U.S. Department of Labor

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

BRB No. 16-0159 BLA

ALLAN BURTON Claimant-Respondent v. DRUMMOND COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 12/06/2016 DECISION and ORDER

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Jeannie B. Walston and Phillip G. Piggott (Starnes Davis Florie, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2013-BLA-05958) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 25, 2012.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment,[2] 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). 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 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. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[3]

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).

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[1] 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 qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. § 921(c)(4) (2012); see 20 C.F.R. §718.305.

[2] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has at least fifteen years of qualifying coal mine employment, and that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983).

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 specifically contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4]

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. O'Reilly and Hawkins.[5] The administrative law judge accorded less weight to Dr. O'Reilly's opinion because the doctor relied upon pulmonary function study results that the administrative law judge determined were not probative of claimant's condition. Decision and Order at 18; Director's Exhibit 10; Claimant's Exhibit 4. Because no party challenges the administrative law judge's basis for discrediting Dr. O'Reilly's opinion, it is affirmed. Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983).

The administrative law judge then considered the records of claimant's treating pulmonologist, Dr. Hawkins. Dr. Hawkins first saw claimant on February 28, 2013, at which time he conducted a physical examination and obtained claimant's medical and employment histories. Claimant's Exhibit 5. Dr. Hawkins opined that claimant "is very limited with resting and exertional shortness of breath . . . He has likely developed respiratory impairment from his work exposures." Claimant's Exhibit 5.

Dr. Hawkins saw claimant again on March 13, 2013, at which time he conducted a pulmonary function study that he interpreted as showing a moderate to severe ventilatory impairment. Claimant's Exhibit 5. After conducting a physical examination and reviewing claimant's objective tests, Dr. Hawkins stated:

> [Claimant] remains very limited with exertional shortness of breath at minimal exertion. . . . [H]is clinical presentation, severe shortness of breath on exertion, [chest x-ray] and [pulmonary function tests] are all compatible with coal workers pneumoconiosis. He is unable to perform any manual labor and is unablel [sic] to perform his last coal mine job.

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[4] 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 8-11.

[5] Although the administrative law judge also considered the opinions of Drs. Goldstein and Russakoff, she found that their opinions were equivocal on the issue of total disability. Decision and Order at 18. The administrative law judge, therefore, determined that these opinions were "not probative" on the issue of total disability. Id.

Dr. Hawkins performed additional examinations on September 13, 2013, March 14, 2014, April 28, 2014, and July 30, 2014. In the April 28, 2014 treatment note, Dr. Hawkins reported that claimant had "multiple metastases from his sarcoma of the leg" and was "scheduled to undergo chemotherapy." Under "History of Present Illness," Dr. Hawkins noted that claimant "is short of breath and may be a little more short of breath." Id.

In considering Dr. Hawkins' opinion, the administrative law judge acknowledged that the doctor relied upon March 13, 2013 pulmonary function study results that the administrative law judge had determined were "not probative of . . . [c]laimant's condition."[6] Decision and Order at 18. The administrative law judge, however, credited Dr. Hawkins' assessment, explaining that Dr. Hawkins' "treatment records were recent enough to allow him to consider the consequences of . . . [c]laimant's cancer, which had metastasized to the lung and would cause further shortness of breath." Id. The administrative law judge concluded that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Id. at 18-19.

Employer contends that the administrative law judge erred in her consideration of Dr. Hawkins' opinion. After noting that Dr. Hawkins relied upon pulmonary function study results that were "not probative," the administrative law judge found that Dr. Hawkins provided an additional basis for diagnosing total disability; specifically, that Dr. Hawkins opined that claimant's lung cancer is causing him to have increasing shortness of breath that leaves him unable to work. Decision and Order at 18. Employer, however, argues that Dr. Hawkins did not render such an opinion and, therefore, substantial evidence does not support the administrative law judge's finding that Dr. Hawkins diagnosed total disability on the basis of increasing shortness of breath due to lung cancer. We agree with employer.

The administrative law judge stated that Dr. Hawkins, in his April 28, 2014 treatment note, "explained that . . . [c]laimant was short of breath and might become more short of breath, due to metastases." Decision and Order at 14 (emphasis added). The administrative law judge also credited Dr. Hawkins' opinion because his "records were recent enough to allow him to consider the consequences of . . . [c]laimant's cancer, which had metastasized to the lung and would cause further shortness of breath." Id. at 18. However, as employer accurately notes, Dr. Hawkins did not opine that claimant was

[6] Noting Dr. Russakoff's opinion that claimant's effort on the March 13, 2013 pulmonary function study was inadequate, and noting that the study's tracings were not in the record, the administrative law judge declined to give Dr. Hawkins' pulmonary function study significant weight and found that it did not support a finding of total disability. Decision and Order at 10.

becoming short of breath due to metastasized lung cancer. Rather, Dr. Hawkins reported that claimant was "short of breath" without addressing its cause. Consequently, the administrative law judge erred in her characterization of the basis for Dr. Hawkins' diagnosis of total disability. See Tackett v. Director, OWCP, 7 BLR 1-703, 1-706 (1985). Therefore, substantial evidence does not support the administrative law judge's determination as to why Dr. Hawkins' opinion constitutes a reasoned medical opinion diagnosing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc); Lucostic v. U.S. Steel Corp., 8 BLR 1-46, 1-47 (1985). Therefore, we must vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. We, therefore, must also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) rebuttable presumption.

On remand, when reconsidering whether Dr. Hawkins' opinion establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the explanations for Dr. Hawkins' conclusions, the documentation underlying his medical judgments,[7] and the sophistication of, and bases for, his diagnosis. Jordan v. Benefits Review Board, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc); Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989). In rendering all of her findings on remand, the administrative law judge's analysis of the medical evidence must comport with the Administrative Procedure Act, 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).

If the administrative law judge, on remand, finds that Dr. Hawkins' opinion is sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

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[7] On remand, the administrative law judge should consider how Dr. Hawkins' reliance on the March 13, 2013 pulmonary function study results impacted his assessment of claimant's pulmonary function. See Director, OWCP v. Siwiec, 894 F.2d 635, 639, 13 BLR 2-259, 2-265 (3rd Cir. 1990); Siegel v. Director, OWCP, 8 BLR 1-156, 1-157 (1985).

See Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-21 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc).

If the administrative law judge, on remand, finds 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, on remand, 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 unchallenged finding that employer failed to establish rebuttal of the presumption, claimant would then be entitled to benefits.

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

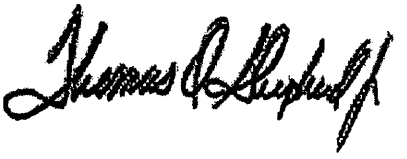
RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

CERTIFICATE OF SERVICE

2016-0159-BLA Allan Burton v. Drummond Co., Inc., Director, Office of Workers' Compensation Programs
(Case No. 13-BLA-5958)

I certify that the parties below were served this day.



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