U.S. Department of Labor

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

BRB No. 18-0517 BLA

GLEN M. CHILDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH STAR MINING, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 09/20/2019
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Cameron Blair and Andrew L. Kenney (Fogle Keller Walker PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2016-BLA-05133) of Administrative Law Judge Clement J. Kennington, rendered on a subsequent claim filed on June 13, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant worked twenty-six years in underground coal mine employment. He also determined 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,[2] or establish entitlement under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, the Director and claimant argue the administrative law judge erred in finding he is not totally disabled and therefore did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant filed an initial claim for benefits on March 10, 2009, which the district director denied on October 13, 2009, for failing to establish any element of entitlement. Director's Exhibit 1. Claimant next filed a claim on March 7, 2011, but he withdrew it on September 1, 2011. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4), 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 surface 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.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

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 Director asserts the administrative law judge erred in finding the blood gas studies and medical opinions are not sufficient to establish total disability.[4]

Blood Gas Studies

The administrative law judge considered five resting blood gas studies. Dr. Gallop's August 20, 2014 study was qualifying;[5] Dr. Rosenberg's March 16, 2015 study was non-qualifying; Dr. Green's February 5, 2016 and April 19, 2016 studies were qualifying; and Dr. Sikder's December 2, 2016 study was non-qualifying. Director's Exhibits 11, 12; Claimant's Exhibits 1, 2; Employer's Exhibit 3.

The administrative law judge found three of the blood gas studies were qualifying, and two were non-qualifying, including the most recent study. Decision and Order at 13. He stated "[c]laimant does not contend that his [blood gas studies] are preponderantly

[4] We affirm, as unchallenged, the administrative law judge's findings that: claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis because there is no evidence he has complicated pneumoconiosis; the pulmonary function studies do not establish total disability; and there is no evidence indicating claimant has cor pulmonale with right-sided congestive heart failure. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.204(b)(2)(i), (iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

[5] A "qualifying" 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, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

qualifying" and explained he gave "greater weight to the latest [study] as it provides the most accurate reflection of [c]laimant's current pulmonary condition." *Id*. He further credited Dr. Dahhan's opinion that the two positive blood gas studies in February and April 2016 "seem to indicate an intermittent condition that had subsided or improved." *Id*. Thus, the administrative law judge found claimant did not establish total disability based on the blood gas studies. 20 C.F.R. §718.204(b)(2)(ii).

The Director argues the administrative law judge did not rationally explain why he credited the most recent blood gas study. Director's Brief at 7. We agree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that it is irrational to credit evidence solely on the basis of recency. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). Further, a more recent non-qualifying study may not provide the most accurate information regarding a miner's current pulmonary condition if the testing is not separated by a significant amount of time. *See Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309, 1-312 (1984). Here, the administrative law judge did not adequately consider that a preponderance of the blood gas studies administered within a two and one-half year period are qualifying.[6] *Id*. He also did not address whether "the seven and [one]-half months that had elapsed between the most recent non-qualifying study [administered on April 19, 2016] and the prior qualifying study [administered on February 5, 2016] was significant." Director's Brief at 7; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014).

Additionally, the administrative law judge credited the most recent non-qualifying study values based on Dr. Dahhan's opinion claimant is not able to produce an artificially higher value and thus his non-qualifying values show his blood gas impairment was intermittent or had improved. Employer's Exhibit 2. The Sixth Circuit has recognized, however, that because pneumoconiosis is a chronic condition, higher results are not necessarily more credible than lower results among valid objective tests. *See Keathley*, 773 F.3d at 740; *Thorn*, 3 F.3d at 719; *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (because pneumoconiosis is a chronic condition, on any given day, it is possible to do better than one's typical condition would permit). So the administrative law judge should consider Dr. Dahhan's rationale on remand and determine whether his opinion is

[6] Even if claimant did not specifically assert that a preponderance of the blood gas studies are qualifying, the administrative law judge was still required to evaluate all the relevant evidence and rationally explain his findings on total disability. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

reasoned regarding the significance of the blood gas studies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the administrative law judge did not provide an adequate rationale for assigning controlling weight to the December 2, 2016 non-qualifying blood gas study, other than recency, we vacate his finding that claimant did not establish total disability based on the blood gas evidence. 20 C.F.R. §718.204(b)(2)(ii); *see Woodward*, 991 F.2d at 319; *Conley*, 7 BLR at 1-312; Decision and Order at 13.

Medical Opinions

The administrative law judge credited the opinions of Drs. Dahhan and Rosenberg that claimant is not totally disabled over the contrary opinions of Drs. Gallup and Green. Decision and Order at 15. To the extent the administrative law judge's erroneous weighing of the blood gas studies influenced his credibility determinations on the medical opinions, we vacate them.[7] 20 C.F.R. §718.204(b)(2)(iv). Further, as the Director noted, the administrative law judge committed other errors in weighing the medical opinions that require remand.

Dr. Dahhan opined claimant could perform his usual coal mine work, which he described as "moderately heavy," lifting "anywhere from 50 to 70 pounds" on a daily basis. Employer's Exhibit 4 at 16-17, 40. The administrative law judge found claimant's usual coal mine work, however, involved "very heavy manual labor" because he was required to lift "30-80 pounds several times per day," walk "four to five miles per shift," and "carry 50-pound bags of rock dust at varying rates per shift." Decision and Order at 10; Hearing Transcript at 12, 16, 19-25. The administrative law judge therefore erred in crediting Dr. Dahhan's opinion without addressing whether he had an accurate understanding of the physical demands of claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). He also failed to consider that Dr. Dahhan based his opinion, in part, on the results of a January 26, 2016 blood gas study which is not part of the evidentiary record. Employer's Exhibit 4 at 10-12; *see Harris v. Old Ben*

[7] The administrative law judge gave Dr. Green's opinion less weight because it "is based wholly on two qualifying [blood gas] studies" and he found the blood gas studies "weigh preponderantly against a finding of total disability." Decision and Order at 15. He found the opinions of Drs. Dahhan and Rosenberg credible because they relied on the non-qualifying blood gas studies. *Id*. at 15-16.

Coal Co., 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004).

The administrative law judge found Dr. Rosenberg's opinion credible because he "did a better job of integrating all of the available evidence." Decision and Order at 15. Dr. Rosenberg's opinion was limited, however, to his examination findings and his review of Dr. Gallup's August 20, 2014 examination report. Director's Exhibit 12. He did not review Dr. Green's qualifying April 19, 2016 blood gas studies. Claimant's Exhibit 2. The administrative law judge therefore did not adequately explain his rationale for crediting Dr. Rosenberg's opinion. *See Wojtowicz*, 12 BLR at 1-165.

Furthermore, we agree with the Director that the administrative law judge erred in finding Dr. Gallup's opinion "unclear" as to whether claimant is totally disabled from a respiratory impairment. Decision and Order at 15. Dr. Gallop obtained a qualifying blood gas study and specifically stated claimant has "significant pulmonary limitations and is totally disabled from this impairment to perform his last coal mine job."[8] Director's Exhibit 11 at 5.

For these reasons, we 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). Thus, we vacate the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

Remand Instructions

The administrative law judge must reconsider whether claimant established total disability based on the blood gas studies and medical opinions. 20 C.F.R. §718.204(b)(2)(ii), (iv). He should reconsider the physicians' opinions in light of his finding that claimant's last coal mine job involved "very heavy" work. *See Cornett*, 227 F.3d at 576. He must also consider the qualifications of the respective physicians, the

[8] The administrative law judge also rejected Dr. Gallup's opinion because he found it based on an inaccurate smoking history. Decision and Order at 15. Contrary to the administrative law judge's finding, while claimant's smoking history is relevant to the etiology of his respiratory impairment, it is not relevant to whether the impairment is totally disabling. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

explanations their medical opinions provide, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If the administrative law judge determines that total disability has been demonstrated by the blood gas studies, medical opinions or both, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record and determine whether claimant is totally disabled. *See Defor*e, 12 BLR at 1-28-29. If claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the administrative law judge must consider if employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If claimant does not establish total disability, however, the administrative law judge may reinstate the denial of benefits.[9] *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In reaching his credibility determinations on remand, the administrative law judge must set forth his findings in detail and explain his underlying rationale in accordance with the Administrative Procedure Act.[10] *Wojtowicz*, 12 BLR at 1-165.

[9] The administrative law judge indicated the prior claim evidence was less probative of claimant's current condition and did not establish total disability. Decision and Order at 11.

[10] 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).

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