U.S. Department of Labor

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

BRB No. 20-0208 BLA

SAM P. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RUM CREEK COAL SALES, INCORPORATED[1]	)	
	)	
	)	DATE ISSUED: 04/29/2021
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

[1] The administrative law judge incorrectly identified Employer as "Run Creek," not "Rum Creek" Coal Sales, Incorporated. Employer's Petition for Review at 1 n.1.

PER CURIAM:

Employer appeals Administrative Law Judge Sean M. Ramaley's Decision and Order Awarding Benefits (2018-BLA-05100) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on January 7, 2016.

The administrative law judge determined Claimant established complicated pneumoconiosis arising out of coal mine employment and was thereby entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.203(b). He also found Claimant established at least twenty-six years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he 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) (2018).[2] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established complicated pneumoconiosis and invoked the Section 411(c)(3) irrebuttable presumption. It also contends he erred in finding Claimant totally disabled and invoked the Section 411(c)(4) presumption, and that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established at least twenty-six years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 15.

into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 361-62 (1965).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable 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. 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 established total disability based on the pulmonary function studies,[5] medical opinions, and the evidence as a whole.[6] Decision and Order at 10-21, 40-43. Employer contends the administrative law judge erred in weighing the medical opinion evidence. Employer's Brief at 31-36. We disagree.

Drs. Raj and Nader opined Claimant is totally disabled from performing his usual coal mine work. Director's Exhibit 17; Claimant's Exhibits 2, 3. Drs. Basheda and Zaldivar similarly opined Claimant is totally disabled,[7] although each stated they would

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values. We affirm, as unchallenged on appeal, the administrative law judge's determination that Claimant established total disability based on a preponderance of the qualifying pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); *see Skrack*, 6 BLR at 1-711; Decision and Order at 39-40.

[6] The administrative law judge found the arterial blood gas studies did not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 39 n.51, 40-41.

[7] Dr. Zaldivar initially concluded Claimant is not totally disabled, but noted he has untreated asthma. Employer's Exhibit 1 at 7. When asked at his deposition if Claimant could perform the exertional demands of his usual coal mine work from a respiratory or pulmonary standpoint, Dr. Zaldivar replied, "No, no. As he remains untreated, no. No." Employer's Exhibit 6 at 58.

have a better understanding of his respiratory capacity if he underwent "aggressive" or "intensive" asthma treatment.[8] Employer's Exhibits 1, 6, 7, 9. The administrative law judge gave controlling weight to Drs. Raj's and Nader's opinions and found Claimant established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Employer asserts Drs. Raj's and Nader's opinions are not reasoned because "neither physician offered a substantive analysis of the medical evidence" and reviewed only a "fraction of the clinical data that Dr. Basheda reviewed." Employer's Brief at 33, 36. But even if Dr. Basheda did review more evidence as Employer asserts, it fails to explain how the administrative law judge erred in finding total disability established; Dr. Basheda opined Claimant is totally disabled, and Employer asserts his opinion is well-reasoned.[9] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, independent of Dr. Basheda's opinion, the administrative law judge also permissibly found Drs. Raj's and Nader's opinions reasoned and documented based on their respective examinations and the objective testing they conducted, including qualifying pulmonary function studies.[10] *See Milburn Colliery Co.*

[8] The administrative law judge found Claimant's usual coal mine work entailed working as an excavator and drill operator requiring moderate labor because he had to climb to enter the machines; load trucks with coal, rock, or dirt; dig ditches; and help the mechanics to maintain equipment. Decision and Order at 5-6; Director's Exhibits 4, 5; Hearing Transcript at 12, 14-15, 25-26.

[9] Dr. Basheda opined that Claimant's level of respiratory impairment indicated on pulmonary function testing is not discernible due to his untreated asthma, but believed he would qualify for oxygen therapy based on his last series of blood gas studies. Because these studies indicated moderate to severe hypoxemia at rest and with exercise, Dr. Basheda opined Claimant "would not be able to do any type of exertional work at all." Employer's Exhibits 7 at 30; 9 at 15.

[10] Dr. Raj stated Claimant's pulmonary function testing reflected a severe obstructive defect with air trapping and his blood gas testing indicated hypoxemia with exercise. Director's Exhibit 17 at 3. He explained that Claimant's "reduced physical capacity," as evidenced by shortness of breath walking fifty feet uphill or 200 feet on level ground, coughing and wheezing, prevents him from performing the exertional requirements of his last coal mine employment. *Id*. Similarly, Dr. Nader stated Claimant's pulmonary function testing reflected a "severe obstructive airway disease" and his blood gas studies reflected "underlying significant hypoxemia with exertion;" he believed these

v. Hicks, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer also contends the administrative law judge did not sufficiently consider Drs. Zaldivar's and Basheda's explanations that Claimant might not be totally disabled if he were properly treated with asthma medication and re-tested. Employer's Exhibits 6 at 52, 57, 58; 7 at 19, 30; 9 at 15. However, the proper inquiry regarding whether total disability is established is whether Claimant is able to perform his usual coal mine work, and not whether he is able to perform that work with the use of medication. 20 C.F.R. §718.204(b)(2); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability . . . ."). As Employer concedes, Drs. Basheda and Zaldivar opined "Claimant is totally disabled based on the existing record." Employer's Brief at 35. Therefore, we reject Employer's contention of error.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 43. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[11] or that "no part of [his] respiratory or pulmonary total

conditions preclude Claimant from performing the exertional requirements of his usual coal mine employment. Claimant's Exhibits 2 at 2-3, 3 at 3.

[11] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

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 failed to establish rebuttal by either method.

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).

Employer relies on the opinions of Drs. Zaldivar and Basheda. Dr. Zaldivar opined Claimant has an obstructive respiratory impairment caused by asthma, with a component of emphysema due to smoking. Employer's Exhibits 1, 6. Dr. Basheda opined Claimant suffers from chronic obstructive pulmonary disease due to smoking and asthma. Employer's Exhibits 7, 9. Both physicians opined Claimant's obstructive impairment is unrelated to his coal mine dust exposure. The administrative law judge found their opinions unreasoned and unpersuasive.

Employer contends the administrative law judge did not give valid reasons for rejecting Drs. Zaldivar's and Basheda's opinions on legal pneumoconiosis. Employer's Brief at 22-30. We disagree.

As the administrative law judge accurately noted, Dr. Basheda excluded a diagnosis of legal pneumoconiosis, reasoning Claimant has "the classic findings of tobacco induced obstructive lung disease and/or persistent asthma," and therefore concluded "there is no reason to implicate coal dust in any way in this situation." Employer's Exhibit 7 at 27. Similarly, Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis because he believes "coal dust does not in itself cause asthma." Employer's Exhibit 6 at 53. Dr. Zaldivar was unable to state whether Claimant had any coal mine dust-related residual impairment on his pulmonary function testing because he believed Claimant was not receiving adequate bronchodilator treatment for asthma. *Id*. The administrative law judge permissibly found Drs. Basheda's and Zaldivar's opinions unpersuasive because neither physician adequately explained why Claimant's coal mine dust exposure did not aggravate his asthma or why it could not have been a contributing factor, along with his smoking and asthma, in causing his obstructive respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d

550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 36-37.

Additionally, Employer argues the administrative law judge erred in determining Claimant smoked a half a pack of cigarettes a day, as opposed to one pack of cigarettes a day, for twenty-five years. Employer's Brief at 17-18. But error, if any, in this regard is harmless, as Employer bears the burden to disprove legal pneumoconiosis and it does not allege the administrative law judge discredited its medical experts because they relied on an inaccurate smoking history.[12] *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those opinions appropriate weight. *See Owens*, 724 F.3d at 558; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012). Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in discrediting Drs. Basheda's and Zaldivar's opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis.[13] Thus, we affirm the administrative law judge's finding that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i).

[12] We need not consider Employer's contention that Drs. Raj and Nader relied on an inaccurate smoking history because they do not support Employer's burden of proof. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] Because Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 7-16.

[14] As the administrative law judge gave a valid reason for discrediting Drs. Basheda's and Zaldivar's opinions, we need not address its other arguments pertaining to the weight he accorded their opinions or the contrary opinions of Drs. Raj and Nader that Claimant has legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing "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); Decision and Order at 43-45. He permissibly discredited Drs. Zaldivar's and Basheda's opinions on the cause of Claimant's respiratory disability because neither physician diagnosed legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 43-45. We therefore affirm the administrative law judge's determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 14.

Thus, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because we affirm the administrative law judge's award of benefits pursuant to Section 411(c)(4), we need not address Employer's challenge to his finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). Employer's Brief at 7-16.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge