U.S. Department of Labor

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

BRB No. 16-0653 BLA

DAVID D. TRUMP, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 09/27/2017
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06157) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent claim filed on October 31, 2011,[1] pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant filed five prior claims, each of which was denied. Director's Exhibits 1-4. Claimant's fifth claim was filed on December 23, 2004, and was denied by

amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established nineteen and one-half years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, based on the newly submitted evidence. Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] and also established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[3] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled and thus entitled to invocation of the Section 411(c)(4) presumption. Employer also contends that the administrative law judge did not give proper reasons for finding employer's evidence to be insufficient to establish rebuttal of the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.[4]

Administrative Law Judge Paul Teitler on Mar. 21, 2007, because claimant did not establish total disability. Director's Exhibit 4.

[2] 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 surface 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.

[3] When a miner 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 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). Because claimant's last claim was denied because the evidence failed to establish total disability, claimant was required to establish this element in order to obtain a merits review of his current subsequent claim. *See White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established nineteen and one-half years of underground coal mine employment.

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.[5] 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

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered two newly submitted blood gas studies dated January 10, 2012 and October 3, 2012. The January 10, 2012 blood gas study obtained by Dr. Rasmussen had qualifying values for total disability at rest, and with exercise, while the October 3, 2012 blood gas study obtained by Dr. Zaldivar had non-qualifying values at rest, and no exercise study was performed.[6] Director's Exhibit 15; Employer's Exhibit 1. Observing that "exercise testing is a better predictor of [claimant's] ability to work in the mines," the administrative law judge gave determinative weight to the qualifying exercise blood gas study and found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11.

Employer asserts that the administrative law judge erred in finding that claimant established total disability based on the qualifying exercise blood gas study, as Drs. Zaldivar and Basheda specifically opined that claimant's blood gas abnormality is not due to a pulmonary impairment. The regulations provide that absent contrary probative evidence, claimant may establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), based on qualifying blood gas studies. Dr. Basheda opined that the miner's exercise-induced hypoxemia "may represent underlying cardiovascular impairment" and Dr. Zaldivar stated that he did not know the cause of the "very abnormal" blood gas results obtained by Dr. Rasmussen, "although there are cardiac reasons and a problem with the left hem[i]diaphragm that may justify such

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See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983); Decision and Order at 7, 9 n.14, 10.

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

hypoxemia." Neither physician stated that the arterial blood gas test could not be taken as indicative of a pulmonary or respiratory impairment. Further, as the administrative law judge found, neither physician challenged the validity of the study. Employer raises no other specific argument with regard to the administrative law judge's crediting of the qualifying exercise blood gas study. Consequently, we affirm the administrative law judge's finding that based on consideration of the arterial blood gas evidence in isolation, claimant could establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).[7]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[8] the administrative law judge credited Dr. Rasmussen's opinion that claimant is totally disabled over the contrary opinions of Drs. Zaldivar and Basheda.[9] Decision and Order at 11-17. Initially, we reject employer's contention that the administrative law judge did not rationally explain the weight accorded the opinions of Drs. Zaldivar and Basheda. The administrative law judge

[7] The administrative law judge considered each possible basis for establishing total disability independently, and then considered them in totality. Decision and Order at 9-17, 22. Thus, although she phrased her determinations with respect to each possible basis in terms of establishing total disability, she actually did not find total disability established until she considered them together.

[8] The administrative law judge determined that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as all of the newly submitted pulmonary function studies were non-qualifying for total disability. Decision and Order at 10. The administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), because there was no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 9 n.14.

[9] Dr. Rasmussen opined that claimant's January 10, 2012 blood gas study showed a marked impairment in oxygen transfer and hypoxia after light exercise, which would preclude claimant from performing his usual coal mine work. Director's Exhibit 15. Drs. Zaldivar and Basheda opined that claimant is not totally disabled, based on the non-qualifying pulmonary function studies. Employer's Exhibits 1, 5, 6. Dr. Zaldivar stated, "I do not know the cause of the very abnormal resting and exercise gases obtained by Dr. Rasmussen, although there are cardiac reasons and a problem with the left hemidiaphragm that may justify such hypoxemia." Employer's Exhibit 1. Dr. Basheda reported that claimant had "[n]o evidence of pulmonary impairment or disability based on pulmonary function testing." Employer's Exhibit 5. He diagnosed "exercise-induced hypoxemia with questionable cardiovascular limitation with superimposed exercise-induced metabolic acidosis." *Id.*

correctly noted that while Drs. Zaldivar and Basheda opined that claimant has no respiratory impairment based on the non-qualifying pulmonary function studies, blood gas studies and pulmonary function studies measure different types of impairment. Decision and Order at 6, *citing Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984). We see no error in the administrative law judge's assignment of less weight to the opinions of Drs. Zaldivar and Basheda on the issue of total disability, as neither physician specifically addressed whether claimant is totally disabled from performing his usual coal mine work, in light of the qualifying exercise blood gas study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 7.

However, we agree that the administrative law judge did not adequately explain her finding of total disability based on Dr. Rasmussen's opinion. Relying on "claimant's testimony and the documents [c]laimant filed in conjunction with his claim," the administrative law judge found that "[c]laimant performed heavy manual labor in his last coal mine job as a mine foreman." Decision and Order at 16. The administrative law judge specifically noted that claimant was required "to sit and stand for seven hours a day, crawl three hours a day, shovel spilled coal and *lift eighty to 100 pounds four times a day*." *Id*. (emphasis added). In crediting Dr. Rasmussen's opinion, the administrative law judge stated:

> During Dr. Rasmussen's exercise test, [c]laimant walked on a treadmill at 1.8 miles per hour and zero percent grade for four minutes. Accordingly, Dr. Rasmussen reasonably concluded the [c]laimant performed light exercise during his arterial blood gas test. *Thus, Dr. Rasmussen's opinion that* [*c*]*laimant would not be able to perform heavy manual labor in his last coal mine job* because [c]laimant demonstrated a gas exchange impairment after light exercise is well reasoned.

Decision and Order at 16 (emphasis added).

Employer argues that, contrary to the administrative law judge's conclusion, claimant's hearing testimony from his prior claim does not support a finding that claimant performed heavy manual labor. Employer notes that during a September 26, 2006 hearing, when asked whether he did any physical labor as a foreman, claimant responded "No" and indicated that he did not do "any hard work." 2006 Hearing Transcript at 8. Employer also points out that contrary to the administrative law judge's description of claimant's lifting requirements, the CM-913 form indicates that claimant was required to lift only "4 pounds 80-100 times per day." Director's Exhibit 8. Employer asserts that the lifting requirements described on the CM-913 form are consistent with claimant's description at the hearing in June 18, 2014, that claimant had

to carry a safety light, "a belt and hammer and stuff like that." 2014 Hearing Transcript at 12.

To the extent that the administrative law judge did not specifically identify the basis for her finding that claimant's usual coal mine employment required heavy manual labor, and because she has not resolved potential conflicts in the evidence on this issue, her Decision and Order does not satisfy the Administrative Procedure Act (APA).[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation). Thus, we vacate the administrative law judge's determinations that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invocation of the Section 411(c)(4) presumption.

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

Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[11] 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

[10] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), 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).

[11] 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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but failed to establish that claimant does not have legal pneumoconiosis. Specifically, the administrative law judge concluded that the opinions of Drs. Basheda and Zaldivar were not credible to disprove the presumed fact of legal pneumoconiosis because neither physician diagnosed a respiratory or pulmonary impairment, contrary to the administrative law judge's finding under 20 C.F.R. §718.204(b)(2). Decision and Order at 31. As neither Dr. Basheda nor Dr. Zaldivar diagnosed legal pneumoconiosis, the administrative law judge found that their opinions were not credible to establish that no part of claimant's respiratory disability was related to legal pneumoconiosis. *Id.* at 31-32. To the extent that we have vacated the administrative law judge's determination pursuant to 20 C.F.R. §718.204(b), which influenced her credibility findings on rebuttal, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 20 C.F.R. 718.305(d)(1)(i)(A), (ii).

Remand Instructions

On remand, the administrative law judge must reconsider whether claimant has established total disability under 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge first must determine the exertional requirements of claimant's usual coal mine employment and explain the basis for those findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge then shall address whether Dr. Rasmussen's finding of a marked impairment in oxygen transfer with light exercise would preclude claimant from performing the requirements of claimant's usual coal mine work, even if that work does not involve heavy or very heavy manual labor.[12] The

[12] In his report, Dr. Rasmussen indicated that he had reviewed the CM-913 form titled "Description of Coal Mine Work and Other Employment," completed by claimant. Director's Exhibit 15. Dr. Rasmussen summarized the physical requirements of claimant's job as follows:

> [Claimant] eventually became general mine foreman, which was his last job. He went underground daily. He did considerable walking and crawling. He set timbers and shoveled to clean up spills. He unloaded supplies. He pulled miner cable. All of his work was at the face. He did heavy and some very heavy manual labor.

Id. Dr. Rasmussen indicated that claimant's exercise blood gas study showed "marked impairment in oxygen and hypoxia during very light exercise" and stated that claimant "does not retain the pulmonary capacity to perform his regular coal mine employment." *Id.*

administrative law judge must also consider whether the evidence supportive of total disability outweighs the contrary probative evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

If total disability is established, claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and claimant will have satisfied his burden under 20 C.F.R. §725.309. If claimant invokes the Section 411(c)(4) presumption, the administrative law judge must reconsider whether employer has rebutted the presumption. If claimant is unable to invoke the Section 411(c)(4) presumption, the administrative law judge must deny benefits as claimant will have failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge