U.S. Department of Labor

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

BRB No. 20-0114 BLA

ODIAS JUDE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL MAC, INCORPORATED	)	DATE ISSUED: 04/19/2021
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-06248), rendered on a subsequent claim filed on

December 27, 2016[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Based on the parties' stipulation, the administrative law judge credited Claimant with thirty-five years of surface coal mine employment, all of which he found occurred in conditions substantially similar to those in an underground mine. The administrative law judge further found the new evidence established Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption, and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding Claimant totally disabled and therefore erred in finding he invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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[1] Claimant filed three prior claims for benefits. The first two were withdrawn and are considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibits 1-3. The district director denied his most recent claim on May 14, 2015, for failure to establish any element of entitlement. Director's Exhibit 3.

[2] When 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). The district director denied Claimant's prior claim because he failed to establish any element of entitlement; therefore, to obtain review of the merits of his subsequent claim, he had to establish any element of entitlement. *See* 20 C.F.R. §725.309(c); Director's Exhibit 3.

[3] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he 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); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty-five years of surface coal mine employment in conditions

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).

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine 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 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 all relevant supporting evidence against all relevant contrary 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).

The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 4, 7.

Before weighing the medical opinions, the administrative law judge found Claimant's usual coal mine employment as a mechanic and welder required heavy manual labor, including lifting up to 100 pounds every day. Decision and Order at 4-5. Employer contends the record does not support a finding that Claimant's work "regularly required heavy and very heavy manual labor" and contains contradictory statements from Claimant as to the frequency with which he had to lift 100-pound parts. Employer's Brief at 14, 18. We disagree.

The administrative law judge considered Claimant's CM-913 Form, Description of Coal Mine Work and Other Employment, his testimony at an October 10, 2017 deposition, and his testimony at the May 21, 2019 hearing. Decision and Order at 5; Director's Exhibits 8, 29; Hearing Transcript at 24-26. Claimant stated that his work required him to

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substantially similar to those in an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12; Director's Exhibit 6.

repair equipment, stand during most of his shift, and lift parts weighing fifty to 100 pounds. Director's Exhibit 8. He explained his job required him to use heavy tools, and he was constantly prying and lifting heavy objects. Director's Exhibit 29 at 27. According to Claimant, he had to lift hoses that weighed eighty to 100 pounds, big impact guns that weighed eighty pounds, bushings that weighed 100 pounds or more, and drill bits that weighed over 100 pounds. Director's Exhibit 29 at 27; Hearing Transcript at 24-26. He stated his job required him to regularly do heavy lifting. Hearing Transcript at 26.

The administrative law judge found Claimant's uncontradicted testimony establishes that his job required him to regularly perform heavy lifting.[6] Decision and Order at 5. As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the evidence, including witness testimony. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Claimant's usual coal mine employment regularly required heavy labor. *Stallard*, 876 F.3d at 670; *Tackett*, 12 BLR at 1-14; Decision and Order at 5.

The administrative law judge next considered the opinions of Drs. Shah, Sood, Fino, and Tuteur to determine whether Claimant could perform that labor. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7-15. Drs. Shah and Sood opined Claimant has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine employment. Director's Exhibits 17, 24; Claimant's Exhibits 1, 2. Drs. Fino and Tuteur opined Claimant has a mild, non-disabling impairment. Director's Exhibit 25; Employer's Exhibits 1-3, 5. The administrative law judge found the opinions of Drs. Shah and Sood well-reasoned, well-documented, and persuasive. Decision and Order at 8-12. Conversely, he found the opinions of Drs. Fino and Tuteur less persuasive and entitled to less weight. *Id*. at 12-14.

Employer contends the administrative law judge erred in crediting the opinions of Drs. Shah and Sood. Employer's Brief at 13-23. We disagree. The administrative law judge accurately found that Dr. Shah relied upon Claimant's statements that his job required him to walk long distances, routinely lift twenty-five to thirty-pound parts, and

[6] Employer points to no evidence that contradicts Claimant's testimony or undermines the administrative law judge's determination that his testimony establishes his job required regular heavy labor. Moreover, Drs. Shah, Sood, and Fino each noted Claimant's usual coal mine employment required him to perform heavy and very heavy manual labor, with Dr. Fino specifically noting Claimant performed heavy labor at least half of the time. Director's Exhibit 25; Claimant's Exhibits 1-2.

sometimes lift parts weighing over 100 pounds. Decision and Order at 8; Director's Exhibit 17. Dr. Shah explained that Claimant is totally disabled based upon his oxygen consumption test which is "generally accepted by medical society for disability evaluation," showing he could perform "light to minimal moderate" work for a prolonged period but could not do heavy labor for more than five minutes.[7] Decision and Order at 10; Claimant's Exhibit 1 at 16-17, 19, 26. Noting that Claimant's hardest work required him to lift 100-pound drill parts once or twice a week, Dr. Shah opined that Claimant could not perform this task as it required twenty-five to thirty minutes of sustained heavy labor. Claimant's Exhibit 1 at 19.

Similarly, as the administrative law judge noted, Dr. Sood stated Claimant's oxygen consumption level would not allow him to perform the heaviest and hardest part of his job which required him to carry drill bits and bushings that weighed over 100 pounds. Decision and Order at 11-12; Claimant's Exhibit 2. Consequently, contrary to Employer's arguments, substantial evidence supports the administrative law judge's determination that Drs. Shah and Sood adequately understood the exertional requirements of Claimant's usual coal mine employment. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); Employer's Brief at 14, 16.

Moreover, the administrative law judge permissibly found their opinions well-reasoned and well-documented because the physicians addressed the specific exertional requirements of Claimant's usual coal mine employment and persuasively explained why his oxygen consumption level would prevent him from performing it. *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); Decision and Order at 10-12. As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and assign those opinions appropriate weight; the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Stallard*, 876 F.3d at 670; *Anderson v. Valley*

[7] To the extent Employer argues the administrative law judge erred in crediting the opinions of Drs. Shah and Sood because they found total disability based upon Claimant's oxygen consumption value despite non-qualifying pulmonary function testing and arterial blood gas studies, we reject this argument. *See* 20 C.F.R. §718.204(b)(2)(iv) ("a physician exercising reasoned medical judgment" may find total disability "based on medically acceptable clinical and laboratory diagnostic techniques"); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (a claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); Employer's Brief at 14-21.

Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's conclusion that the opinions of Drs. Shah and Sood are well-reasoned and documented. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-12.

We also reject Employer's argument that the administrative law judge mischaracterized the opinions of Drs. Fino and Tuteur and erred in discrediting their opinions. Employer's Brief at 22-23. The administrative law judge accurately noted that Drs. Fino and Tuteur opined Claimant has a mild, non-disabling reduction in pulmonary function. Director's Exhibit 25; Director's Exhibit 17; Decision and Order at 12, 14. He found their opinions less persuasive because they did not adequately explain why they disagreed with Drs. Shah and Sood that Claimant's oxygen consumption as measured by Dr. Shah rendered him totally disabled. Decision and Order at 13-14. He further found their opinions less persuasive because neither physician compared his diagnosis of a mild impairment with the specific exertional requirements of Claimant's job duties, while Drs. Shah and Sood specifically related Claimant's impairment to his job duties. *Id*. Because it is supported by substantial evidence, we affirm the administrative law judge's permissible finding that the opinions of Drs. Fino and Tuteur are less persuasive and entitled to less weight. *See Hicks*, 138 F.3d. at 533; *Akers*, 131 F. 3d. at 441; Decision and Order at 14. Consequently, we affirm his determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14.

We further affirm the administrative law judge's finding that all the relevant evidence weighed together establishes total disability at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 15. Consequently, we affirm the determinations that Claimant established a change in an application condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§725.309(c), 718.305(b)(1); Decision and Order at 18. Because Employer does not challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm that determination.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-21.

[8] While Employer challenges only the finding of total disability, its brief contains a conclusory assertion that "Drs. Fino and Tuteur gave supported and reasoned medical opinions ruling out total disability *and legal pneumoconiosis* that rebut the revived rebuttable presumption." Employer's Brief at 22 (emphasis added). As Employer has not explained its argument or attempted to identify error in the administrative law judge's findings regarding its failure to rebut the Section 411(c)(4) presumption, we decline to address Employer's statements regarding rebuttal. 20 C.F.R. §802.211(b); *Cox v. Benefits*

Review Board, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge