dr. Castle opined that claimant "does not have a disabling respiratory impairment from any cause." Employer's Exhibit 7 at 20-21. Despite the invalidations of the February 28, 2014 pulmonary function study, the administrative law judge stated, without explanation, that he declined to find the study invalid. Decision and Order at 35 n.64.

qualifying pulmonary function and blood gas values. Employer's Exhibit 6 at 22. Dr. Rosenberg, therefore, indicated that claimant had sufficient respiratory capacity to do his last coal mine work "[a]t certain points in time." Employer's Exhibit 6 at 22. Subsequent to this testimony, Dr. Rosenberg opined, without equivocation, that claimant does not have a totally disabling respiratory impairment.[8] *Id.* at 29-30. We, therefore, agree with employer that the administrative law judge erred in finding that Dr. Rosenberg's opinion was supportive of a finding of total disability.[9]

Although the medical opinion evidence before the administrative law judge is currently insufficient to establish that claimant suffers from a totally disabling pulmonary impairment, we cannot reverse the administrative law judge's award of benefits without addressing whether the DOL provided claimant with a complete pulmonary evaluation as

[8] We further note that Dr. Rosenberg found all of the new pulmonary function studies of record to be either invalid or lacking sufficient information to validate, which is in accord with the administrative law judge's assessment that the pulmonary function study evidence is not "reliable." Decision and Order at 35. As a result, even if Dr. Rosenberg's opinion could be construed as supporting a finding of total disability, the administrative law judge failed to consider the extent to which it was based upon the invalid pulmonary function study evidence. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990) (diagnosis of total disability based entirely on invalid pulmonary function studies is unreasoned). When viewed in the context of his entire testimony, however, it is clear that Dr. Rosenberg was not diagnosing total disability, but was merely recognizing that claimant was at certain times, even with less than optimal effort, able to produce non-qualifying results.

[9] Dr. Castle, the only other physician to assess the degree of claimant's pulmonary impairment, opined that claimant "does not have a disabling respiratory impairment from any cause." Employer's Exhibit 7 at 21. The administrative law judge accorded less weight to Dr. Castle's opinion because he found that the doctor was "wrong about the [blood gas study] results." Decision and Order at 37. The administrative law judge presumably meant that Dr. Castle's assessment of the blood gas study results conflicted with the assessments provided by Drs. Forehand and Rosenberg. The administrative law judge, however, erred in indicating that Dr. Forehand interpreted the non-qualifying January 9, 2014 blood gas study as revealing hypoxemia. Decision and Order at 13; Director's Exhibit 17. As employer accurately notes, Dr. Forehand interpreted the study as revealing "no arterial hypoxemia." Director's Exhibit 17. Moreover, Drs. Rosenberg and Castle each interpreted the results of claimant's non-qualifying November 10, 2014 blood gas study as revealing only a mild reduction of oxygenation with exercise. Employer's Exhibits 1 at 4; 5 at 10.

required under Section 413(b) of the Act, 30 U.S.C. §923(b).[10] The purpose of a DOL-sponsored evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Consistent with that purpose, a complete pulmonary evaluation must include "a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Importantly, the complete pulmonary evaluation must also "address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim." 20 C.F.R. §725.456(e).

The United States Court of Appeals for the Sixth Circuit has set forth the standard for determining whether a pulmonary evaluation is complete:

> The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-221 (6th Cir. 2009).

As discussed, *supra*, Dr. Forehand's initial assessment that claimant was totally disabled from a respiratory standpoint was based upon invalidated pulmonary function study results. After Dr. Forehand conducted a second pulmonary function study that produced higher FEV1 and FVC values, he did not provide an updated assessment or opinion regarding the extent of claimant's pulmonary impairment. Thus, Dr. Forehand did not address the relevant issue of total disability in a manner that would allow the administrative law judge to determine whether claimant suffers from a totally disabling respiratory impairment. We, therefore, remand the case to the administrative law judge for further development of the evidence. On remand, the administrative law judge shall, in his discretion, "remand the claim to the district director with instructions to develop only such additional evidence as is required,"[11] or "allow the parties a reasonable time to obtain and submit such evidence . . . ." 20 C.F.R. §725.456(e).

[10] Pursuant to Section 413(b) of the Black Lung Benefits Act, "Each miner who files a claim for benefits . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b).

[11] A similar requirement applies to the district director:

Because the medical evidence does not currently support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we vacate the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[12] In light of this holding, we also vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and his determination that claimant invoked the Section 411(c)(4) presumption.[13] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

> If any medical examination or test conducted [as part of claimant's complete pulmonary evaluation] . . . does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director *must* schedule the miner for further examination and testing.

20 C.F.R §725.406(c) (emphasis added).

[12] The administrative law judge noted that claimant testified that he is unable to walk more than ten to twelve yards, and requires oxygen treatment. Decision and Order at 17, 36-37. However, in the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony. *See* 20 C.F.R. §718.204(d)(5).

[13] Because this case is subject to the development of further medical evidence, we decline to address employer's contention that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.

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 consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge