U.S. Department of Labor

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

BRB No. 19-0259 BLA

ELWOOD CARRINGTON Claimant-Respondent v. SOUTHERN OHIO COAL COMPANY, Self-Insured through EAST COAST RISK MANAGEMENT, LLC. Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Robert S. Seer (Ellis Legal, P.C.) and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, PC), Chicago, Illinois, for claimant.

J. Lawson Johnston and Michael A. Muha (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05093) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to 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 June 2, 2015.

The administrative law judge credited the parties' stipulation that claimant worked for twenty-three years in underground coal mine employment and found claimant established a totally disabling respiratory impairment. He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established total respiratory disability. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant 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) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

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

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He 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). He may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[4] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 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 probative evidence to determine whether claimant has established total disability by a preponderance of the 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).

Although he found the preponderance of the pulmonary function and arterial blood gas studies non-qualifying, the administrative law judge determined claimant established total respiratory disability by the medical opinions and the weight of the evidence as a whole.[5] Drs. Gottschall and Feicht opined claimant has a totally disabling respiratory impairment, and Dr. Grodner stated claimant has moderately severe obstructive airway disease and hypoxemia. Decision and Order at 8-12. The administrative law judge found Dr. Gottschall's opinion "convincingly explained" and entitled to "substantial weight," but accorded "little probative weight" to Dr. Feicht's opinion as inadequately explained and "no probative weight" to Dr. Grodner's opinion because it is silent on total disability.

[4] 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).

[5] Considering the pulmonary function study evidence, the administrative law judge found the pre-bronchodilator values of one study were qualifying while the pre-bronchodilator values of another study were non-qualifying. Decision and Order at 8. He concluded that the pulmonary function study evidence was inconclusive and, therefore, "neither supports nor refutes a finding of total disability" at 20 C.F.R. §718.204(b)(2)(i). *Id*. Because the two arterial blood gas studies were non-qualifying, the administrative law judge found these tests do not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 6. He further found the record contains no evidence of cor pulmonale with right-sided congestive heart failure and, therefore, total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 5.

Decision and Order at 8-9, 11-12; Director's Exhibits 18-21; Claimant's Exhibit 2; Employer's Exhibit 4. Based on his crediting of Dr. Gottschall's opinion, the administrative law judge concluded the medical opinion evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12.

Employer contends that Dr. Gottschall's reliance on the exertional requirements of a truck driver rather than those of a bulldozer operator renders her disability opinion flawed. Employer's Memorandum of Law in Support (Employer's Memorandum) at 7-8. Employer also argues Dr. Gottschall's disability opinion is speculative because she relied on her extrapolation of qualifying values from a non-qualifying exercise blood-gas study. These contentions do not have merit.

A miner's "usual coal mine employment" is "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). "This determination must be made on a case by case basis and will vary depending upon the employment history in the individual case." *Id*. The record contains Department of Labor CM-911a (Employment History) and CM-913 (Description of Coal Mine Work and Other Employment) Forms, and claimant's hearing testimony. On his CM-911a and CM-913 Forms, claimant indicated he worked for employer as a truck driver from 1980 to 1997, the year he retired from coal mine employment. Director's Exhibits 6, 7. He testified at the hearing that his last job was as a truck driver hauling various types of equipment and stated that he "hauled dozers back and forth between the mines … [t]hat was part of the equipment I hauled."[6] Hearing Tr. at 19-20, 22. On cross-examination by employer's counsel, claimant stated he stopped working in the coal mines because "my shoulder was bad and they stick me running a [bull]dozer where you're continually using your right arm all the time, and … I couldn't do it no longer." *Id*. at 47.

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[6] The following exchange occurred between claimant's counsel and claimant:

> Q. Okay. And this job on the roving crew as a truck driver hauling equipment, was this the last job that you had—
>
> A. Yes.
>
> Q. – working for Southern Ohio?
>
> A. Yes, it was.

Hearing Tr. at 19-20.

We affirm the administrative law judge's finding that claimant's usual coal mine job was working as a truck driver. Contrary to employer's contention, claimant's testimony that he retired in 1997 due to shoulder pain when employer required him to run a bulldozer does not establish bulldozer operator as his usual coal mine job or that he performed the job for anything more than a brief period of time. Hearing Tr. at 47. The administrative law judge credited, as within his discretion, the remainder of claimant's testimony and his employment history forms consistently describing his usual coal mine work from 1980 to 1997 as a truck driver. *Id*. at 19-23, 34; Director's Exhibits 6, 7. In light of this evidence, the administrative law judge rationally determined claimant's usual coal mine work was as a truck driver, which required medium to heavy manual labor.[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78 (6th Cir. 2000); Decision and Order at 6. Thus, contrary to employer's argument, the administrative law judge permissibly credited Dr. Gottschall's description of claimant's usual coal mine job as truck driver, and her reliance on claimant's report of the job's exertional requirements that were consistent with the administrative law judge's finding claimant performed medium to heavy manual labor.[8] Decision and Order at 11, *quoting* Claimant's Exhibit 1 at 4; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185.

We also reject employer's argument the administrative law judge erred in crediting Dr. Gottschall's diagnosis because she relied on extrapolated qualifying values from the exercise portion of a non-qualifying blood gas study. Employer's Memorandum at 6-7. In her May 16, 2018 report, Dr. Gottschall reviewed medical evidence, including the two pulmonary function studies and two arterial blood-gas studies of record.[9] Claimant's

[7] We affirm as unchallenged the administrative law judge's determination claimant's job as a truck driver required medium to heavy exertion because he had to occasionally move and lift equipment weighing 100 pounds. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[8] Dr. Gotschall reported claimant's job as a truck driver required him to climb into the cab and the bed of a two-ton truck, move chains weighing 100 pounds, and change tires weighing 100 pounds. Claimant's Exhibit 1 at 3-4.

[9] Dr. Gotschall reviewed pulmonary function studies dated November 17, 2015, and May 11, 2016. Director's Exhibit 18; Claimant's Exhibit 1; Employer's Exhibit 3. Only the pre-bronchodilator test from November 17, 2015, produced qualifying values. Director's Exhibit 18. Dr. Gottschall also reviewed the two blood gas studies of record. The test dated July 28, 2015, yielded non-qualifying values at rest and after exercise while the test dated May 11, 2016, administered only at rest, yielded non-qualifying values. Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibit 3.

Exhibit 1 at 2-3. She noted the 2015 and 2016 pulmonary function studies showed significant airflow limitation but the 2015 pre-bronchodilator study was a better measure of claimant's lung function because he exhaled long enough to produce a "true" FVC result and exerted better effort as the higher PEF and/or FEF maximums showed. *Id*. at 2. She further stated claimant's bronchodilator response was limited and concluded he has a significant fixed impairment consistent with disabling chronic obstructive pulmonary disease and asthma. *Id*.

As for the blood gas studies, Dr. Gottschall noted the 2016 resting test showed hypoxemia and she questioned why Dr. Grodner, the administering physician, did not have an exercise test performed.[10] Claimant's Exhibit 1 at 3. She then observed that during the exercise portion of the 2015 test, claimant's values were "only 0.5 mmHg above what would be considered qualifying" based on the tables in Appendix C to Part 718. *Id*. She also noted claimant exercised for less than six minutes and did not exceed 85% of his maximum predicted heart rate.[11] *Id*. She opined that had these benchmarks been met, the test would have been qualifying, stating "[o]ne can extrapolate that [claimant's] paO2 . . . would have easily dropped below 64 mmHg had he exercised to a slightly higher heart rate for just another minute[.]" *Id*. Dr. Gottschall concluded claimant has an obstructive impairment and hypoxemia, both of which render him incapable of performing his usual coal mine work as a truck driver. *Id*. at 3-4.

It is the administrative law judge's function to assess the credibility of the medical opinion evidence. *See Crisp*, 866 F.2d at 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). He rationally found Dr. Gottschall's diagnosis of total disability "convincing and well-reasoned" because she explained why the qualifying 2015 pre-bronchodilator pulmonary function study was the most reliable indicator of claimant's pulmonary condition; she accurately noted claimant became symptomatic less than two minutes after beginning the 2015 exercise blood-gas study and was unable to complete the study; she correctly observed claimant's oxygen values dropped to nearly qualifying before the 2015 exercise test was terminated early; she explained how the drop in claimant's pO2 level and his inability to finish the test supported her conclusion that he is significantly impaired; and she described how claimant's obstructive impairment and hypoxemia render him unable to perform his usual coal mine work as a truck driver in light of the exertional

[10] Neither Dr. Grodner's report, nor the report of the blood gas study, contains any affirmative indication of why an exercise study was not performed. Employer's Exhibit 3.

[11] Claimant performed the exercise portion of the July 28, 2015 arterial blood gas study for one minute and thirty-seven seconds. Director's Exhibit 14. His maximum heart rate was 84, and he "never reached >85% of his maximum predicted heart rate." *Id*.

requirements of that job. Decision and Order at 10-11; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that Dr. Gottschall's opinion established total disability at 20 C.F.R. §718.204(b)(2)(iv), and his finding that the evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12.

In light of our affirmance of the administrative law judge's determinations that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), we also affirm his finding that claimant invoked the Section 411(c)(4) presumption. Because the administrative law judge found employer did not rebut this presumption, a determination we affirm as unchallenged on appeal, we affirm the award of benefits in this claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-19.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge