U.S. Department of Labor

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

BRB No. 14-0391 BLA

MICHAEL WHALEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 08/17/2015
	)	
Employer-Respondent	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

William W. Smith (Smith & Alspaugh, P.C.), Birmingham, Alabama, for claimant.

John C. Webb (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-05703) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed on May 20, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the

Act). The administrative law judge initially considered whether claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. 921(c)(4), as implemented by 20 C.F.R §718.305.[1] The administrative law judge determined that claimant established 37.167 years of underground coal mine employment,[2] but did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement. Accordingly, the administrative law judge found that claimant failed to invoke the amended Section 411(c)(4) presumption and failed to establish entitlement to benefits.

On appeal, claimant argues that the administrative law judge erred in finding that Dr. Hawkins's opinion was not sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, requesting that the Board remand the case to the district director for the Director to satisfy his obligation to provide claimant with a complete pulmonary evaluation. Employer replied, asserting that claimant was provided with a complete pulmonary evaluation as required by 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406. Employer further maintains, in the alternative, that any failure by the Director in not providing a complete pulmonary evaluation is harmless because claimant submitted his own pulmonary evaluation by Dr. Hawkins.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

---

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge indicated that "about nine months" of claimant's coal mine employment with employer was aboveground at an underground mine site and determined that this period was qualifying for purposes of invoking the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Decision and Order at 7, *citing Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 37.167 years of underground coal mine employment and that claimant did not establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and is in accordance with applicable law.[4] 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).

In considering whether the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the opinions of Drs. O'Reilly, Hawkins, Goldstein, and Fino. Decision and Order at 10-14. Dr. O'Reilly performed the Department of Labor-sponsored evaluation of claimant on September 14, 2011, and obtained a chest x-ray, pulmonary function study, and blood gas study. Director's Exhibit 11. Dr. O'Reilly indicated that claimant worked as a dispatcher at a coal mine in 1992 and was still performing this work when he examined him. *Id*. Dr. O'Reilly concluded that claimant is "100% impaired due to shortness of breath and hypoxia." *Id*. In a supplemental report, dated October 24, 2011,[5] Dr. O'Reilly stated that claimant "has a severe respiratory impairment based on his symptoms of severe shortness of breath with exertion and severe resting arterial hypoxemia. However, this has not prevented him from performing his current coal mine work as a dispatcher." *Id*. The administrative law judge found that it was evident from the record that Dr. O'Reilly was aware that claimant worked as a dispatcher, but that it was not clear whether he understood the exertional requirements of this position, or whether he considered these requirements when forming his opinion. Decision and Order at 16. In addition, the administrative law judge found that Dr. O'Reilly's subsequent report appeared to contradict his earlier opinion concerning whether claimant is totally disabled due to a respiratory impairment. *Id*. Further, the administrative law judge indicated that the record does not show why Dr. O'Reilly submitted his second report or what caused him to change his opinion. *Id*. Consequently, the administrative law judge determined that Dr. O'Reilly's opinion is not well-reasoned or well-documented and she gave it less weight. *Id*.

Dr. Hawkins examined claimant on April 19, 2012, and in a report dated January 21, 2013, he indicated that claimant "is now limited with exertional shortness of breath," that the "alveolar blood gas data is compatible with complete respiratory disability," and that claimant "has developed impairing lung disease from many years of underground

[4] The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] As the administrative law judge noted, there is no documentation in the record indicating why Dr. O'Reilly sent the supplemental letter to the claims examiner. *See* Decision and Order at 16.

coal mine work." Claimant's Exhibit 5; *see also* Claimant's Exhibit 4. The administrative law judge found that, because the blood gas study was the only objective evidence Dr. Hawkins cited to support his conclusion, she "infer[red]" that Dr. Hawkins's opinion was based solely on this objective test. Decision and Order at 15. The administrative law judge concluded that Dr. Hawkins's opinion was not well-reasoned or well-documented and did not give it any weight. *Id.*

Dr. Goldstein examined claimant and opined, in a report dated April 23, 2012, that claimant has a pulmonary impairment in the form of "a small airways obstructive defect with no improvement following bronchodilators." Employer's Exhibit 1. The administrative law judge determined that Dr. Goldstein's opinion is not sufficient to establish total disability. Decision and Order at 16. The administrative law judge indicated that, although Dr. Goldstein found that claimant had a respiratory impairment, he did not address whether claimant could perform his previous coal mine employment or any other work. *Id*.

Dr. Fino reviewed claimant's medical records and, in a report dated January 5, 2013, he concluded that claimant does not have a respiratory impairment. Employer's Exhibit 4. In a supplemental report, dated February 27, 2013, Dr. Fino reviewed Dr. Hawkins's report and commented that, although the blood gas study obtained by Dr. Hawkins, on April 19, 2012, was qualifying,[6] a blood gas study obtained by Dr. Goldstein four days later, on April 23, 2012, was not qualifying and showed improvement with oxygenation during exertion. *Id*. Dr. Fino also stated that the subsequent blood gas study was consistent with the results, at rest and with exercise, of the July 6, 2011 blood gas study obtained by Dr. O'Reilly. *Id*.

The administrative law judge determined that Dr. Fino's supplemental report, discussing Dr. Goldstein's April 23, 2012 non-qualifying blood gas study, is supported by the objective evidence. Decision and Order at 15. Additionally, the administrative law judge concluded that, even though Dr. Hawkins's blood gas study is qualifying, this did not establish total disability, as claimant did not consistently show qualifying values and a more recent test was non-qualifying. *Id*. The administrative law judge determined, therefore, that Dr. Fino's opinion does not assist claimant in establishing total disability, as he did not diagnose a respiratory impairment. *Id*. at 16. Accordingly, the administrative law judge concluded that claimant failed to establish total disability, based

[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, C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

on medical opinion evidence at 20 C.F.R. 718.204(b)(2)(iv) and, in consideration of all of the evidence together at 20 C.F.R. §718.204(b)(2). *Id*.

We will first address the Director's request that the Board remand the case so that he may comply with the statutory obligation to provide claimant with a complete pulmonary evaluation pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406. The Director states that, because the administrative law judge reasonably found that Dr. O'Reilly's contradictory statements negated each other, the administrative law judge could not determine Dr. O'Reilly's opinion concerning total disability. The Director indicates that "[t]his defect is particularly crucial in this case," in light of the potential invocation of the rebuttable presumption at amended Section 411(c)(4). Director's Letter Brief at 3 n.4.

Employer argues that this case is similar to *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009), where the court concluded that, because the physician addressed all elements of entitlement and linked his findings to the objective data, his opinion satisfied the requirements of a complete pulmonary evaluation. *Greene*, 575 F.3d at 642, 24 BLR at 2-221-22. Employer notes that the court reached this holding despite the fact that the administrative law judge discredited the opinion because the physician did not explain how he reached his determinations, based on the objective medical evidence. *Id*. Employer asserts that Dr. O'Reilly conducted the objective tests required by the Act and offered an opinion concerning all of the elements of entitlement. In the alternative, employer contends that, even if the Board agrees that a complete pulmonary evaluation was not provided, this error is harmless because claimant did not rely exclusively on Dr. O'Reilly's report to establish total disability, but rather submitted Dr. Hawkins's opinion. Employer also states that the current case is similar to the situation in *W.C.* [*Cornett*] *v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-31 (2008), where the Board rejected claimant's request for the case to be remanded for a complete pulmonary evaluation, stating that the administrative law judge's basis for discrediting the physician's disability opinion, that he relied on the diagnosis of a severe respiratory impairment, which the administrative law judge rejected, would remain the same. *Cornett*, 24 BLR at 1-31.

Contrary to employer's contention, the fact that claimant submitted an additional physician's opinion does not relieve the Director from the statutory duty to provide claimant with a complete pulmonary evaluation in order to substantiate his claim. 30 U.S.C. §923(b); 20 C.F.R. §725.406; *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990); *see Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990). Further, as the Director maintains, Dr. O'Reilly did not provide a definitive opinion on the issue of total disability, as the administrative law judge reasonably found that his initial and

supplemental opinions contradicted each other. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004). Therefore, we vacate the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), invocation of the amended Section 411(c)(4) presumption or entitlement to benefits, and remand the case to the district director for further evidentiary development in the form of a supplemental report from Dr. O'Reilly. Employer is entitled to respond to Dr. O'Reilly's supplemental report. *See Pettry*, 14 BLR at 1-98; *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (en banc).

In the interest of judicial economy, we also address claimant's arguments concerning the administrative law judge's consideration of Dr. Hawkins's opinion. Claimant argues that the administrative law judge erred in determining that Dr. Hawkins's opinion, that claimant is totally disabled from a respiratory impairment, was supported only by the qualifying blood gas study, as he also considered claimant's work and smoking histories, physically examined claimant and reviewed the results of a pulmonary function study. Claimant asserts that Dr. Hawkins was aware of the various jobs that claimant performed for employer, and claimant's physical limitations, and "[w]hile Dr. Hawkins did not specifically discuss the values, it is clear . . . that Dr. Hawkins had [claimant] participate in a pulmonary function test which revealed that [claimant] has a 'minimal to mild' airflow obstruction." Claimant's Brief in Support of Petition for Review at 8, *quoting* Claimant's Exhibit 5. Claimant further states that, at the January 31, 2013 hearing, he testified concerning the duties of his last coal mine employment and that the administrative law judge determined that his job required "at least a moderate degree of physical exertion." Claimant's Brief in Support of Petition for Review at 9, *quoting* Decision and Order at 16.

Finally, claimant contends that this case is similar to *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985), where an administrative law judge found invocation at 20 C.F.R. §727.203, based on his determination that a physician's opinion was sufficient to establish total disability where the physician diagnosed a severe obstructive respiratory impairment and discussed the claimant's physical limitations. *Raines*, 758 F.2d at 1534, 7 BLR at 2-210. The court held that, although the physician did not evaluate the exertional requirements of claimant's last coal mine employment, it was "apparent from the record that the [administrative law judge] could draw an inference from [the physician's] report that [the claimant] was totally disabled." *Id*. Therefore, claimant argues that Dr. Hawkins's opinion, when considered in conjunction with claimant's testimony, "provides substantial, credible evidence that [claimant] is totally disabled pursuant to 20 C.F.R. §718.204(b)." Claimant's Brief in Support of Petition for Review at 10.

Contrary to claimant's contention, the administrative law judge permissibly determined that Dr. Hawkins's diagnosis of total disability was based solely on the

qualifying blood gas study he considered. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238. In Dr. Hawkins's report, he noted that he reviewed the results of a pulmonary function study but, when setting out his findings, he stated that "[a]lveolar blood gas data is compatible with complete respiratory disability." Claimant's Exhibit 5. In addition, the administrative law judge acted within her discretion in giving Dr. Hawkins's opinion no weight because she found that the more recent blood gas study evidence, and the blood gas study evidence as a whole, did not support a finding of total disability.[7] *See Jones*, 386 F.3d at 992, 23 BLR at 2-238. Therefore, we affirm the administrative law judge's discrediting of Dr. Hawkins's opinion on the issue of total disability.[8]

[7] The blood gas study performed by Dr. O'Reilly, on July 6, 2011, produced non-qualifying results, both at rest and after exercise. Director's Exhibit 11. The blood gas study administered by Dr. Hawkins on April 19, 2012, was qualifying at rest only. Claimant's Exhibit 4. Dr. Hawkins did not perform an exercise test on claimant. *Id.* The blood gas study performed by Dr. Goldstein, on April 23, 2012, was non-qualifying at rest and after exercise. Employer's Exhibit 1.

[8] As the administrative law judge provided a valid reason for discrediting Dr. Hawkins's diagnosis of a totally disabling impairment, it is not necessary to discuss claimant's remaining arguments regarding the administrative law judge's weighing of Dr. Hawkins's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

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 district director to allow for a supplemental report from Dr. O'Reilly, to which employer must be given the opportunity to respond.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge