U.S. Department of Labor

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

BRB No. 20-0099 BLA

GARY K. FLANNER Claimant-Respondent v. CONSOL OF KENTUCKY, INCORPORATED and Self-insured through CONSOL ENERGY, INCORPORATED, c/o HEALTHSMART, CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/19/2021 DECISION and ORDER

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

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05028) rendered on a subsequent claim filed on July 14, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established at least twenty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and in invoking the Section 411(c)(4) presumption.[4] It also argues the administrative law judge erred in finding the presumption unrebutted. Claimant

[1] Claimant filed a prior claim on March 6, 1997. Director's Exhibit 1 at 73. The district director denied it on May 19, 1997, because Claimant failed to establish any element of entitlement. Director's Exhibit 1 at 6.

[2] 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) (2018); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he 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). Because the district director denied Claimant's prior claim for failure to establish any element of entitlement, he had to submit new evidence establishing at least one element of entitlement in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established at least twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

has not filed a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 – Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 9 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer contends the administrative law judge erred in finding Claimant established total disability based on the pulmonary function study evidence and Dr. Ajjarapu's opinion. We disagree.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 13.

[6] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies, cor pulmonale with right-sided congestive heart failure, or complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(ii), (iii), 718.304; Decision and Order at 4, 11.

Pulmonary Function Studies

The administrative law judge considered seven studies. The two earliest studies, dated June 19, 2012, and June 4, 2014, were non-qualifying.[7] Director's Exhibit 30. Dr. Ajjarapu's June 27, 2016 study was qualifying and no bronchodilator was administered. Director's Exhibit 27. Dr. Ajjarapu's August 3, 2016 study had qualifying pre-bronchodilator and post-bronchodilator values. Director's Exhibit 15. Dr. Tuteur's June 19, 2017 study had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibit 34. Studies dated May 15, 2017 and March 9, 2018 were qualifying and no bronchodilator was administered. Claimant's Exhibits 4, 5.

The administrative law judge found all of the pulmonary function studies valid. Decision and Order at 11. He credited the more recent studies dating from 2016 through 2018 as more probative of Claimant's condition. *Id.* Relying on the qualifying pre-bronchodilator values, the administrative law judge found Claimant established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

Employer contends the five qualifying pre-bronchodilator studies are invalid because it alleges Claimant gave poor effort in performing them.[8] Employer's Brief at 4-8. Even if we were to conclude the administrative law judge erred in determining the validity of some of the studies as Employer suggests, it has not shown why remand is necessary. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As discussed below, because the administrative law judge permissibly found the qualifying August 3, 2016 and June 19, 2017 pre-bronchodilator studies valid, any error he made in determining the

[7] 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).

[8] When considering the pulmonary function study evidence, the administrative law judge must determine whether the studies substantially comply with the quality standards. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 n.8 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of the miner's pulmonary function. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring).

validity of the other qualifying studies would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

August 3, 2016 Pulmonary Function Study

Dr. Ajjarapu conducted Claimant's August 3, 2016 pulmonary function study as part of the Department of Labor's complete pulmonary evaluation. Director's Exhibit 15. On the study's report, the administering technician indicated Claimant had "good" cooperation, and was able to understand instructions and follow directions. *Id*. Under "ATS Reproducibility," "MET" was noted for both the pre-bronchodilator and the post-bronchodilator tests. *Id*. at15. Dr. Ajjarapu opined the study showed a severe pulmonary impairment, but described the MVV value as "suboptimal." *Id*. at 3. Dr. Gaziano validated the test results. Director's Exhibit 20.

In his initial report, Dr. Vuskovich stated Claimant's "respiratory rate and tidal volume were not sufficient to generate valid MVV results." Director's Exhibit 32 at 4. He added that Claimant's "deep breath efforts were not maximum efforts," which "artificially lowered his FVC-FEV1 results." *Id.* However, Dr. Vuskovich also remarked that Claimant "put forth the effort required to generate valid FVC-FEV1 results." *Id.* In a subsequent report, however, Dr. Vuskovich stated Claimant "did *not* put forth the effort required to generate valid FVC-FEV1 results" because "[h]is deep breath efforts were variable" and he had not taken the "initial deepest breath possible." Employer's Exhibit 1 at 10 (emphasis added). Dr. Tuteur testified that the August 3, 2016 pre-bronchodilator study was invalid based on the MVV value and calculated that it should have been eighty, not forty-two.[9] Employer's Exhibit 3 at 16-18.

In resolving the conflict in this pulmonary function study evidence, the administrative law judge noted correctly that while Dr. Ajjarapu commented on the MVV value, she did not indicate it was invalid and specifically relied on the study to conclude Claimant is totally disabled. Decision and Order at 7-8; Director's Exhibit 15. He also accurately noted that even if the MVV is invalid, the study is qualifying based on the FEV1 and FVC values. Further, although Dr. Vuskovich opined the FEV1 and FVC values are invalid, the administrative law judge permissibly found Dr. Vuskovich's opinion unpersuasive in view of his contradictory statements regarding Claimant's effort. *See*

[9] Dr. Tuteur referenced a March 2016 study. Employer's Exhibit 3 at 17. Because there is no study corresponding to that month and year in the record, the administrative law judge assumed Dr. Tuteur was referring to the August 3, 2016 study. Decision and Order at 8 n.3.

Director, OWCP v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983*); Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order 8.

We see no error in the administrative law judge's reliance on the technician's first-hand observations of Claimant's effort, as supported by Dr. Ajjarapu's opinion and Dr. Gaziano's validation report. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (administrative law judge may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990) (administrative law judge must provide a rationale to credit consultant's opinion over physician or technician who observed the test). Therefore, we affirm the administrative law judge's determination that the qualifying August 3, 2016 pulmonary function study is valid.[10] Decision and Order at 8.

June 19, 2017 Pulmonary Function Study

Dr. Tuteur examined Claimant on behalf of Employer on June 19, 2017. Director's Exhibit 34. Employer alleges Dr. Tuteur invalidated this study and therefore asserts the administrative law judge erred in "deem[ing] the test valid, despite the lack of an opinion from a medical doctor." Employer's Brief at 7. Contrary to Employer's characterization, Dr. Tuteur specifically opined his testing was valid and the results showed Claimant had a mild restrictive respiratory impairment.[11] Employer's Exhibit 3 at 18. As Employer concedes, the technician who conducted this study indicated Claimant understood the instructions and gave good effort in performing the test. Director's Exhibit 34 at 6. Although Dr. Vuskovich opined that Claimant did not put forth the effort required to generate valid results, the administrative law judge permissibly relied on Dr. Tuteur's opinion as supported by the technician's comments. *See Hunt*, 124 F.3d at 744; *Worrell*, 27 F.3d at 231; *Brinkley*, 14 BLR at 1-149. We therefore affirm the administrative law judge's finding that the June 19, 2017 study is valid. Decision and Order at 10.

[10] Employer asserts Dr. Tuteur also invalidated the August 3, 2016 study because the two best values were not within five percent of each other. Employer's Brief at 5, *citing* Employer's Exhibit 3 at 17. However, Dr. Tuteur's description of a five percent variation pertains to his review of the March 9, 2018 pulmonary function study, not the August 3, 2016 study. *Id*.

[11] Dr. Tuteur testified at his deposition that the June 19, 2017 pulmonary function study "was not" invalid. Employer's Exhibit 3 at 18.

Conclusion on Pulmonary Function Study Evidence

We affirm, as unchallenged, the administrative law judge's finding that the non-qualifying studies from 2012 and 2014 are entitled to less weight. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11. We also affirm the administrative law judge's crediting of the pre-bronchodilator values over the post-bronchodilator values. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (use of a bronchodilator does not provide an adequate assessment of the miner's disability, though it may aid in determining the presence or absence of pneumoconiosis); Decision and Order at 11. Substantial evidence supports the administrative law judge's finding that Claimant established total disability based on the August 3, 2016 and June 19, 2017 qualifying pre-bronchodilator studies. We therefore affirm the administrative law judge's finding that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

Medical Opinion Evidence

The administrative law judge considered three medical opinions on total disability. Dr. Ajjarapu opined that Claimant's pulmonary function study results from August 3, 2016 and June 19, 2017 show a severe respiratory impairment. Director's Exhibits 15 at 3, 25 at 2. Dr. Ajjarapu opined that Claimant is totally disabled from performing his usual coal mine employment. Director's Exhibits 15 at 7, 25 at 3. Dr. Tuteur opined that Claimant is not totally disabled by a "primary pulmonary" process. Director's Exhibit 34; Employer's Exhibit 3. Dr. Vuskovich opined that the changes in Claimant's spirometry were effort-related, rather than manifestations of pulmonary disease, and there was no valid evidence Claimant is totally disabled. Employer's Exhibit 1 at 13-14.

The administrative law judge found Dr. Ajjarapu's opinion sufficient to establish that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). Specifically, he found:

> Dr. Ajjarapu's opinion is consistent with her examination of the Claimant and the evidence she considered. She relied on qualifying pre-bronchodilator pulmonary function tests in concluding that the Claimant is totally disabled. Because her opinion is well-reasoned, well-documented, and consistent with the weight of the evidence of record, I give it probative weight.

Decision and Order at 13. Weighing all of the medical opinions together, he found Dr. Ajjarapu's opinion on total disability the most persuasive. *Id*. at 15.

Contrary to Employer's contention, we see no error in the administrative law judge's finding that Dr. Ajjarapu's opinion is reasoned, documented, and supported by the

qualifying pulmonary function studies. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (administrative law judge may properly credit the medical opinions he determines are better supported by the objective evidence). The administrative law judge also permissibly discredited Dr. Tuteur's opinion because he did not adequately explain why the impairment evidenced by the qualifying pulmonary function studies would not preclude Claimant from performing his usual coal mine employment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 14.

Additionally, the administrative law judge permissibly rejected Dr. Vuskovich's opinion because the doctor did not believe any of the pulmonary function studies were valid to assess Claimant's respiratory disability, contrary to the administrative law judge's determination. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 14-15; Employer's Exhibit 1 at 15. We therefore affirm the administrative law judge's finding that Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15.

Conclusion on Total Disability based on the Relevant Evidence as a Whole

Weighing all the evidence together, the administrative law judge permissibly found the non-qualifying blood gas studies "do not contradict" the qualifying pulmonary function studies. Decision and Order at 15; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) (Because they measure different types of impairment, non-qualifying pulmonary function studies do not call into question the validity of blood gas study results demonstrating impairment); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). We therefore affirm the administrative law judge's finding that Claimant established total disability, as supported by the August 3, 2016 and June 19, 2017 qualifying pre-bronchodilator pulmonary function studies and Dr. Ajjarapu's opinion. Decision and Order at 15. We thus affirm the administrative law judge's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309; Decision and Order at 15-16.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not establish rebuttal by either method.[13] Employer challenges the administrative law judge's finding on legal pneumoconiosis.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

The administrative law judge found the opinions of Drs. Tuteur and Vuskovich insufficient to disprove legal pneumoconiosis.[14] Decision and Order at 19-21. Employer contends the administrative law judge improperly required Dr. Tuteur to "rule out" coal mine dust exposure as a contributing factor in Claimant's respiratory impairment and therefore applied the wrong standard of proof. Employer's Brief at 9-11. We disagree.

---

[12] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[13] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 17-19.

[14] We affirm, as unchallenged, the administrative law judge's rejection of Dr. Vuskovich's opinion on legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-21.

The administrative law judge correctly noted Employer has the burden to establish Claimant does not have a respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 16-17, *quoting* 20 C.F.R. §718.201(a)(2), (b). He rejected Dr. Tuteur's opinion not for failing to meet a particular legal standard, but instead because he found it not adequately reasoned.

Dr. Tuteur examined Claimant and diagnosed a restrictive impairment. He attributed it to a combination of obesity and an obstructed posterior pharynx.[15] Employer's Exhibit 3 at 13-15, 19-20. The administrative law judge accurately noted Dr. Tuteur referenced Claimant's post-bronchodilator values to support his conclusion that Claimant does not have legal pneumoconiosis, Employer's Exhibit 3 at 19-20, and he permissibly found Dr. Tuteur did not adequately explain why Claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his restrictive respiratory impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 20. The administrative law judge also permissibly found that while Dr. Tuteur identified non-respiratory causes for Claimant's restrictive impairment, he did not persuasively explain why Claimant's twenty-one years of coal mine dust exposure did not also significantly contribute to, or substantially aggravate, his disabling pulmonary impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 20.

Because the administrative law judge applied the correct legal standard and acted within his discretion in weighing the evidence, we affirm his determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge further found Employer failed to establish "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly

[15] Dr. Tuteur explained the degree of obstruction of Claimant's pharynx represented a III on the "Mallampati score," which is a "semiquantitative method to assess the state of the opening of the posterior pharynx." Employer's Exhibit 3 at 14. A "normal person" has a "Mallampati I." *Id*. When the "opening is completely obstructed visually, it's a Mallampati IV." *Id*. at 15.

discounted Drs. Tuteur's and Vuskovich's opinions on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 22. Employer raises no arguments on disability causation other than to assert Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the administrative law judge's determination that Employer failed to rebut legal pneumoconiosis as a cause of Claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge