U.S. Department of Labor

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

BRB No. 19-0394 BLA

HOWARD DRIVER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 08/20/2020
	)	
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 Granting Request for Modification and Awarding Benefits of Patrick Rosenow, Administrative Law Judge, United States Department of Labor.

J. Thomas Walker and John R. Jacobs (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Patrick Rosenow's Decision and Order Granting Request for Modification and Awarding Benefits (2018-BLA-05179)

rendered on a subsequent claim[1] filed on February 19, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In his August 4, 2016 Decision and Order Denying Benefits, Administrative Law Judge Scott R. Morris found Claimant failed to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 46. Thus he found Claimant could not invoke 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] Because Claimant failed to establish an essential element of entitlement, Judge Morris denied benefits. Director's Exhibit 46.

Claimant requested modification of that denial. Director's Exhibit 47. In his May 6, 2019 Decision and Order that is the subject of this appeal, Judge Rosenow (the administrative law judge) credited Claimant with twenty-three years of underground coal mine employment based on the parties' stipulation[3] and found he is totally disabled. 20 C.F.R. §718.204(b)(2). He thus found Claimant established a mistake in a determination of fact, 20 C.F.R. §725.310, and invoked the Section 411(c)(4) presumption. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the administrative law judge's finding Claimant established total disability to invoke the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.[4]

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[1] Claimant filed three previous claims for benefits. Director's Exhibits 1-3. The district director denied the most recent prior claim on December 24, 2009, because Claimant failed to establish any element of entitlement. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established 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 6.

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 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.[5] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).[6]

The administrative law judge considered two pulmonary function studies conducted on March 19, 2013, and June 11, 2014, that the parties initially submitted before Judge Morris. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 11; Director's Exhibits 12, 27. He also considered six studies conducted on September 6, 2016, June 12, 2017, September 6, 2017, October 12, 2017, February 27, 2018, and March 22, 2018, which the parties submitted in the modification proceeding.[7] Decision and Order on Modification at 7, 11; Director's Exhibits 47, 52; Claimant's Exhibits 5-7, 9; Employer's Exhibit 9.

The administrative law judge credited the "six most recent studies" taken between 2016 and 2018 over the studies taken in 2013 and 2014.[8] Decision and Order on

[5] The administrative law judge found Claimant did not establish total disability based on the 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)(ii)-(iv); Decision and Order on Modification at 12-14.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] The parties also submitted two older studies conducted on November 30, 2004, and December 13, 2004, in the modification proceeding. Claimant's Exhibit 7; Employer's Exhibit 9. The administrative law judge stated, however, he would credit "the results of the most recent tests" in evaluating total disability. Decision and Order on Modification at 11.

[8] The administrative law judge further noted Judge Morris's finding that the March 19, 2013 and June 11, 2014 studies are in equipoise because the former study produced

Modification at 11. The first study done on September 6, 2016, produced qualifying values pre-bronchodilator. Director's Exhibit 47. The next three studies performed on June 12, 2017, September 6, 2017, and October 12, 2017, produced non-qualifying values pre-bronchodilator. Director's Exhibit 52; Claimant's Exhibit 6, 7. The final two studies performed on February 27, 2018,[9] and March 22, 2018, produced qualifying values pre-bronchodilator.[10] Claimant's Exhibits 7, 9. Because the "two most recent studies, done in February and March of 2018, produced qualifying values," the administrative law judge found the newly submitted pulmonary function studies established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 11.

Employer argues the administrative law judge summarily applied the later evidence rule and did not adequately explain his rationale for resolving the conflict in the evidence. Employer's Brief at 3-5. We disagree.

The administrative law judge acknowledged Employer's argument that the June 12, 2017 pulmonary function study should be assigned greatest weight because it produced the "highest values" and thus best represents Claimant's condition. Decision and Order on Modification at 11 n.44, *citing* Employer's Brief at 2. He permissibly rejected it because Employer cited only to the higher test results and did not submit any medical evidence to

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non-qualifying values whereas the latter study produced qualifying values. Decision and Order on Modification at 11.

[9] Employer argues the administrative law judge erred in crediting the February 27, 2018 study because it does not meet the quality standards. 20 C.F.R. §718.103(b); Employer's Brief at 4. This study is contained in Claimant's treatment records. Claimant's Exhibit 9. The quality standards apply only to evidence developed for a claim and are inapplicable to treatment records. *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). Further, Employer failed to raise the validity of this study before the administrative law judge and, thus, has waived its objection to the quality of this evidence. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

[10] With respect to post-bronchodilator testing, the September 6, 2017 study produced non-qualifying values whereas the February 27, 2018 and March 22, 2018 studies produced qualifying values. Director's Exhibit 52; Claimant's Exhibits 6, 7, 9. The remaining studies included no post-bronchodilator testing. The administrative law judge agreed with Judge Morris's finding that pre-bronchodilator testing is a better indicator of disability. Decision and Order on Modification at 11-12; 2016 Decision and Order at 9-10.

support its assertion the study best represents Claimant's condition. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460-61 (11th Cir. 1989); *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (rejecting argument that the higher test results should be credited as more reliable than lower ones); Decision and Order on Modification at 11 n.44.

The administrative law judge also acknowledged Employer's argument that the non-qualifying 2017 studies and qualifying 2018 studies are "not separated by [a sufficient] amount of time" and thus the pulmonary function testing does not establish total disability. Employer's Brief at 2; *see* Decision and Order on Modification at 11 n.44. In addressing whether the studies taken from 2017 onward are contemporaneous with one another, the administrative law judge permissibly found Employer's argument "not supported by any medical evidence" and, thus, acted within his discretion in assigning greatest weight to the two most recent qualifying studies taken four-and-a-half and five-and-a-half months after the most recent non-qualifying study, and between five-and-a-half and nine months after the other non-qualifying studies. Decision and Order on Modification at 11 n.44; *see, e.g., Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (administrative law judge permissibly found valid contemporaneous pulmonary function tests established disability where most recent and two of three most recent studies were qualifying); *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020) (five and one-half months sufficient time to credit study as most current representation of claimant's condition where no evidence warranted according an earlier study greater weight). Consistent with the Board's published holding in *Noble*, no physician questioned the validity of any of the studies here, and the two most recent qualifying studies were taken four-and-a-half and five-and-a-half months after the most recent non-qualifying study.

In addition, the administrative law judge's decision to credit the more recent February 27, 2018 and March 22, 2018 qualifying studies over the prior non-qualifying studies is consistent with the principle that pneumoconiosis can be a progressive and irreversible disease. *See Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1288 (11th Cir. 2019); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). In explaining the rationale behind the "later evidence rule," the *Woodward* Court reasoned that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id.* As the pulmonary function tests show Claimant's condition worsening, no such conflict exists here. *Id.*

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function studies establish total disability. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 11-12.

In weighing all the relevant contrary evidence, the administrative law judge discredited Dr. Hasson's opinion that Claimant is not disabled because the doctor "conflated the issues of total disability and [disability] causation." Decision and Order on Modification at 12; 20 C.F.R. §718.204(b)(2)(iv). Because Employer does not challenge this credibility finding, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §802.211(b). The administrative law judge also discredited Dr. Connolly's discussion of total disability in Claimant's treatment records because the doctor incorrectly stated the September 6, 2016 pulmonary function study is normal, contrary to the administrative law judge's finding it is qualifying under the regulations. Decision and Order on Modification at 12; 20 C.F.R. §718.204(b)(2)(iv). He also found no other treatment records contain an opinion that Claimant is not totally disabled. *Id*. As Employer does not challenge these findings, we affirm them. *Skrack*, 6 BLR at 1-711.

Because there is no evidence undermining the qualifying February 27, 2018 and March 22, 2018 pulmonary function studies, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and his determinations that Claimant established a change in conditions, 20 C.F.R. §725.310, and invoked the Section 411(c)(4) presumption. Decision and Order on Modification at 13. Employer does not challenge the administrative law judge's findings that it failed to rebut the presumption and granting modification would render justice under the Act. 20 C.F.R. §718.305(d)(1)(i), (ii); Decision and Order on Modification at 3, 13-19. Thus we affirm these findings. *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge