U.S. Department of Labor

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

BRB No. 17-0665 BLA

IRA DEAN PACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG HAZARD, LLC	)	DATE ISSUED: 09/26/2018
	)	
and	)	
	)	
ARCH COAL COMPANY	)	
	)	
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 of William J. King, Administrative Law Judge, United States Department of Labor.

Ira Dean Pace, Hyden, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2014-BLA-05220) of Administrative Law Judge William J. King, rendered on a claim filed on July 2, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the employer's stipulation and the evidence of record, the administrative law judge credited claimant with seventeen years of surface coal mine employment and found that claimant's work was performed in conditions substantially similar to those found in an underground mine. However, because the administrative law judge determined that the evidence was insufficient to establish that claimant is totally disabled, he found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4).[2] Considering the claim under 20 C.F.R. Part 718, the administrative law judge also found that claimant failed to establish any element of entitlement and, therefore, denied benefits accordingly.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is rational, supported by substantial evidence, and in accordance with applicable law.[3] *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must

[1] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Under Section 411(c)(4), claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 5.

affirm the administrative law judge's findings if they satisfy these criteria. 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).

I. Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered 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 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four pulmonary function studies dated September 11, 2012, January 22, 2013, April 17, 2013, and November 19, 2015.[4] Decision and Order at 7-8. The September 11, 2012 study by Dr. Habre was qualifying for total disability[5] before use of a bronchodilator, and non-qualifying after a bronchodilator was administered. Director's Exhibit 11. The January 22, 2013 study by Dr. Dahhan was non-qualifying before and after the administration of a bronchodilator. Director's Exhibit 12. The April 17, 2013 and November 19, 2015 studies, obtained at the Saint Charles Respiratory Clinic, were qualifying and no bronchodilator was administered. Director's Exhibit 13; Claimant's Exhibit 4. The administrative law judge "accord[ed] less weight to the results of the April 2013 and November 2015 studies" finding that they "do not describe [c]laimant's effort and comprehension" and indicate "that only two attempts were made while the guidelines in Appendix B to Part 718 require that three acceptable tests are included." Decision and Order at 8. Based on the non-qualifying post-bronchodilator results obtained on September

[4] The administrative law judge permissibly determined that claimant's average reported height was 67.1 inches tall and correctly applied the closest table height of 67.3 inches for purposes of assessing whether the pulmonary function studies were qualifying for total disability. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

11, 2012, and the non-qualifying pre-bronchodilator and post-bronchodilator results obtained on January 22, 2013, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[6]

We cannot affirm the administrative law judge's finding, as he mischaracterized the pulmonary function study evidence and did not adequately explain his conclusion. *See* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). The regulation at 20 C.F.R. §718.103(b) provides that "[a]ll pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings." 20 C.F.R. §718.103(b); *see* Appendix B. Contrary to the administrative law judge's finding, the printouts for the April 17, 2013 and November 19, 2015 studies include three tracings from at least three trials. Director's Exhibit 13; Claimant's Exhibit 4. In addition, each study includes a statement that claimant gave "good effort."[7] *Id.*

We therefore vacate the administrative law judge's determination that claimant failed to establish total disability based on the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). To the extent the administrative law judge's weighing of the pulmonary function studies influenced his weighing of the medical opinion evidence, we further vacate the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[8] Because the administrative law judge

[6] The administrative law judge correctly found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as there are no qualifying blood gas studies of record, and no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 8-9; Director's Exhibits 11, 12.

[7] The administrative law judge noted that Dr. Ajjarapu validated the results of the November 19, 2015 study, but the administrative law judge erred in failing to explain the weight he accorded to Dr. Ajjarapu's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 7; Claimant's Exhibit 4.

[8] The administrative law judge credited the opinions of Drs. Dahhan and Jarboe that claimant is not totally disabled, as supported by the non-qualifying pulmonary function studies. Decision and Order at 12. He discounted Dr. Habre's opinion that claimant is totally disabled because the physician relied on the September 11, 2012 qualifying pre-

erred in concluding that claimant is not totally disabled by a respiratory or pulmonary impairment, we vacate his finding that claimant is unable to invoke the Section 411(c)(4) presumption, and we further vacate his denial of benefits pursuant to 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

II. Remand Instructions

On remand, the administrative law judge must reconsider whether claimant has established total disability based on the pulmonary function study evidence[9] and medical opinion evidence. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must compare the exertional requirements of claimant's most recent coal mine work with the physicians' opinions regarding claimant's physical limitations, and reach a conclusion as to whether the medical opinion evidence supports a finding that claimant is totally disabled. *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). If the administrative law judge finds that claimant has established total disability under either of the subsections at 20 C.F.R. §718.204(b)(2)(i) or (iv), he must then weigh that evidence against the contrary probative evidence in reaching a determination as to whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232.

If the administrative law judge determines that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant will have invoked the Section 411(c)(4) presumption, and the administrative law judge must determine whether employer has rebutted that presumption.[10] *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If claimant fails to

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bronchodilator study that the administrative law judge found was outweighed by the non-qualifying studies. *Id*.

[9] The comments to the regulations caution against reliance on post-bronchodilator results in determining total disability: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980).

[10] Once the Section 411(c)(4) presumption is invoked, the burden shifts to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

establish total disability, a prerequisite for invocation of the Section 411(c)(4) presumption, and a necessary element of entitlement pursuant to 20 C.F.R. Part 718, benefits are precluded. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In rendering his findings on remand, the administrative law judge must comply with the Administrative Procedure Act.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] 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).