

BRB No. 14-0123 BLA

MICHAEL DIXON)
)
Claimant-Petitioner)
)
v.)
)
NALLY & HAMILTON ENTERPRISES) DATE ISSUED: 07/14/2014
)
and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-05382) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed on March 7, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act). The administrative law judge found that claimant worked for 10.46 years in coal mine employment. Because claimant worked for fewer than fifteen years in coal mine employment, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4).¹ The administrative law judge further found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled. Specifically, claimant asserts that the administrative law judge erred in weighing the pulmonary function study evidence and in giving little weight to the opinion of Dr. Alam, that claimant has a totally disabling respiratory impairment.² Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, agreeing with claimant that the administrative law judge erred in finding that claimant did not establish total disability.

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

In order to establish entitlement to benefits in this miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his

¹ Under amended 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 coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 10.46 years of coal mine employment, and that claimant is unable to invoke the amended Section 411(c)(4) presumption because he has fewer than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 4.

pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the record contains two pulmonary function tests, dated June 29, 2011 and February 28, 2012. *See* Decision and Order at 9; Director's Exhibit 12; Employer's Exhibit 3. She determined that the June 29, 2011 pulmonary function test had pre-bronchodilator values that qualify for total disability under the regulations, but non-qualifying values after a bronchodilator was administered.⁴ Director's Exhibit 12. In contrast, the February 28, 2012 pulmonary function test had pre-bronchodilator values that were non-qualifying, but after the use of a bronchodilator, the values were qualifying for total disability. Employer's Exhibit 3. The administrative law judge stated that because two of the tests qualified and two tests did not, "at best, the tests are in equipoise." Decision and Order at 9. The administrative law judge also observed:

Dr. John Michos, Board-certified in internal medicine and pulmonary medicine, reviewed the June 2011 ventilatory test and determined that the results are valid. However, he wrote "suboptimal MVV performance." Dr. Castle, Board-certified in internal medicine and pulmonary disease, opined that neither of the [c]laimant's pulmonary function tests is valid. Dr. Dahhan invalidated the tests administered under his aegis, due to excessive variation and poor effort [B]ecause the validity of each test has been questioned by a Board-certified pulmonologist, I find that the results are unreliable. I note that while Dr. Michos determined the June test was valid, Dr. Castle opined that it was not. Because there is no qualifying pulmonary function test that all parties agreed is valid, I find that the pulmonary function test evidence does not preponderantly establish total disability.

Id., citations omitted.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered two resting arterial blood gas studies. She determined that the June 29, 2011 study, administered by Dr. Alam, yielded qualifying results, while the February 28, 2012 study,

⁴ A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

administered by Dr. Dahhan, yielded non-qualifying results.⁵ Decision and Order at 10; *see* Director's Exhibit 12; Employer's Exhibit 3. The administrative law judge stated:

I presume that the most recent tests reflect the [c]laimant's current condition most accurately. Therefore, I find that the [c]laimant is unable to establish total disability by a preponderance of the arterial blood gas test evidence.

Decision and Order at 10.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Alam, Dahhan and Castle.⁶ The administrative law judge gave "little weight" to Dr. Dahhan's opinion, that claimant is not totally disabled, because Dr. Dahhan invalidated the pulmonary function test he obtained and "did not explain why his opinion was nonetheless reliable given the lack of valid pulmonary function study results." Decision and Order at 14; *see* Employer's Exhibits 3, 4. Although Dr. Castle opined that claimant is totally disabled, the administrative law judge found that his opinion was not well-reasoned, to the extent that Dr. Castle acknowledged that he could not provide a definitive diagnosis regarding the degree of claimant's respiratory impairment based on the data he reviewed. *See* Decision and Order at 14; Employer's Exhibit 6. With regard to Dr. Alam's opinion, the administrative law judge stated:

⁵ A qualifying blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A non-qualifying study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(ii).

⁶ Dr. Dahhan examined claimant on February 28, 2012, and administered pulmonary function tests, but found the tests invalid due to poor effort. Employer's Exhibit 3. Therefore, Dr. Dahhan concluded that he was unable to determine claimant's ventilatory capacity "due to his poor performance on spirometry testing," but as "all of the other parameters of his respiratory system, including lung volume, diffusion capacity, and arterial blood gas analysis show no evidence of significant pulmonary impairment," Dr. Dahhan concluded that claimant retained the capacity to return to his previous coal mine employment. *Id.* Dr. Castle reviewed medical evidence provided by employer and opined, based on Dr. Dahhan's testing, that claimant is not totally disabled. Employer's Exhibit 6. Dr. Castle opined, however, that claimant may be disabled as a result of cardiac disease and musculoskeletal orthopedic problems, neither of which is related to claimant's coal mine dust exposure. *Id.*

[T]he utility of Dr. Alam's opinion is limited because it is based on the results of the tests he administered. Later tests (e.g. the later arterial blood gas test) indicate that the Claimant's respiratory condition was variable and may not have been as disabling as Dr. Alam observed. Based on all of the record evidence of disability, I find that the inconclusive pulmonary function test and arterial blood gas test evidence outweighs Dr. Alam's opinion that the Claimant is totally disabled, because Dr. Alam did not have the opportunity to review the later, non-qualifying evidence of record.

Decision and Order at 14; *see* Director's Exhibit 12. Thus, the administrative law judge concluded that, while Dr. Alam's opinion was supportive of a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), claimant failed to establish, by a preponderance of all of the relevant evidence, that he is totally disabled. *Id.*

Claimant and the Director maintain that the administrative law judge mischaracterized Dr. Castle's opinion as to the validity of the June 29, 2011 pulmonary function study. We agree. As noted by the Director, the administrative law judge determined that the qualifying pre-bronchodilator pulmonary function study, obtained by Dr. Alam on June 29, 2011, was not reliable because Dr. Castle deemed it to be invalid. Contrary to the administrative law judge's finding, although Dr. Castle indicated that the June 2011 *post-bronchodilator* results were invalid, Dr. Castle expressly found that "the *pre[-]bronchodilator* studies are probably valid despite significant variability." Employer's Exhibit 6. Dr. Michos also specifically validated the test results. Director's Exhibit 12. Therefore, because the administrative law judge misstated Dr. Castle's opinion regarding the validity of the June 29, 2011 pre-bronchodilator pulmonary function test and did not give proper weight to the qualifying pre-bronchodilator values of that test before concluding that claimant is not totally disabled, we vacate the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(i). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 516, 22 BLR 2-62, 2-651 (6th Cir. 2003); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-26 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Claimant also contends that the administrative law judge "erred in relying on the later arterial blood gas test evidence" to discredit Dr. Alam's opinion. Claimant's Brief at 13. 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, 17 BLR 2-77, 2-84-85 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Because the administrative law judge did not provide any rationale for assigning controlling weight to the non-qualifying February 28, 2012 arterial blood gas study, other than its recency, we vacate the administrative law judge's finding that claimant did not

establish total disability under 20 C.F.R. §718.204(b)(2)(ii). Additionally, to the extent the administrative law judge's findings with regard to the credibility of the pulmonary function and arterial blood gas study evidence influenced the weight she accorded to Dr. Alam's opinion, we vacate her finding at 20 C.F.R. §718.204(b)(2)(iv), and her determinations that claimant is not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).

For these reasons, we vacate the administrative law judge's denial of benefits and remand the case for further consideration as to whether claimant has satisfied his burden to establish total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc). If, on remand, the administrative law judge finds that claimant is totally disabled, she must also reconsider whether claimant has established that pneumoconiosis was a substantially contributing cause of his respiratory disability. 20 C.F.R. §718.204(c). In reaching her credibility determinations on remand, the administrative law judge is instructed to set forth her rationale, findings of fact and conclusions of law, in accordance with the Administrative Procedure Act.⁷ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁷ The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the 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.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge