U.S. Department of Labor

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

BRB No. 19-0467 BLA

RALPH E. CANNADY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY, LLC	)	DATE ISSUED: 08/27/2020
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2017-BLA-05432), rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a miner's subsequent claim filed on November 16, 2015.[1]

The administrative law judge credited Claimant with thirty years of underground or substantially similar surface coal mine employment and found he established a totally disabling pulmonary or respiratory impairment. She therefore 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),[2] and established a change in an applicable condition of entitlement.[3] The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established total disability and 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 in this appeal.[4]

---

[1] Claimant filed his initial claim on January 9, 2014, which the district director denied on September 9, 2014, because he failed to establish total disability. Director's Exhibit 1. Claimant took no further action until filing the present subsequent claim.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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] 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(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 2, 5-6. The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability**.** Director's Exhibit 1. Consequently, Claimant had to submit new evidence establishing total disability to proceed with his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3, 7-8.

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).

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 and gainful work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[6] 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 the relevant evidence supporting a finding of total disability against the 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 total disability established through the medical opinions and the weight of the evidence as a whole.

[5] 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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); H. Tr. at 17-18; Director's Exhibit 5.

[6] A "qualifying" pulmonary function study or 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Forehand,[7] Green,[8] Porterfield,[9] Habre,[10] and Zaldivar,[11] all of whom examined claimant. Decision and Order at 14-23, 25. She found the opinions of Drs. Forehand and Green diagnosing a totally disabling respiratory impairment documented, well-reasoned and supported by their blood gas testing. *Id*. at 24, 25. She gave less weight to Dr. Habre's opinion that Claimant is totally disabled because he relied on the results of an exercise blood gas study that was not in compliance with the quality standards. *Id*. at 22-23, 25 & n.15; Claimant's Exhibit 4. She also gave less weight to the opinions of Drs. Zaldivar and Porterfield because they are "less conclusive" on the issue of total disability. Decision and Order at 24-25. Based on the credible opinions of Drs. Forehand and Green, the administrative law judge determined Claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 25.

[7] Dr. Forehand diagnosed pneumoconiosis with respiratory impairment based on laboratory testing, medical history, and symptomology including shortness of breath and abnormal breath sounds. He opined Claimant has a totally disabling impairment based on an exercise blood gas study showing hypoxemia and an impairment in gas exchange. Director's Exhibits 14, 18; Employer's Exhibit 10 at 9, 30-32.

[8] Based on Dr. Crum's x-ray reading, Dr. Green diagnosed a type A opacity and testing demonstrating moderately to severely reduced diffusing capacity, severe resting hypoxemia, chronic obstructive pulmonary disease (COPD), and chronic productive cough, wheezing and shortness of breath. Claimant's Exhibit 3 at 3-4. He opined Claimant is totally disabled based on the x-ray and the blood gas testing results. *Id*.

[9] Dr. Porterfield examined Claimant in August, 2017. Based on his own examination and testing, including non-qualifying ventilatory and blood gas testing, he found no indication of COPD and that Claimant does not meet the requirements for total disability. However, after reviewing the blood gas testing of Dr. Green and Dr. Habre, he stated Claimant is totally disabled. Employer's Exhibits 2; 11 at 33-37, 39-41.

[10] Dr. Habre opined Claimant is totally disabled based on medical history, symptomology and diagnostic testing including a qualifying exercise blood gas test. Claimant's Exhibit 4 at 2-3.

[11] Dr. Zaldivar diagnosed pulmonary restriction. He believed Dr. Porterfield's non-qualifying exercise blood gas test showing no hypoxemia was more reliable than Dr. Habre's qualifying exercise blood gas test. Director's Exhibit 21; Employer's Exhibits 3; 12 at 3-12, 15-16, 22-33, 37-47. At his deposition, Dr. Zaldivar stated "what I believe is we do not know yet if he is or is not" totally disabled, due to the uncertain validity of the blood gas studies of record. Director's Exhibit 21; Employer's Exhibit 12 at 28-31.

Employer asserts the administrative law judge erred in finding the opinions of Drs. Forehand and Green documented because their reliance on qualifying blood gas studies is inconsistent with her finding that the blood gas study evidence as a whole failed to establish total disability. Employer's Brief at 17. Employer also avers the administrative law judge erred in crediting Drs. Forehand and Green because, according to Employer, their respective blood gas study results varied widely from the other tests of record and were of questionable validity. *Id*. at 16-18. Employer further contends Dr. Green's opinion should have been rejected because it is based, in part, on a finding of complicated pneumoconiosis on x-ray, contrary to the administrative law judge's finding the x-ray evidence negative for complicated pneumoconiosis. *Id*. at 16. Employer also asserts Dr. Habre's diagnosis of a totally disabling impairment should have been given "no weight" because he relied on an invalid exercise blood gas study. *Id*. at 14-15, 16 n.4. Finally, Employer asserts the administrative law judge erred in discrediting the opinions of Drs. Porterfield and Zaldivar. *Id*. at 18-19. Employer's arguments do not have merit.

Contrary to Employer's allegation, the administrative law judge's finding that the blood gas studies, when weighed together, are insufficient to establish total disability did not require her to reject the opinions of Drs. Forehand and Green. The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, . . . *total disability may nevertheless be found* if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv) (emphasis added). The administrative law judge therefore permissibly determined the diagnoses of a totally disabling respiratory impairment by Drs. Forehand and Green are documented by the valid, qualifying blood gas studies they performed. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 25.

We also reject Employer's assertion the administrative law judge was required to discredit the opinions of Drs. Forehand and Green because, according to Employer, their qualifying pO2 blood gas study results were lower than the non-qualifying pO2 results to an unusual degree. Employer's contention amounts to a request to re-weigh the evidence, which the Board is not empowered to do. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Finally, the administrative law judge permissibly determined Dr. Zaldivar's discrediting of Dr. Green's qualifying blood gas study was entitled to little weight, as Dr.

Zaldivar "made the unsubstantiated claim that Norton Community Hospital does not ice their blood samples following a blood gas test, which he claims causes the pO2 to drop in between the time of withdrawal and examination." Decision and Order at 24-25; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000).

There is also no merit in Employer's allegation that Dr. Green's opinion was entitled to little weight because he based his total disability finding in part on Dr. Crum's positive x-ray reading for complicated pneumoconiosis, when the administrative law judge determined the evidence was insufficient to establish Claimant has the disease. Employer's Brief at 14, 16; Claimant's Exhibit 3. Although Dr. Green stated Claimant "is totally disabled on the basis of radiographic findings" of complicated pneumoconiosis, he separately opined Claimant "is totally disabled from a pulmonary capacity standpoint on the basis of the resting arterial blood gases demonstrating . . . significant resting hypoxemia which is severe in degree." Claimant's Exhibit 3 at 4. He also stated Claimant suffers from a moderate to severe reduction in diffusing capacity, chronic obstructive pulmonary disease, and "chronic symptoms of cough, wheeze, mucus expectoration, and shortness of breath." *Id*. Given Dr. Green's assessment that Claimant "could not meet the exertional demands of his previous coal mine employment due to the significant resting hypoxemia," independent of Dr. Crum's x-ray reading for complicated pneumoconiosis, the administrative law judge rationally found his opinion documented and well-reasoned. *Id.*; *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 25.

We also reject Employer's assertion the administrative law judge erred in assigning any weight to Dr. Habre's total disability opinion. Employer's Brief at 14-15, 16 n.4. The administrative law judge gave "less weight" to Dr. Habre's diagnosis of a totally disabling respiratory impairment because it is "inextricably linked" to an invalid exercise blood gas study.[12] Decision and Order at 25. She therefore relied on the opinions of Drs. Forehand and Green in finding the medical opinion evidence established total disability. *Id*. at 25. Thus error, if any, in giving some weight to Dr. Habre's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1284 (1983).

We also reject Employer's contention the administrative law judge erred in discrediting the opinions of Drs. Porterfield and Zaldivar. Employer's Brief at 13-14, 17-19, 23-24. Based on his own testing, Dr. Porterfield initially opined Claimant was able to perform his usual coal mine work. Decision and Order at 21-22, 24-25; Employer's Exhibit

[12] The administrative law judge found the qualifying exercise blood gas study Dr. Habre administered on August 10, 2017, invalid because he did not describe the type or duration of the exercise Claimant performed. Decision and Order at 13 n.11; Claimant's Exhibit 4.

2. After reviewing the subsequent blood gas tests Drs. Habre and Green administered, Dr. Porterfield stated if the results were valid, they would demonstrate a developing and worsening of Claimant's impairment, rendering him totally disabled. Employer's Exhibit 11 at 22-24, 27, 33-35, 40-42. Contrary to Employer's suggestion that the blood gas tests Dr. Green and Dr. Habre conducted were both discredited, the administrative law judge credited Dr. Green's blood gas testing as valid and discounted Dr. Habre's blood gas testing as deficient. In view of her determination that Dr. Porterfield based his opinion on a valid test (Dr. Green's) and an invalid test (Dr. Habre's), the administrative law judge permissibly found his "conclusion that Claimant is totally disabled . . . supports, but is not definitive, on the issue of whether Claimant is totally disabled." *See Hicks*, 138 F.3d at 533; Decision and Order at 24, 25. Additionally, she reasonably determined Dr. Porterfield's statement that he would be "hesitant" to say Claimant can perform his usual work in light of Dr. Habre's and Dr. Green's blood gas testing made his opinion "less conclusive" and entitled to less weight on the issue of total disability. Decision and Order at 25; *see Akers*, 131 F.3d at 441.

Lastly, the administrative law judge permissibly determined Dr. Zaldivar did not provide a definitive conclusion on the issue of total disability because he was concerned about the validity of the qualifying blood gas testing. Decision and Order at 17-19, 23-24. When asked at his deposition whether Claimant can perform his usual coal mine work, Dr. Zaldivar stated:

> Well, that depends on the results of the blood gases. So if the blood gases are normal, yes, he can. Obesity would prevent him, but not because the lungs are damaged but because they cannot expand. If the blood gases are abnormal, well, then, no, he couldn't. There we go back again to getting reliable blood gases during exercise.

Employer's Exhibit 12 at 28. The administrative law judge found Dr. Habre's qualifying exercise blood gas study dated August 10, 2017 invalid, gave no weight to this study, and gave diminished weight to Dr. Habre's diagnosis of total disability. *Id*. at 13 n.11, 25. She credited Dr. Forehand's qualifying December 12, 2015 exercise study, however, and found the record did not substantiate Dr. Zaldivar's opinion that Dr. Green's June 22, 2017 qualifying resting blood gas study was invalid. *Id*. at 24-25. Substantial evidence therefore supports the administrative law judge's finding Dr. Zaldivar did not offer a definitive opinion on total disability. *See Hicks*, 138 F.3d at 533; Decision and Order at 24-25.

Because Employer raises no additional allegations of error, we affirm the administrative law judge's findings that Claimant established total respiratory disability under 20 C.F.R. 718.204(b)(2)(iv) and the weight of the evidence as a whole established total pulmonary disability under 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 25. Consequently, we affirm the

administrative law judge's findings that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.305(b)(1)(iii), 725.309(d)(2); Decision and Order at 26. Because Employer has not alleged error in the administrative law judge's determination that it did not rebut the presumption, we further affirm her finding and the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31-42.

Accordingly, the 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