U.S. Department of Labor

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

BRB No. 20-0293 BLA

JOHN P. WALKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMOUNT COAL CORPORATION	)	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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-06222) 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 subsequent claim filed on April 26, 2017.[1]

The administrative law judge credited Claimant with 23.60 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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)[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 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 is totally disabled and invoking the Section 411(c)(4) presumption. Employer also argues he erred in finding the presumption unrebutted. Claimant responds in support of the award

[1] Claimant filed three previous claims. He withdrew two of the claims; therefore, they are considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibits 1, 3. The district director denied Claimant's April 20, 2010 claim because the evidence did not establish any element of entitlement. Director's Exhibit 2.

[2] Section 411(c)(4) 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] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must 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 Claimant's prior claim was denied for failure to establish any element of entitlement, he must submit new evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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, 362 (1965).

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

A miner is totally disabled if his pulmonary or respiratory impairment, 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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[6] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See*

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 23.60 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11, 14, 28.

[6] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The administrative law judge determined that Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). He found one pulmonary function study was non-qualifying and two subsequent studies were invalid; none of the arterial blood gas studies were qualifying; and the evidence was insufficient to establish cor pulmonale with right-sided congestive heart failure. Decision and Order at 15. The administrative law judge also found that Claimant did not establish complicated pneumoconiosis and, thus, could not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 11-14.

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). Employer contends the administrative law judge erred in finding Claimant totally disabled based on Dr. Sargent's medical opinion. Employer Brief at 6-8. We disagree.

The administrative law judge considered the medical opinions of Drs. Green, McSharry, and Sargent.[8] Decision and Order at 8-10. Dr. Green conducted Claimant's Department of Labor (DOL) complete pulmonary evaluation on August 12, 2017, and opined that Claimant is totally disabled because he has radiographic evidence of complicated pneumoconiosis and should avoid further dust exposure. Director's Exhibit 15 at 4. Dr. McSharry examined Claimant on March 7, 2018, and reviewed medical records. He indicated a pulmonary function study he administered was invalid but a resting blood gas study he administered showed a mild respiratory impairment and mild hypoxemia. Director's Exhibit 21 (unpaginated) at 2. He noted the resting blood gas study results were "just above the demarcation set by [the] Department of Labor for disability," and thus opined Claimant does not have a disabling impairment by DOL standards. *Id*. Dr. McSharry concluded Claimant has "other conditions, including arthritis" and orthopedic problems, that may prevent him from performing his last coal mining employment but they are unrelated to coal dust exposure. *Id*.

Dr. Sargent examined Claimant on March 13, 2019, and reviewed Claimant's treatment records and additional medical evidence. Employer's Exhibit 1 at 1. He noted Claimant worked as a roof bolter and operated a continuous miner, "but his last job was running a ram car." *Id*. He also noted Claimant described shortness of breath and being unable to walk twenty-five to thirty feet on level ground before having to catch his breath. *Id*. Dr. Sargent opined Claimant's pulmonary function study that he administered was invalid but an exercise blood gas study he administered showed moderate hypoxemia and a widening of the A-a gradient which was an abnormal response to low level exercise. Employer's Exhibit 1 at 2 and attached blood gas study report. He noted Claimant's exercise blood gas study results approached the DOL disability standards and opined Claimant is "likely disabled from [a] respiratory standpoint" due to obesity and pulmonary

[8] The administrative law judge found Claimant last worked as a ram car operator, which required him to pull and move cable weighing 100 pounds; hang cable above his head so shuttle cars could go through; and perform "dead work" such as shoveling the belt lines, moving belts, building brattices, moving blocks, carrying buckets of oil, and laying steel tracks. Decision and Order at 3.

emboli which have resulted in cor pulmonale and "exercise-induced arterial oxygen desaturation." Employer's Exhibit 1 at 2.

The administrative law judge discredited Dr. Green's opinion as not well-reasoned because it was contrary to his finding that the evidence did not establish Claimant has complicated pneumoconiosis. Decision and Order at 15-16. Weighing the opinions of Drs. McSharry and Sargent, the administrative law judge found Dr. Sargent's opinion reasoned and the most probative of Claimant's current respiratory condition. *Id*. at 16. Thus, the administrative law judge found Claimant established total disability based on Dr. Sargent's opinion at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. *Id*. at 16-17.

Employer generally asserts Dr. Sargent "provided little explanation" for his opinion that Claimant is totally disabled in view of the non-qualifying pulmonary function and blood gas study evidence. Employer's Brief at 6-7. However, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Moreover, 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 assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). The administrative law judge found Dr. Sargent's opinion adequately explained and supported by his examination of Claimant and the objective testing he obtained. Decision and Order at 16. Employer has not identified any specific error in the administrative law judge's finding Dr. Sargent's opinion is reasoned and documented. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (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).

Employer also asserts the administrative law judge erred in giving more weight to Dr. Sargent's opinion solely because he conducted the most recent examination of Claimant. It argues the administrative law judge failed to explain how he resolved the conflict between the opinions of Drs. McSharry and Sargent. Employer's Brief at 5-8. We disagree.

The administrative law judge found Dr. Sargent's opinion warranted greater weight because it was better in accord with the medical evidence he reviewed. Decision and Order at 16; *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997). He noted Dr. Sargent considered Claimant's blood gas results were close to the qualifying level and that he was the only doctor to discuss the "A-a gradient, which indicated widening with

low-level exercise and represented an abnormal oxygenation function." Decision and Order at 6; *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). He accurately noted Dr. Sargent's more recent exercise blood gas study showed a moderate oxygen impairment in comparison to Dr. McSharry's blood gas testing, and inferred that Claimant's respiratory condition deteriorated subsequent to Dr. McSharry's evaluation. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990) (administrative law judge has discretion to assess the evidence of record and draw his own conclusions and inferences therefrom); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 16. Because Employer does not challenge either of these findings or the administrative law judge's determination that Dr. Sargent's opinion warranted greater weight because it was better in accord with the medical evidence he reviewed, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's determination that the medical evidence supports total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Doss v. Director, OWCP*, 53 F.3d 654, 659 (4th Cir. 1995). We further affirm the administrative law judge's overall determination that Claimant is totally disabled and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; *Shedlock*, 9 BLR at 1-198.

In light of our affirmance of the administrative law judge's findings that Claimant established 23.60 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2); Decision and Order at 17.

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,[9] or that "no part of [his] respiratory or pulmonary total

[9] "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.[10]

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. McSharry and Sargent. Dr. McSharry opined Claimant's mild hypoxemia was likely due to abnormalities seen on chest radiographs or his known history of pulmonary emboli and was unrelated to coal mine dust exposure. Director's Exhibit 21 at 2. Dr. Sargent stated he could not exclude the possibility that coal dust exposure contributed in some degree to the Claimant's oxygen impairment. Employer's Exhibit 1 at 2. The administrative law judge found Dr. McSharry's opinion not well-reasoned and unpersuasive, and Dr. Sargent's opinion "insufficient to rebut the presumption that Claimant has legal pneumoconiosis." Decision and Order at 21.

Employer generally argues the administrative law judge applied the wrong legal standard by requiring Dr. McSharry to "rule out" coal mine dust as a cause of Claimant's impairment. Employer's Brief at 11-12. We disagree. The administrative law judge properly noted Employer must affirmatively establish Claimant's respiratory or pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order at 20.

Further, the administrative law judge discounted Dr. McSharry's opinion because he found it not adequately reasoned, but not because it failed to satisfy a particular legal standard. In this regard, the administrative law judge permissibly found Dr. McSharry's statements on the cause of Claimant's respiratory condition "vague and conclusory" and that he did not adequately explain why Claimant's hypoxemia is unrelated to coal dust

[10] We affirm, as unchallenged, the administrative law judge's finding that Employer failed to disprove the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we address the administrative law judge's findings on legal pneumoconiosis as they are relevant to rebuttal of the presumed fact of disability causation. 20 C.F.R. §718.305(d)(1)(i), (ii).

exposure, beyond stating that the impairment is likely due to other medical issues. Decision and Order at 21; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 21.

Employer also contends, without any explanation, that the administrative law judge improperly discredited Dr. Sargent's opinion and mischaracterized the evidence. Employer's Brief at 10. As Employer has not identified specific error with any of the reasons the administrative law judge provided for finding Dr. Sargent's opinion insufficient to rebut the presumption that Clamant has legal pneumoconiosis, we affirm this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox*, 791 F.2d at 446 (6th Cir. 1986); *Sarf*, 10 BLR at 1-120-21; Decision and Order at 21.

Because Employer has the burden to affirmatively establish the absence of legal pneumoconiosis, it bears the risk of non-persuasion if its evidence is found insufficient. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). We consider Employer's arguments on legal pneumoconiosis to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly found Dr. McSharry's and Dr. Sargent's opinions insufficient to disprove legal pneumoconiosis, we affirm his finding that Employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the [M]iner'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); *see* Decision and Order at 21-23. Contrary to Employer's contention, the administrative law judge permissibly discredited Dr. McSharry's opinion on the cause of Claimant's respiratory disability because he did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease.[11] *See Hobet Mining, LLC v.*

[11] Neither physician offered an explanation with respect to whether legal pneumoconiosis caused the Miner's total respiratory disability independent of his incorrect conclusion that the Miner did not have the disease. Additionally, contrary to Employer's assertion, the administrative law judge also permissibly found Dr. McSharry's opinion less credible on disability causation because he did not believe Claimant was totally disabled. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (an administrative law judge who finds that the miner suffers from pneumoconiosis and is totally disabled,

Epling, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 22. As Employer raises no specific challenge to the administrative law judge's finding that Dr. Sargent's opinion is insufficient to establish rebuttal, we affirm it. *See Skrack*, 6 BLR at 1-711. We therefore affirm the administrative law judge's finding that Employer failed to establish that no part of the Miner's respiratory disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

"may not credit a medical opinion that the former did not cause the latter, unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon [his] disagreement with the [administrative law judge's] finding as to either or both of the predicates in the causal chain."); Employer's Brief at 14.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge