U.S. Department of Labor

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

BRB No. 15-0021 BLA

SILAS M. CAMERON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	DATE ISSUED: 10/28/2015
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Crab Orchard, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-5492) of Administrative Law Judge Scott R. Morris (the administrative law judge) rendered on

a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge credited claimant with at least fifteen years of underground coal mine employment, found that the current claim was timely filed, and adjudicated this claim, filed on June 13, 2012, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly-submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, the administrative law judge determined that the new evidence outweighed the earlier evidence, and found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. 921(c)(4).[4] The administrative law judge further found that employer failed to establish rebuttal of the presumption, and awarded benefits.

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[1] Claimant's initial claim, filed on October 7, 1979, was finally denied on May 31, 1988, because claimant failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 2-68; Decision and Order at 5; *see Cameron v. Robinson Phillips Coal Co.*, BRB No. 10-0211 BLA, slip op. at 2 (Dec. 15, 2010)(unpub.).

Claimant's second claim, filed on March 8, 2004, was denied by Administrative Law Judge Daniel L. Leland on October 24, 2006, because the evidence was insufficient to establish total respiratory disability and, thus, failed to establish a change in an applicable condition of entitlement. Director's Exhibit 2-68. Claimant subsequently requested modification, which was denied by Judge Leland on November 5, 2009. Director's Exhibit 2. The Board affirmed the denial of benefits on modification. *Cameron v. Robinson Phillips Coal Co.*, BRB No. 10-0211 BLA (Dec. 15, 2010) (unpub.).

[2] On March 20, 2014, the administrative law judge granted claimant's request for a decision on the record. Decision and Order at 2.

[3] Where 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 that "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(c); *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(c)(3).

[4] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C.

On appeal, employer challenges the administrative law judge's analysis in finding the evidence sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b) and invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). Employer contends that the administrative law judge: did not apply the appropriate standard in rendering his findings on rebuttal; that he erred in weighing the relevant evidence; and that his decision violated the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the rebuttal standards imposed by the administrative law judge are fully consistent with the revised regulation at 20 C.F.R. §718.305, which specifically addresses employer's burden on rebuttal.[5]

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.[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).

Employer initially contends that the administrative law judge improperly restricted employer to the rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer asserts that the

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§921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 6.

administrative law judge erred in applying the "rule out" standard on rebuttal when addressing disability causation, and argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute. Employer's Brief at 13-14.

The Board has addressed and rejected these arguments in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015), as has the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015). For the reasons set forth in *Minich* and *Bender*, we reject employer's arguments in this case.

Next, we address employer's contention that the administrative law judge, in finding invocation of the amended Section 411(c)(4) presumption established, erred in weighing the evidence relevant to total respiratory disability pursuant to 20 C.F.R. §718.204(b). Employer challenges the administrative law judge's weighing of the medical opinion evidence, arguing that the administrative law judge failed to provide valid reasons for discrediting the opinion of Dr. Basheda and for crediting the contrary opinions of Drs. Forehand and Zaldivar. Employer contends that the administrative law judge substituted his judgment for that of the experts and violated the APA in rendering his findings of fact. Employer further asserts that the administrative law judge's findings fail to comport with applicable law and are not supported by the evidence of record. Employer also argues that the administrative law judge failed to consider the contrary probative evidence weighing against a finding of total respiratory disability. Employer's Brief at 9-10, 14-16, 18-19, 25-26, 29, 32, 36-37. Some of employer's arguments have merit.

At Section 718.204(b)(2)(i), the administrative law judge found that the pulmonary function study evidence of record failed to establish total respiratory disability, as neither of the pulmonary function studies of record produced qualifying results.[7] Decision and Order at 7-8. The administrative law judge further determined that the blood gas study conducted by Dr. Forehand in 2012 produced non-qualifying results at rest and qualifying results during exercise, and that the 2013 blood gas study conducted by Dr. Zaldivar, who measured only resting blood gases, produced non-qualifying results. According greater weight to the more recent evidence, the administrative law judge found that, when considered together, the weight of the blood gas study evidence failed to establish a total respiratory disability at Section 718.204(b)(2)(ii). Decision and Order at 9.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed the requisite table values.

After determining that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge considered the medical opinions of Drs. Forehand, Zaldivar, and Basheda at Section 718.204(b)(2)(iv), noting that all of the physicians specialize in the treatment of pulmonary disease. Decision and Order at 9-16. The administrative law judge summarized the doctors' respective opinions and determined that both Dr. Forehand[8] and Dr. Zaldivar[9] opined that claimant's impairment precludes him from performing his last coal mine employment, while Dr. Basheda determined that claimant is not totally disabled, as he opined that claimant would be able to perform his last coal mining work or similar work as a truck driver/supply man from a respiratory standpoint. Decision and Order at 17; Director's Exhibit 14; Employer's Exhibits 1, 5, 6, 7.

The administrative law judge accorded less weight to Dr. Basheda's opinion, finding that "it is not clear that Dr. Basheda[10] understood the exertional requirements of

[8] Dr. Forehand performed the Department of Labor (DOL) examination on August 22, 2012, and diagnosed a significant respiratory impairment, noting that claimant has insufficient residual gas exchange capacity to return to his last coal mining job. He opined that claimant is totally and permanently disabled and is unable to work. He diagnosed clinical pneumoconiosis and an obstructive lung disease with arterial hypoxemia due to cigarette smoking and coal dust exposure. Director's Exhibit 14.

[9] Dr. Zaldivar examined claimant on May 22, 2013 and reviewed past medical records. He diagnosed a mild restriction of vital capacity, normal total lung capacity with mild air trapping, moderate diffusion impairment at 40%, minimal obstruction, and no restriction. Employer's Exhibits 1, 7 at 19-20. Dr. Zaldivar concluded that claimant has a respiratory impairment due to smoking, pulmonary fibrosis and asthma remodeling over time that is sufficient to preclude him from performing his last coal mine employment. Employer's Exhibit 7 at 29-30. He opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 7 at 40-41.

[10] Dr. Basheda provided a consulting opinion, reviewing claimant's medical testing records from 2002 to 2013 and claimant's filings with the DOL. He noted that claimant last worked as a truck driver and supply man for four years, and that his work required loading and unloading supplies. Employer's Exhibits 5 at 8, 6 at 37. He stated that claimant's airway obstruction is variable and "would go against a diagnosis of chronic obstructive lung disease," [] "so you have to think of reversible types of airway obstruction, the most common would be bronchial asthma." He further opined that the lung volumes did not show any evidence of restrictive lung disease, and the persistently reduced diffusion capacity was anywhere from mild to moderate in severity on some of the pulmonary function studies. Employer's Exhibit 6 at 25-26. He noted evidence of exercise induced hypoxemia on the blood gas studies from 2007 and 2012, but stated that

[claimant's] job," and that "it appears that Dr. Basheda's benchmark for disability is one who does not require oxygen therapy." Decision and Order at 17. Noting that Dr. Basheda diagnosed bronchial asthma based on claimant's history of reduced diffusion capacity from mild to moderate, the administrative law judge determined that "there is no diagnosis that claimant had bronchial asthma, if at all, prior to Dr. Basheda's 2014 report," and that Dr. Zaldivar did not diagnose asthma in his report, "but then added the possibility of asthma during his deposition [] after reading Dr. Basheda's medical report." Decision and Order at 17. The administrative law judge also noted that "Dr. Basheda pointed to Claimant's siblings' history of asthma as support for his proposition that claimant has asthma," but "made no mention of any heredity/genetics correlation one way or the other" with respect to the fact that five of claimant's siblings had emphysema and black lung. *Id.*

The administrative law judge further determined that, while Dr. Basheda expressed concerns about Dr. Forehand's exercise stress test, "Dr. Basheda [did] not explain how a more than 20% drop in pO_2 qualifies as 'slight' especially when this 'slight' decline resulted in a qualifying study per the regulations," and "merely commented that this pO_2 does not qualify for the need for oxygen therapy." Decision and Order at 17-18. Lastly, the administrative law judge found Dr. Basheda's opinion, that bronchial asthma was the cause of claimant's drop in pO_2, to be "vague" because "he did not explain how claimant could accomplish [his] prior work when exertion after just a couple of minutes [during claimant's exercise blood gas study] induced qualifying hypox[em]ia." Decision and Order at 18. According the least weight to Dr. Basheda's opinion on the ground that it was "not well reasoned," the administrative law judge found that claimant established total respiratory disability and invocation of the amended Section 411(c)(4) presumption. Decision and Order at 18.

We agree with employer that the administrative law judge, in finding that the weight of the medical opinion evidence established the presence of a totally disabling respiratory or pulmonary impairment, erred in determining that Dr. Basheda may not have had a correct understanding of the exertional requirements of claimant's usual coal mine employment, as the administrative law judge failed to provide any explanation or

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the reduction did not qualify claimant for the need for oxygen therapy. Employer's Exhibit 6 at 27. Dr. Basheda questioned the exercise protocol that Dr. Forehand used for his 2012 study, and stated that the 2012 blood gas testing indicated no evidence of ventilatory failure and a slight decline in the PO_2 from 78 to 62. Based on the pulmonary function and blood gas study results and noting a slight impairment as the PO_2 goes down with vigorous exercise at a 16% grade, he opined that claimant is not prevented from doing his work as a truck driver. Employer's Exhibit 6 at 31.

rationale for his finding.[11] Thus, the administrative law judge's decision does not comport with the requirements of the APA. Additionally, in determining that Dr. Basheda's opinion was entitled to diminished weight because the physician considered claimant's genetic predisposition to asthma but did not discuss whether there was a genetic correlation to emphysema and black lung, the administrative law judge failed to consider that Dr. Zaldivar testified that asthma is a genetic or hereditary disease, but that there is no evidence of record regarding any correlation between pneumoconiosis and heredity. Employer's Exhibit 6 at 13. Further, in discounting Dr. Basheda's diagnosis of bronchial asthma as the most likely explanation for claimant's condition, the administrative law judge conflated the issues of disability and disability causation. The administrative law judge also appears to have substituted his own opinion for that of a physician in determining that the drop in the values obtained on the exercise blood gas study was not slight. As we cannot affirm the administrative law judge's rationale for discounting the opinion of Dr. Basheda, we must vacate the administrative law judge's finding of total respiratory disability at Section 718.204(b), and remand the case for further consideration. Thus, we must also vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement pursuant to Section 725.309.

On remand, the administrative law judge is cautioned not to provide his own interpretation of the medical data, but is instructed to reassess the opinion of Dr. Basheda, as well as the conflicting opinions of Drs. Forehand and Zaldivar, and reweigh the medical opinions in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the reasoning and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge must compare the medical opinions

[11] While the administrative law judge noted claimant's testimony regarding the exertional requirements of driving a supply truck, none of the physicians relied on this testimony when preparing their reports. Decision and Order at 4. Dr. Forehand relied on claimant's employment history form, which indicated that claimant last operated a loading machine, pulling and hanging cabling, setting timbers, and rock dusting. Director's Exhibit 14. Dr. Zaldivar noted that claimant last worked as a truck driver for four years, hauling supplies that included belts and cables, and that he lifted them by hand although there was a hoist in the truck for things he could not lift. Employer's Exhibit 1. Dr. Basheda, like Dr. Forehand, relied on claimant's employment history form that listed claimant's last job as an operator of a loading machine. He also noted Dr. Crisalli's documentation of coal mine employment from his 2005 report indicating that claimant would have to lift up to 50 pounds. Employer's Exhibit 5 at 8; Director's Exhibit 2.

to the exertional requirements of the miner's usual coal mine employment, and assess whether, in light of the exertional requirements and the objective testing, the physicians rendered reasoned and documented opinions on the issue of total disability. The administrative law judge is required to set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-126 (1989).

Because we have vacated the administrative law judge's finding that the evidence established total disability, we also vacate his finding that claimant invoked the amended Section 411(c)(4) presumption, and the award of benefits. On remand, should the administrative law judge find that the new medical opinion evidence establishes total disability pursuant to Section 718.204(b)(2)(iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b), thereby establishing a change in an applicable condition of entitlement under Section 725.309, and invocation of the amended Section 411(c)(4) presumption. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *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 the administrative law judge determines that claimant has failed to establish total disability under Section 718.204(b)(2), an award of benefits is precluded. *See White*, 23 BLR at 1-3; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). If the administrative law judge determines that claimant has established total disability pursuant to Section 718.204(b), and is entitled to invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal of the presumption with affirmative proof that claimant does not have pneumoconiosis, or that no part of his respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich*, slip op. at 10-11.

The administrative law judge should begin his rebuttal analysis in this case at Section 718.305(d)(1)(i)(A) by considering all relevant and credible evidence to determine whether employer has established that claimant does not have legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Even if legal pneumoconiosis is found to be present, the administrative law judge should determine whether employer has disproved the existence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B), as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong. If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the amended Section 411(c)(4) presumption at Section 718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer

fails to rebut the presumption at Section 718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at Section 718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge