U.S. Department of Labor

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

BRB No. 16-0307 BLA

HERBERT KISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANITA COAL COMPANY d/b/a JARVEY & HERBERT KISER	)	
	)	
and	)	
	)	DATE ISSUED: 03/24/2017
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05123) of Administrative Law Judge Lee J. Romero, Jr. awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on October 15, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with at least eighteen years of qualifying coal mine employment,[3] and found that the new evidence established claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his length of coal mine employment determination. Employer also contends that the administrative law judge erred in finding that the evidence established total disability pursuant to Section 718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. In addition, employer contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds in

[1] Claimant filed previous claims in 1989 and 1993. Director's Exhibit 1. An administrative law judge denied claimant's most recent prior claim because the evidence did not establish that claimant suffered from pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Upon review of claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Kiser v. Anita Coal Co.*, BRB No. 98-0279 BLA (Dec. 4, 1998) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

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

[4] Because the new evidence established a disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

support of the administrative law judge's award of benefits. The Director, Office of Workers' Programs, has not filed a response brief. In reply brief, employer reiterates its previous contentions.

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. 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

Although employer acknowledges that the parties stipulated to seventeen years of underground coal mine employment,[5] Employer's Brief at 12, employer challenges the administrative law judge's calculation, in his decision, of at least eighteen years of coal mine employment.[6] We decline to address employer's contention. Because employer stipulated to at least seventeen years of qualifying coal mine employment, more than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, we hold that the administrative law judge's error, if any, in crediting claimant with an additional year of coal mine employment is harmless.[7] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Employer next argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

[5] The administrative law judge accurately notes that employer, in its post-hearing brief, conceded that claimant had at least seventeen "full years" of coal mine employment. Decision and Order at 6; Employer's Post-Hearing Brief at 15.

[6] The administrative law judge found that all of claimant's coal mine employment was underground. Decision and Order at 6.

[7] We also reject employer's contention that the administrative law judge's length of coal mine employment finding affected his assessment of the credibility of the medical opinion evidence. Employer's Brief at 12. The administrative law judge found that every physician's opinion was "based upon comparable employment and smoking histories." Decision and Order at 32.

The administrative law judge considered three new pulmonary function studies, conducted on March 4, 2011, June 23, 2011, and December 12, 2011. The administrative law judge accorded little weight to the June 23, 2011 pulmonary function study because Dr. Rosenberg, the administering physician, declared it invalid. Decision and Order at 17; Director's Exhibit 15. The administrative law judge found that the two remaining pulmonary function studies conducted on March 4, 2011 and December 12, 2011 produced qualifying values both before and after the administration of a bronchodilator.[8] Decision and Order at 17; Director's Exhibit 13; Claimant's Exhibit 2. The administrative law judge, therefore, found that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer contends that the administrative law judge committed numerous errors in his consideration of the new pulmonary function study evidence. Employer initially argues that the administrative law judge mischaracterized the December 12, 2011 pulmonary function study. The administrative law judge characterized the pre-bronchodilator results from the December 12, 2011 study as qualifying. However, the FEV1 value (2.02) from this particular study is more than the value provided in Part 718, Appendix B, for a miner whose height is 69.7 inches and who is 66 years of age (1.93).[9] Consequently, the December 12, 2011 pulmonary function study produced non-qualifying values before the administration of a bronchodilator. Thus, we agree with employer that the administrative law judge mischaracterized the study. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also argues that the administrative law judge erred in not finding the March 4, 2011 and December 12, 2011 pulmonary function studies invalid based upon Dr. Vuskovich's invalidations.[10] In regard to the December 12, 2011 pulmonary function

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[9] Claimant's listed height of 69.5 inches on the December 12, 2011 pulmonary function study falls between the heights listed in Part 718, Appendix B (69.3 and 69.7 inches). Because claimant's height falls between the heights listed on the tables, the administrative law judge opted to use the "closer greater height" of 69.7 inches, a position he found consistent with the procedure outlined in the Coal Mine Procedure Manual. Decision and Order at 16.

[10] Dr. Vuskovich invalidated the March 4, 2011 and December 12, 2011 pulmonary function studies based on his opinion that claimant "did not put forth the effort required to generate valid spirometry results." Director's Exhibit 14; Employer's

study, the administrative law judge permissibly credited the opinions of Drs. Gallai and Jarboe that the study was acceptable, over Dr. Vuskovich's contrary assessment, based upon the superior pulmonary qualifications of Drs. Gallai and Jarboe.[11] *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (en banc recon.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 17; Claimant's Exhibit 2; Employer's Exhibit 6 at 12. However, in regard to the March 4, 2011 pulmonary function study, the administrative law judge did not address the significance of Dr. Vuskovich's invalidation. Because this evidence is relevant to the credibility of the March 4, 2011 pulmonary function study, the administrative law judge erred in not addressing it.[12] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration. On remand, the administrative law judge must weigh all of the pre-bronchodilator and post-bronchodilator pulmonary function study evidence, and explain his consideration of it. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480-81, 25 BLR 2-1, 2-10 (6th Cir. 2011).

Exhibit 9.

[11] While Drs. Gallai and Jarboe are Board-certified in Internal Medicine and Pulmonary Disease, Claimant's Exhibit 2; Employer's Exhibit 6, Dr. Vuskovich is Board-certified in Occupational Medicine. Employer's Exhibit 9b.

[12] Employer also argues that the administrative law judge erred in not considering the non-qualifying values produced by the invalidated June 23, 2011 pulmonary function study. Because the study produced non-qualifying values despite claimant's insufficient effort, employer argues that the study's "probative value is not diminished." Employer's Brief at 15. We disagree. As the administrative law judge noted, Dr. Rosenberg, the administering physician, invalidated the study because it was "not performed with complete effort." Director's Exhibit 15. The regulations provide that the results of such pulmonary function studies, *i.e.*, studies not conducted in accordance with the requirements of 20 C.F.R. §718.103 and Appendix B, shall not "constitute evidence of the presence *or absence* of a respiratory or pulmonary impairment." 20 C.F.R. §718.103(c).

Employer next argues that the administrative law judge erred in his consideration of the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Habre, Gallia, Rothfleisch, Rosenberg and Jarboe. While Drs. Habre, Gallai, and Rothfleisch opined that claimant suffers from a totally disabling pulmonary impairment, Director's Exhibit 13; Claimant's Exhibits 2, 3; Drs. Rosenberg and Jarboe opined that he is not totally disabled from a pulmonary standpoint. Employer's Exhibits 3, 11.

The administrative law judge credited the opinions of Drs. Habre, Gallai, and Jarboe because he found that they had a better understanding of the exertional requirements of claimant's last coal mine employment.[13] Decision and Order at 35. The administrative law judge concluded that the new medical opinion evidence therefore established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

We agree with employer that the administrative law judge failed to adequately explain his weighing of the new medical opinion evidence. Although the administrative law judge credited the opinions of Drs. Habre, Gallai, and Jarboe based upon their better understanding of the exertional requirements of claimant's last coal mine employment, he did not explain why he credited the opinions of Drs. Habre and Gallai that claimant suffers from a totally disabling pulmonary impairment over Dr. Jarboe's contrary opinion.[14] Because the administrative law judge failed to resolve this conflict, his analysis of the new medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's finding that the new medical opinion evidence established

[13] The administrative law judge found that claimant's last coal mine employment required him "to lift and carry between 10 to 50 pounds at various distances and various times per day." Decision and Order at 33. The administrative law judge also found that claimant's last coal mine employment required him "to crawl or duck walk frequently." *Id.*

[14] We note that the administrative law judge, in his summary of the medical opinion evidence, mistakenly attributed the findings in Dr. Jarboe's September 24, 2015 report to both Dr. Jarboe and Dr. Rosenberg. *See* Decision and Order at 24, 29. The administrative law judge also did not address Dr. Rosenberg's September 19, 2015 report. Employer's Exhibit 10.

total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[15] On remand, when considering whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Should the administrative law judge find on remand that the new pulmonary function study or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[16] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[17] 20 C.F.R. §718.305(d)(1)(i), or by establishing that

[15] On remand, the administrative must also reconsider the new medical opinion evidence in light of his reevaluation of the new pulmonary function study evidence.

[16] If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to

"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)(ii).

The administrative law judge found that employer established that claimant does not suffer from clinical pneumoconiosis. Decision and Order at 44. However, employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating that issue, the administrative law judge considered the new medical opinions of Drs. Rosenberg and Jarboe. Dr. Rosenberg opined that claimant suffers from a restrictive lung impairment that is probably related to obesity. Employer's Exhibit 3. Dr. Jarboe opined that claimant suffers from "bronchial asthma, which may present as a restrictive ventilatory defect." Employer's Exhibit 11. The administrative law judge found their opinions inconsistent with the regulations. Decision and Order at 46-47

Employer argues that the administrative law judge erred. We disagree. Dr. Rosenberg relied on the absence of radiographic evidence of fibrosis in opining that claimant's restrictive defect is not related to coal mine dust exposure. Decision and Order at 46; Employer's Exhibit 1, 18 at 71, 89. The administrative law judge appropriately accorded less weight to Dr. Rosenberg's opinion because he found that his reasoning was inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000) (recognizing that evidence of fibrosis is not required for a finding of legal pneumoconiosis); Decision and Order at 46-47.

In regard to Dr. Jarboe's opinion that claimant's bronchial asthma was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that claimant had "completely normal function a year or two after leaving the mining industry." Decision and Order at 27; Employer's Exhibit 5 at 18. The administrative law judge found that reasoning inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 46. Thus the administrative law judge, in essence, permissibly determined that Dr. Jarboe's testimony did not adequately address the question of whether claimant, in particular, had latently developed pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed

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that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[18] *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Jarboe that claimant's pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease, and their explanations as to why legal pneumoconiosis played no role in claimant's disability were tied to their assumption that claimant did not have it. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 50-51. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

In summary, if the administrative law judge finds on remand that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant would be entitled to benefits.

[18] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Jarboe, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge