U.S. Department of Labor

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

BRB No. 19-0421 BLA

HURBERT P. WOOLUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BANNER COAL & LAND COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 08/20/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2017-BLA-06156) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (Act). This case involves a subsequent claim filed on October 13, 2015.[1]

The administrative law judge found Claimant has at least seventeen years of underground coal mine employment based on the parties' stipulation and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[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 total disability and therefore invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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

[1] The administrative law judge stated "it appears" the documents from Claimant's prior claim "filed in 1991" were "probably destroyed by [the Federal Records Center]." Decision and Order at 5. He further stated this appears to be "the reason why Director's Exhibit 2 states the exhibits from the prior claim are 'Not Exhibited.'" *Id*. Therefore, he "address[ed] this claim under the assumption that the prior claim was denied because Claimant failed to establish any element of entitlement." *Id*.

[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) (2012); *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 seventeen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in West Virginia. *See*

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

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 also deny the subsequent claim unless he finds 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). Here, the administrative law judge assumed Claimant's prior claim was denied because he did not establish any of the elements of entitlement. Director's Exhibit 2. Neither party disputes that assumption. Consequently, to obtain review of the merits of his claim, Claimant had to establish an element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

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

A miner is totally disabled if a 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). Notwithstanding the non-qualifying[5] pulmonary function studies,[6] the administrative law judge found Claimant established total disability based on the new blood gas study and medical opinion evidence, and his weighing of the

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 21.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge found the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8-9. Further, as there is no evidence of record that Claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found Claimant unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 10.

new evidence as a whole. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 9, 10, 21.

The administrative law judge considered the results of five new blood gas studies dated April 8, 2016, January 18, 2017, August 24, 2017, January 27, 2018, and February 6, 2018. The January 18, 2017 study Dr. Zaldivar conducted and the August 24, 2017 study Dr. Fino conducted yielded non-qualifying values at rest. Director's Exhibit 29; Employer's Exhibit 3. The April 8, 2016 study Dr. Shamma-Othman conducted, the January 27, 2018 study Dr. Nader conducted, and the February 6, 2018 study Dr. Habre conducted yielded qualifying values at rest. Director's Exhibit 17; Claimant's Exhibits 1, 2.

The administrative law judge accorded greater weight to the January 27, 2018 and February 6, 2018 blood gas studies based on their recency. Decision and Order at 10. Thus he found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii).

Employer asserts the administrative law judge erred in failing to consider Dr. Zaldivar's opinion that there was a breach of protocol in the handling of the blood collected for the January 27, 2018 and February 6, 2018 blood gas studies. Employer's Brief at 12. Contrary to Employer's assertion, while Dr. Zaldivar questioned the protocol used for handling the blood collected for the April 8, 2016 blood gas study,[7] he did not discuss the handling of the blood collected for the February 6, 2018 blood gas study. Rather, in his March 20, 2018 report, Dr. Zaldivar simply noted the February 6, 2018 blood gas study showed a pH of 7.43, PCO2 of 37.8, and PO2 of 60. Employer's Exhibit 6 at 3. Regarding the January 27, 2018 blood gas study Dr. Nader conducted at Norton Community Hospital, Dr. Zaldivar noted the blood "was drawn at 14:46 and analyzed at 14:52" and Dr. Nader did not state whether the blood was iced before he analyzed it. Employer's Exhibit 6 at 2. Although Dr. Zaldivar stated, based on experience, "the blood is never iced [at Norton Community Hospital] between the time it is drawn and the time it is analyzed," he did not state a breach of protocol occurred in this instance. Thus we reject Employer's assertion the administrative law judge erred in failing to consider Dr. Zaldivar's opinion as to the validity of the January 27, 2018 and February 6, 2018 blood gas studies.

[7] With respect to the April 8, 2016 blood gas study, Dr. Zaldivar opined there was a breach of protocol because the collected blood was not iced but was at room temperature for seventeen minutes before it was analyzed. Director's Exhibit 39 at 4. He asserted if the blood is not iced, the white blood cells will continue to use up the oxygen in the blood and thus produce an inaccurate, lower value. *Id.*

We also reject Employer's assertion the administrative law judge erred in discrediting the January 18, 2017 and August 24, 2017 non-qualifying blood gas studies. The administrative law judge permissibly accorded greater weight to the January 27, 2018 and February 6, 2018 blood gas studies because they are the most recent studies of record.[8] *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). As it is supported by substantial evidence, we affirm his finding that the new blood gas studies established total disability. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000).

The administrative law judge next considered the new medical opinions of Drs. Shamma-Othman, Habre, Nader, Zaldivar, and Fino. Drs. Shamma-Othman,[9] Habre,[10] and Nader[11] opined Claimant is totally disabled, while Drs. Zaldivar[12] and Fino[13] opined he is not. Director's Exhibits 17, 39, 44; Employer's Exhibits 3, 5, 6. The administrative law judge noted all the physicians are Board-certified in internal medicine and pulmonary disease. Decision and Order at 19; Director's Exhibits 17, 39, 44; Employer's Exhibits 3, 5, 6. He accorded greater weight to the opinions of Drs. Shamma-Othman, Habre, and Nader because they are better supported by the medical evidence of record and he found

[8] Because the administrative law judge provided a valid reason for according greater weight to the January 27, 2018 and February 6, 2018 blood gas studies in finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), any error in his failing to consider Dr. Zaldivar's observations about the handling of the blood collected for the April 8, 2016 blood gas study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] Dr. Shamma-Othman opined Claimant is unable to return to his last coal mine employment due to his respiratory impairment. Director's Exhibits 17, 44.

[10] Dr. Habre opined Claimant is unable to perform his previous coal mine employment. Claimant's Exhibit 2.

[11] Dr. Nader opined Claimant is totally disabled from a pulmonary capacity impairment and could not perform the exertional requirements of his last coal mine job based on his blood gas study results. Claimant's Exhibit 1.

[12] Dr. Zaldivar opined Claimant is not totally disabled based on his non-qualifying pulmonary function and blood gas studies. Director's Exhibit 39; Employer's Exhibit 6.

[13] Dr. Fino opined Claimant has a very mild respiratory impairment and is not totally disabled from performing his prior coal mine employment based on his non-qualifying pulmonary function and blood gas studies. Employer's Exhibits 3, 5.

Claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 20-21.

Employer asserts the administrative law judge erred in finding the opinions of Drs. Shamma-Othman, Habre, and Nader outweighed the contrary opinions of Drs. Zaldivar and Fino. Employer's Brief at 11-14. We disagree. The administrative law judge noted Drs. Shamma-Othman, Habre, and Nader opined Claimant is totally disabled based on their qualifying blood gas study results. Decision and Order at 20. In contrast, Drs. Zaldivar and Fino concluded Claimant is not totally disabled "based primarily on" the non-qualifying "blood gas study results obtained during their examinations." *Id*. The administrative law judge also noted because Dr. Fino did not address the other blood gas study evidence of record, "his report does not provide a sufficient basis to counter the finding of total disability based on the most recent qualifying blood gas study results included in the reports of Drs. Nader and Habre." *Id*. Thus he permissibly found Dr. Shamma-Othman's, Dr. Habre's, and Dr. Nader's opinions "well-supported by the most recent qualifying blood gas studies"[14] and entitled to greater weight. *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); *Schetroma*, 18 BLR at 1-22; Decision and Order at 20.

Further, the administrative law judge permissibly found Dr. Shamma-Othman's and Dr. Nader's opinions "well-supported by the fact" Claimant's hypoxemia has been treated with "supplemental oxygen for the last two years."[15] Decision and Order at 20; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). He noted Dr. Nader reported Claimant used "2 L oxygen for nocturnal and chronic hypoxemia for the last two years" and Dr. Shamma-Othman opined

[14] Employer also asserts the administrative law judge erred in failing to consider Dr. Shamma-Othman "appears to be of the mistaken impression that Dr. Zaldivar's [blood gas study] produced *qualifying* results." Employer's Brief at 11. As the administrative law judge accorded greater weight to Dr. Shamma-Othman's opinion because it is well-supported by the most recent January 27, 2018 and February 6, 2018 blood gas studies, we need not address Employer's argument regarding his characterization of Dr. Zaldivar's January 18, 2017 blood gas study. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Larioni*, 6 BLR at 1278; Decision Order at 10.

[15] Because the administrative law judge provided a valid reason for according greater weight to Dr. Habre's opinion, any error the administrative law judge committed in finding it well-supported by the fact that Claimant's hypoxemia was treated with supplemental oxygen is harmless. *See Kozele*, 6 BLR at 1-382 n.4; *Larioni*, 6 BLR at 1278; Decision Order at 21.

he is impaired by hypoxemia. Decision and Order at 12, 13. Noting Dr. Zaldivar agreed Claimant may become hypoxic during exercise, the administrative law judge determined his opinion that Claimant is not totally disabled does not accord with the evidence of record. *Id*. at 20. He also noted Dr. Fino did not discuss the hypoxemia the other physicians of record discussed. *Id*. Thus we reject Employer's assertion the administrative law judge erred in according greater weight to the opinions of Drs. Shamma-Othman, Habre, and Nader. Employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1096 (4th Cir. 1993); *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

We therefore affirm the administrative law judge's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We also affirm his finding that all of the relevant evidence, when weighed together, establishes total disability.[16] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 21. Further, we affirm his finding that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).

Because we have affirmed the administrative law judge's findings that Claimant established at least seventeen years of underground coal mine employment and a totally disabling respiratory impairment, we affirm his determination Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 21. We further affirm, as unchallenged, his finding Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32, 34. We therefore affirm the award of benefits.

[16] The administrative law judge found Claimant's non-qualifying pulmonary function studies do not outweigh his qualifying blood gas studies under 20 C.F.R. §718.204(b)(2) because the two tests measure different types of impairments. Decision and Order at 21; *see Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge