U.S. Department of Labor

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

BRB No. 18-0475 BLA

GARY RANDY JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION LIMITED	)	
	)	
and	)	
	)	
ANESTHESIOLOGISTS PROFESSIONAL EMPLOYERS RISK	)	DATE ISSUED: 09/30/2019
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Gary Randy Jones, Corbin, Kentucky.

Felicia A. Snyder (Snyder Law Office, PLLC), Lexington, Kentucky, for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2017-BLA-05041) of Administrative Law Judge Jason A. Golden,[1] rendered on a subsequent claim filed on June 20, 2013,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 15.44 years of underground coal mine employment. He found claimant is not totally disabled and thus did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] or establish a change in the applicable condition of entitlement.[4] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§ 718.204(b)(2), 725.309(c). Accordingly, the administrative law judge denied benefits.

[1] On July 25, 2019, the Board sent a letter to claimant giving him the opportunity to have his case reviewed to determine whether it should be remanded for a new hearing before a new administrative law judge. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). Claimant was directed to make his request for *Lucia* review by August, 4, 2019. Having not received a reply from claimant to the Board's letter, we will review only the merits of his appeal.

[2] Claimant's prior claim, filed on May 13, 2011, was finally denied by the district director on February 1, 2012, for failure to establish total disability. Director's Exhibit 1.

[3] 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 or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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). Claimant's prior claim was denied because he failed to establish total

On appeal, claimant generally challenges the administrative law judge's finding he is not totally disabled. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), asserts the administrative law judge erred in weighing Dr. Banick's opinion on total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must approve the administrative law judge's findings if they are 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

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).

The administrative law judge correctly found the three new pulmonary function studies non-qualifying[6] and the two new arterial blood gas studies non-qualifying.[7] 20

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disability. Director's Exhibit 1. Thus, he had to establish total disability in order for the administrative law judge to consider the merits of his subsequent claim.

[5] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 12. 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).

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

[7] Because the pulmonary function studies reported different heights for claimant, the administrative law judge permissibly averaged them to obtain an actual height of 73.5

C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 27; Director's Exhibits 11-13. He also accurately noted there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 27.

The administrative law judge also considered two new medical opinions. Dr. Littner conducted the Department of Labor examination on October 10, 2013, and opined claimant is totally disabled based on "both his FEV1 and MVV being less than 60% of predicted" and a reduction in diffusion capacity. Director's Exhibits 11, 22, 57. The administrative law judge permissibly found Dr. Littner's opinion not well reasoned because he did "not provide an explanation of why the divergence of [claimant's] MVV and diffusion capacity values from their predicted values totally disables [him] or prevents him performing his usual coal mine work."[8] Decision and Order at 28; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *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).

The administrative law judge erred, however, in summarily stating Dr. Banick's opinion does "not assist [claimant] in proving disability."[9] Decision and Order at 28; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Dr. Banick examined claimant on July 13, 2015, and opined that while the results of the pulmonary function testing were not qualifying under the black lung disability tables, they nevertheless showed an impairment in claimant's diffusion capacity. Director's Exhibit 13. He determined that claimant's

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inches. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 22-23. He noted claimant's actual height of 73.5 inches fell between the table heights of 73.2 and 73.6 inches listed in 20 C.F.R. Part 718, Appendix B, and properly used the table values for the height of 73.6 inches to evaluate the studies. Decision and Order at 23.

[8] Dr. Littner stated that "while the absolute FEV1 does not meet black lung table criteria for 60% by 0.07 liters, it does meet criteria by the predicted values used during the test," which is "more accurate than the Knudson values from 1976" found in Appendix B. Director's Exhibit 33. The administrative law judge permissibly found Dr. Littner did not adequately explain his rationale based on the medical literature he cited to support his opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 28.

[9] The administrative law judge summarized Dr. Banick's opinion but did not provide any analysis of it in discussing total disability. Decision and Order at 28.

reduced diffusion capacity, which is 41 percent of the predicted value, equates to a "severity Class 4B or [fifty] percent whole person impairment" under the American Medical Association, Guidelines to the Evaluation of Permanent Impairment.[10] *Id*.

Total disability may be established with a reasoned medical opinion, even where the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) (A doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying). The regulations specifically provide that a physician may base a reasoned medical judgment of total disability upon "medically acceptable clinical and laboratory diagnostic techniques . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991) (error to discredit a physician's diagnosis of total disability based on a diffusion capacity test merely because that test not listed in the regulations).

Here, the administrative law judge did not properly address whether Dr. Banick's opinion is adequately reasoned and whether his diagnosis of a "severity Class 4B or [fifty] percent whole person impairment" renders claimant totally disabled from performing the exertional requirements of his usual coal mine employment. Director's Exhibit 13; *see Cornett,* 277 F.3d at 578; *Walker*, 927 F.2d at 184-85; *Rowe*, 710 F.2d at 255. We therefore vacate the administrative law judge's finding that claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). We further vacate his findings claimant did not invoke the Section 411(c)(4) presumption and did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

Remand Instructions

The administrative law judge must reconsider on remand whether claimant established total disability based on the medical opinion evidence. He should determine the exertional requirements of claimant's usual coal mine employment and consider Dr. Banick's opinion in conjunction with those requirements. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996). If the administrative law judge determines that claimant is totally disabled, he will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If claimant fails to

[10] The Director, Office of Workers' Compensation Programs, argues Dr. Banick's diagnosis under the American Medical Association, Guidelines to the Evaluation of Permanent Impairment, "represented 'severe' [pulmonary] dysfunction." Director's Brief at 2.

establish total disability, the administrative law judge may reinstate the denial of benefits, as claimant is unable to invoke the Section 411(c)(4) presumption or establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309. In rendering his findings on remand, the administrative law judge must explain the bases for his credibility determinations as required by the Administrative Procedure Act.[11] *See Wojtowicz*, 12 BLR at 1-165.

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
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).