U.S. Department of Labor

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

BRB No. 19-0516 BLA

MEARIL GIBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
	)	
OLD REPUBLIC INSURANCE, COMPANY	)	DATE ISSUED: 11/18/2020
	)	
Employer/Carrier-Respondents	)	
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Mearil Gibson, Raven, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Employer/Carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Christopher Larsen's Decision and Order Denying Benefits (2017-BLA-05097) rendered on a subsequent claim filed on October 18, 2015,[2] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with eleven years and two months of coal mine employment,[3] fewer than the fifteen years needed to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). Considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found Claimant did not satisfy his burden to establish the existence of pneumoconiosis, total disability, or a change in an applicable condition of entitlement.[5] 20 C.F.R. §§718.202(a), 718.204(b)(2), 725.309. Accordingly, he denied benefits.

[1] On Claimant's behalf, Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, requested that the Benefits Review Board review the administrative law judge's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed three prior claims for benefits each of which was denied. Director's Exhibits 1-3. The district director denied Claimant's last claim for failure to establish total disability. Director's Exhibit 3.

[3] Claimant alleged ten years and eight months of coal mine employment on his claim form. Director's Exhibit 1. He also indicated on his employment form that he worked from August 18, 1971 to May 18, 1982. Director's Exhibit 6.

[4] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption 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) (2018); 20 C.F.R. §718.305.

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "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(d); *see 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(d)(2). Because Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain a review of

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

As Claimant filed this appeal without the assistance of counsel, the Board considers whether the administrative law judge's Decision and Order is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met,[7] but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Based on our review of the administrative law judge's Decision and Order, we conclude he erred in finding most of the pulmonary function study results invalid. Consequently he erred in finding Claimant is not totally disabled and did not establish a change in an applicable condition of entitlement or prove legal pneumoconiosis.[8]

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his current subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[7] The administrative law judge found no evidence of complicated pneumoconiosis and, thus, Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[8] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition

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 and gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[9] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions.[10] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the 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 five pulmonary function studies designated by the parties and two studies contained in the treatment records.[11] Decision

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of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

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

[10] The administrative law judge accurately found none of the blood gas studies qualifying for total disability and no evidence indicating Claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 9; Director's Exhibits 11, 17; Employer's Exhibit 1.

[11] The administrative law judge noted the studies listed varying heights for Claimant from 68 to 70 inches and permissibly determined Claimant's average height is 69.5 inches. Decision and Order at 8; *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) (If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height). Because 69.5 does not appear in the tables at Appendix B, he correctly rounded up to the closest table height of 69.7 inches. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (the Office of Workers' Compensation Programs directs use of the closest greater height when a miner's actual height falls between heights listed in the table). He then correctly applied the table height of 69.7 inches and Claimant's age

and Order at 7-8. Dr. Ajjarapu's October 15, 2015 study was qualifying for total disability; no bronchodilator was administered. Director's Exhibit 12. Dr. Forehand's December 22, 2015 study was qualifying before and after a bronchodilator was administered. Director's Exhibit 11. Dr. Rosenberg's May 18, 2016 study and Dr. Fino's October 19, 2016 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Employer's Exhibits 1, 4. Dr. Alam's November 28, 2016 study produced qualifying values; no bronchodilator was administered. Claimant's Exhibit 5. The May 1, 2014 and August 24, 2016 studies contained in the treatment records from St. Charles Breathing Center produced non-qualifying values before and after administration of a bronchodilator. Employer's Exhibit 9.

The administrative law judge found "the non-qualifying results of record outweigh the contrary qualifying results demonstrated on some tests before the use of a bronchodilator, particularly since [Claimant's] effort on the tests was also invalidated by one or more physicians." Decision and Order at 8. Noting the studies contained in the treatment records were non-qualifying even with poor effort, he determined Claimant did not establish total disability based on the pulmonary function study evidence. *Id*.

We vacate the administrative law judge's finding that Claimant did not establish total disability because he has not adequately explained his determination that all of the qualifying studies are invalid because they show inadequate effort by Claimant. *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) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's decision).

Dr. Ajjarapu administered the qualifying October 15, 2015 study. Director's Exhibit 12. The technician indicated Claimant gave good effort in performing it and Dr. Ajjarapu signed off on the results of the test. *Id*. Dr. Vuskovich reviewed the tracings of that study and opined Claimant's respiratory rate and tidal volume were insufficient to generate valid MVV results and further opined Claimant did not put forth the effort required to generate valid FEV1 and FVC results. Director's Exhibit 18 at 4. The administrative law judge summarity credited Dr. Vuskovich's opinion over Dr. Ajjarapu's opinion and the administering technician without providing any rationale as to why Dr. Vuskovich's opinion was more credible regarding Claimant's effort. *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 7; *see Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744

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at the time each study was performed in determining whether each pulmonary function study was qualifying or non-qualify for total disability under Appendix B.

(6th Cir. 1997) (an administrative law judge may rely on the opinion of the physician who actually administered the ventilatory study over those who reviewed the results).

The administrative law judge next gave less weight to Dr. Forehand's December 22, 2015 study, which was qualifying before and after use of a bronchodilator, because "three physicians who reviewed [it]raised questions regarding [its] validity." Decision and Order at 7. However, the administrative law judge did not distinguish between the pre-bronchodilator and post-bronchodilator results in reaching his determination. *Id*. Contrary to the administrative law judge's finding, Dr. Forehand indicated Claimant gave good effort on both the pre-bronchodilator and post-bronchodilator tests; Dr. Gaziano validated the study; and Dr. Rosenberg invalidated only the post-bronchodilator results. Director's Exhibit 11; Employer's Exhibit 4 at 1. Dr. Rosenberg indicated the pre-bronchodilator values appeared valid. Employer's Exhibit 4 at 1. Only Drs. Vuskovich and Fino invalidated the pre-bronchodilator and post-bronchodilator results. Director's Exhibit 15; Employer's Exhibit 1. Thus, the administrative law judge misstated the number of physicians who invalidated the December 22, 2015 pre-bronchodilator results and did not explain how he resolved the conflict in the physicians' opinions. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 7.

Further, Dr. Rosenberg indicated the May 18, 2016 qualifying pre-bronchodilator values obtained during his examination of Claimant appeared valid. Director's Exhibit 17. The administrative law judge noted only Dr. Fino's opinion that the study, as a whole, was invalid. Decision and Order at 8; Employer's Exhibit 1. Thus, he erred in failing to resolve the conflict in Drs. Rosenberg's and Fino's opinions as to the validity of May 18, 2016 qualifying pre-bronchodilator values. *See* 30 U.S.C. §923(b); *McCune*, 6 BLR at 1-998. (1984) (fact finder's failure to discuss relevant evidence requires remand). Additionally, the administrative law judge failed to explain why he credited Dr. Fino's opinion that Dr. Alam's November 28, 2016 study was invalid due to poor effort, when the technician who conducted the test indicated Claimant's good effort and cooperation, and Dr. Alam signed off on the results of the study. Decision and Order at 8; Claimant's Exhibit 3; Employer's Exhibit 4; *see Jonida*, 124 F.3d at 744.

Where the administrative law judge fails to consider relevant evidence and make appropriate factual findings, remand is required. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because the administrative law judge's analysis of the pulmonary function studies does not satisfy the Administrative Procedure Act,[12] we vacate it. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the

[12] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the

administrative law judge's determination that Claimant did not establish total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9.

Further, in weighing the medical opinion evidence on total disability, the administrative law judge rejected Dr. Forehand's opinion that Claimant is totally disabled because he found Dr. Forehand relied on an invalidated pulmonary function test.[13] Decision and Order at 16. To the extent we have vacated the administrative law judge's weighing of the pulmonary function study evidence, we also vacate his finding Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16-17.

Legal Pneumoconiosis

In order to establish legal pneumoconiosis, Claimant must prove he has a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Forehand diagnosed Claimant with a mixed restrictive and obstructive lung disease caused by smoking, coal mine dust exposure and "to a lesser extent" obesity. Director's Exhibit 11. The administrative law rejected this opinion as "based on the invalidated pulmonary function study results" and outweighed by the contrary opinions of Drs. Rosenberg and Fino. Decision and Order at 20. Because we have vacated the administrative law judge's findings with regard to the pulmonary function study evidence, however, we vacate his discrediting of Dr. Forehand's opinion and his finding that Claimant did not establish legal pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 20.

Clinical Pneumoconiosis

In the interest of judicial economy, we address the administrative law judge's findings on clinical pneumoconiosis. The administrative law judge considered nine

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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).

[13] Dr. Forehand opined the pulmonary function study from his examination showed Claimant has "a significant" respiratory impairment and has insufficient residual ventilatory capacity to meet the physical demands of his usual coal mine job. Director's Exhibit 11.

readings of four x-rays dated August 22, 2013, December 22, 2015, May 18, 2016, and October 19, 2016. Decision and Order at 18. Dr. Crum, a B reader and Board-certified radiologist, read the August 22, 2013 x-ray as positive, while Dr. Meyer, also dually-qualified, read it as negative. Director's Exhibits 12, 17. The administrative law judge permissibly found the readings of the x-ray in equipoise based on the equal number of positive and negative readings by equally qualified radiologists. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Decision and Order at 19. The administrative law judge also correctly found the remaining three x-rays were uniformly read as negative for pneumoconiosis. Decision and Order at 18. Because it is supported by substantial evidence, we affirm his finding that Claimant did not establish clinical pneumoconiosis based on the x-ray evidence.[14] *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993).

The administrative law judge noted correctly there is no positive CT scan evidence of clinical pneumoconiosis and none of the designated medical opinions diagnosed the disease. Decision and Order at 16. Further, the administrative law judge accurately found that while the treatment records include diagnoses of coal workers' pneumoconiosis, the x-rays and CT scans contained in the those records are negative for clinical pneumoconiosis. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d 255; Decision and Order at 20; Employer's Exhibits 9-11, 18, 19. We therefore affirm the administrative law judge's finding that Claimant did not establish clinical pneumoconiosis as it is supported by substantial evidence. Decision and Order at 20.

Remand Instructions

On remand, the administrative law judge must reconsider the pulmonary function study evidence and resolve the conflict among the physicians' opinions regarding the validity of the tests. In his analysis, he must distinguish between pre-bronchodilator and post-bronchodilator results and determine if Claimant has established total disability based on a preponderance of the evidence. 20 C.F.R. §718.204(b)(2)(i). He must also reweigh the medical opinions on total disability, taking into consideration the credentials of the physicians and the rationales underlying their medical conclusions. 20 C.F.R. §718.204(b)(2)(iv); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[14] The administrative law judge correctly found no biopsy evidence, and the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2), (3); Decision and Order at 19.

If Claimant establishes total disability, he thereby establishes a change in an applicable condition of entitlement. 20 C.F.R. §718.309. The administrative law judge must then determine whether Claimant established the existence of legal pneumoconiosis and, as necessary, whether he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). If total disability is not established, benefits are precluded. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. In rendering his findings on remand, the administrative law judge must comply with the APA. 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, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge