U.S. Department of Labor

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

BRB No. 17-0422 BLA

DANNY M. VANHOOSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RHINO SERVICES, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 05/31/2018
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, 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 (2015-BLA-05444) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on August 26, 2013.

The administrative law judge credited claimant with thirty-two years of qualifying coal mine employment,[1] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the Section 411(c)(4) presumption.[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer 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 also contends that the administrative law judge erred in finding that it failed to rebut the presumption. Employer further challenges the administrative law judge's determination regarding the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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[1] Employer stipulated that claimant had thirty-seven years of coal mine employment. Hearing Transcript at 5. The administrative law judge found that claimant worked in underground coal mine employment for five years. Decision and Order at 3-4. The administrative law judge further noted that claimant testified that twenty-seven out of his thirty-two years of surface coal mine employment occurred in "high dust" conditions. *Id*. at 4; Transcript at 16-17. The administrative law judge therefore found that twenty-seven years of claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. *Id.*

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because employer does not challenge the administrative law judge's finding that claimant established thirty-two years of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[4] 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

A miner is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon: pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). Employer argues that the administrative law judge erred in finding that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[5]

The administrative law judge considered six blood gas studies conducted on October 2, 2013, May 8, 2014, May 11, 2015, March 31, 2016, June 10, 2016, and June 15, 2016. The October 2, 2013, May 8, 2014, and May 11, 2015 blood gas studies produced non-qualifying[6] values both at rest and during exercise. Decision and Order at 16; Director's Exhibits 12, 16; Employer's Exhibit 1. The blood gas study conducted on March 31, 2016, which was conducted at rest, also produced non-qualifying values. Employer's Exhibit 4. The June 10, 2016 blood gas study conducted by Dr. Habre produced qualifying values at rest, but non-qualifying values during exercise. Claimant's Exhibit 5. On the other hand, the June 15, 2016 blood gas study conducted by Dr. Shamma-Othman produced non-qualifying values at rest, but qualifying values during exercise. Claimant's Exhibit 2.

In finding that the blood gas study evidence established total disability, the administrative law judge stated:

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

[5] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 16.

[6] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

> The arterial blood gas studies demonstrate a steady decline in the [c]laimant's ability to oxygenate blood, which is consistent with a progressive form of lung disease. The earlier studies are non-qualifying to show disability. But all three 2016 studies resulted in near-qualifying or qualifying values. Moreover, the most recent study was performed by Dr. Shamma-Othman. He noted that [c]laimant developed significant hypoxemia with exercise. Exercise testing is a better predictor of the [c]laimant's ability to work in the mines. I find that the [c]laimant has established that he is disabled based on the arterial blood gas studies.

Decision and Order at 16.

In resolving the conflicting medical opinion evidence, the administrative law judge accorded less weight to the opinions of Drs. Klayton, Jarboe and Rosenberg that claimant is not disabled from a pulmonary standpoint, because they did not review the most recent qualifying blood gas study evidence. Decision and Order at 17; Director's Exhibit 17; Employer's Exhibits 1, 2. Conversely, the administrative law judge credited the opinions of Drs. Habre and Shamma-Othman that claimant is totally disabled from a pulmonary standpoint, because she found that their opinions were in better accord with the medical evidence of record. Decision and Order at 17; Claimant's Exhibits 1, 2. "[B]ased on the qualifying 2016 exercise blood gas studies, and the medical opinion evidence," the administrative law judge found that claimant established that he is totally disabled by a pulmonary or respiratory impairment. Decision and Order at 17.

Employer argues that the administrative law judge failed to adequately explain why she found that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). We agree. After noting that exercise blood gas studies are the "best predictor" of a miner's ability to work in the mines, the administrative law judge credited the qualifying exercise blood gas study conducted by Dr. Shamma-Othman on June 15, 2016. As employer notes, however, the administrative law judge did not address the fact that an exercise blood gas study conducted just five days earlier by Dr. Habre produced non-qualifying values. Employer's Brief at 7. Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), which provides 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 must therefore vacate the administrative law judge's finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

In light of our decision to remand the case to the administrative law judge for reconsideration of the arterial blood gas study evidence, we vacate her finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as that finding was based in part upon her finding that the arterial blood gas study evidence established total disability. On remand, when considering whether the 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 that the arterial blood gas study or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), she 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 20 C.F.R. §718.204(b).[7] *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.[8] 30 U.S.C. §921(c)(4).

Commencement Date of Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date is not ascertainable from the record, benefits will commence the month the claim was filed, unless evidence establishes that the miner

[7] 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).

[8] Because we have vacated the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption, we decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to establish rebuttal of 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 findings on rebuttal in a future appellate proceeding.

was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In this case, the administrative law judge found that the date of onset of total disability was not ascertainable from the record and she awarded benefits as of August 2013, the month claimant filed his claim. Decision and Order at 23. As employer accurately notes, however, she also found that claimant was not totally disabled when he was examined by Dr. Klayton in October of 2013, three months after claimant filed his claim. Decision and Order at 23; Director's Exhibit 12. Thus, should the administrative law judge award benefits on remand, she should address evidence that shows that claimant was not totally disabled due to pneumoconiosis at any time after he filed his claim. If she credits such evidence, benefits may not commence prior to that date. *See Lykins*, 12 BLR at 1-182-83.

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