U.S. Department of Labor

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

BRB No. 19-0059 BLA

JESSE J. DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 12/10/2019
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05279) of Administrative Law Judge Carrie Bland on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim

filed on November 7, 2013.[1]

The administrative law judge credited claimant with 15.72 years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding the new evidence established total disability and therefore erred in finding claimant invoked the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding it failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

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[1] Claimant filed nine prior claims. Director's Exhibit 1. The district director finally denied his most recent prior claim, filed on November 30, 2009, based on claimant's failure to establish any element of entitlement. *Id.*

[2] Claimant's most recent coal mine employment occurred in Virginia. Decision and Order at 3 n.3; Director's Exhibit 1. Accordingly, the Board will apply the law 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established over fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered the results of five new blood gas studies.[5] While the November 12, 2013 blood gas study produced qualifying values,[6] a study conducted eight months later on July 16, 2014, produced non-qualifying values. Director's Exhibits 12, 14. The administrative law judge found these studies to be "in equipoise." Decision and Order at 12.

The administrative law judge next considered three blood gas studies taken in 2016. Although the July 6, 2016 blood gas study produced non-qualifying values, the studies taken both before and after it (June 10, 2016 and August 12, 2016) produced qualifying values. Claimant's Exhibits 1, 4; Employer's Exhibit 1. The administrative law judge accorded the greatest weight to the 2016 blood gas studies because they are the most recent studies of record. Decision and Order at 12. Because two of the three most recent blood gas studies are qualifying, she found the blood gas studies established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

The administrative law judge next considered the medical opinions of Drs. Johnson, Raj, Othman, McSharry, and Sargent. Drs. Johnson, Raj, and Othman opined claimant is totally disabled by a pulmonary impairment, Director's Exhibit 17; Claimant's Exhibits 1, 4, while Drs. McSharry and Sargent opined he does not have a totally disabling pulmonary

[5] The administrative law judge found the pulmonary function studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11-12. Because the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure, she also found total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 12-13.

[6] A "qualifying" blood study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

impairment. Director's Exhibit 14; Employer's Exhibits 1, 3, 4. The administrative law judge accorded less weight to the opinions of Drs. McSharry and Sargent, finding they failed to adequately explain how claimant could perform the exertional requirements of his usual coal mine employment in light of the qualifying blood gas studies. Decision and Order at 21-22. Although the administrative law judge found Dr. Othman's opinion was not well-reasoned, she found the opinions of Drs. Johnson and Raj well-reasoned and sufficient to establish a totally disabling pulmonary impairment. *Id.* at 20-22. She therefore found the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the administrative law judge erred in her consideration of the opinions of Drs. McSharry and Sargent. Employer's Brief at 4. Employer specifically contends the administrative law judge erred in not addressing the deposition testimony Drs. McSharry and Sargent provided, explaining that while claimant's blood gas studies are qualifying, they are normal for his advanced age.[7] *Id.* at 6-7. An administrative law judge is required to consider all relevant evidence in the record. 30 U.S.C. §923(b). In addition, a physician may consider a miner's age in interpreting blood gas study results. *See Hucker v. Consolidation Coal Co.*, 9 BLR 1-137, 1-141 (1986).[8] Therefore, the administrative law

[7] During his deposition, Dr. McSharry explained that the partial pressure of oxygen "will tend to decline with age in a relatively predictable fashion . . . ." Employer's Exhibit 4 at 13. Dr. McSharry further noted that the Department of Labor's qualifying values for blood gas studies do not take into account a person's age. *Id.* at 14. Dr. McSharry opined that claimant's blood gas studies, including the three studies conducted in 2016, were "fairly normal" for a ninety-one-year-old man. *Id.* at 16-17. Based upon claimant's objective test results, including his blood gas study results, Dr. McSharry opined claimant is not disabled from performing his last coal mine job "from a purely respiratory standpoint." *Id.* at 18. Dr. Sargent also opined that blood gas values are affected by age. Employer's Exhibit 3 at 16. Based on claimant's age, Dr. Sargent opined the blood gas study that he conducted, as well as the blood gas studies that he reviewed, did not reveal a disabling impairment. *Id.* Dr. Sargent opined that, from a respiratory standpoint alone, claimant could "do anything that a normal 93-year-old male could do." *Id.* at 17.

[8] In *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986), the Board held that an administrative law judge may not reject medical opinions solely because the physicians state a miner's blood gas studies are normal for his age. The Board noted that the comments to Appendix C of 20 C.F.R. Part 718 "do not prohibit consideration of a miner's age in the interpretation of blood gas studies, but merely note that age was not used in formulating the table[s]" of qualifying values, because the Department of Labor concluded

judge erred in not considering the deposition testimony Drs. McSharry and Sargent provided.[9] We therefore vacate the administrative law judge's finding the blood gas studies established total disability. 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9. On remand, the administrative law judge must consider the opinions of Drs. McSharry and Sargent that the qualifying blood gas studies do not represent a totally disabling pulmonary impairment. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (holding the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for a miner who is seventy-one years old are actually normal or otherwise do not represent a totally disabling pulmonary impairment for a miner who is over the age of seventy-one).

Moreover, as the administrative law judge's evaluation of the blood gas study evidence affected her weighing of the medical opinions on total disability,[10] we also vacate her finding at 20 C.F.R. §718.204(b)(2)(iv).

Because we have vacated the administrative law judge's finding of total disability, we also vacate her finding that claimant invoked the Section 411(c)(4) presumption.[11] 30 U.S.C. §921(c)(4).

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that adjusting the tables for age would have made them "'increasingly complicated.'" *Hucker*, 9 BLR at 1-141 (citation omitted).

[9] The administrative law judge made no reference to the deposition testimony of Drs. McSharry and Sargent in her decision.

[10] The administrative law judge accorded less weight to the opinions of Drs. McSharry and Sargent because she found they based their assessments on "normal" blood gas study results, while she found the blood gas studies qualified for disability. Decision and Order at 22. The administrative law judge credited the opinions of Drs. Johnson and Raj, finding the qualifying blood gas studies supported their opinions. *Id.* at 22-23.

[11] We decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to rebut the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's rebuttal findings.

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

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge