U.S. Department of Labor

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

BRB No. 19-0470 BLA

WILLIAM J. GRIFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PAMMLID COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2020
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-5222) on a claim filed on February 26, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

After crediting Claimant with seventeen years of underground coal mine employment,[1] the administrative law judge found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). 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 is totally disabled and therefore erred in finding he invoked the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Benefit 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. 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. *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 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 consider all relevant evidence and weigh the evidence supporting 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). In the absence of contrary probative evidence, evidence that meets the standards for total disability under any of these categories "shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2).

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[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) (2018); *see* 20 C.F.R. §718.305.

The administrative law judge found the pulmonary function studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-10. She further found there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 11. After finding the blood gas studies established total disability, 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 10-11, the administrative law judge considered the opinion of Dr. Porterfield that claimant is totally disabled and the contrary opinion of Dr. Zaldivar. Because she found that neither doctor provided a well-reasoned opinion, the administrative law judge found the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-16. Weighing all the evidence together, the administrative law judge found the blood gas studies established total disability. Decision and Order at 16.

We first affirm the administrative law judge's finding that a preponderance of the three resting blood gas studies establishes total disability. The study Dr. Porterfield administered on May 5, 2016 and the study Dr. Zaldivar administered on February 8, 2017 both produced qualifying values,[3] while a third study Dr. Celko administered on May 21, 2017 produced non-qualifying values. Director's Exhibits 17, 21, 23. The administrative law judge declined to accord greatest weight to the most recent May 21, 2017 study, explaining that its results were "very close" to the two qualifying studies, and was taken in close proximity to the qualifying February 8, 2017 study. Decision and Order at 10-11. Because two of the three blood gas studies produced qualifying values and because the only non-qualifying study revealed results that were close to qualifying, the administrative law judge found the blood gas studies established total disability. *Id.*

Although Employer notes that Drs. Porterfield and Zaldivar indicated the hypoxemia Claimant's resting blood gas study results revealed was inconsistent with the only mild reduction in Claimant's diffusing capacity, *see* Employer's Brief at 8, neither physician opined that the resting blood gas values were invalid. Moreover, Dr. Gaziano reviewed the May 5, 2016 blood gas study Dr. Porterfield administered and found it valid. Director's Exhibit 15. Employer's primary argument, addressed below, is that Dr. Zaldivar's opinion "provides the contrary probative evidence to discount the qualifying resting [blood gas study] as an indicator that claimant has a totally disabling respiratory impairment." Employer's Brief at 8. Because Employer does not otherwise challenge the administrative law judge's finding that the blood gas studies are valid and qualifying for

[3] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

total disability, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.204(b)(2)(ii).

We further reject Employer's contention the administrative law judge erred in her consideration of Dr. Zaldivar's opinion. Employer's Brief at 8-10. The administrative law judge noted Dr. Zaldivar's admission that Claimant's resting blood gas study values were in the borderline range for demonstrating total disability. Decision and Order at 15; Director's Exhibit 23 at 6. She further noted Dr. Zaldivar opined that, given Claimant's normal pulmonary function and diffusion capacity results, he expected that Claimant's low blood gases would "improve dramatically with exercise." *Id.* However, because there are no exercise blood gas studies in the record, the administrative law judge permissibly found that Dr. Zaldivar's opinion was speculative and therefore not well-reasoned. *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). Employer's assertion that Dr. Zaldivar offered a well-reasoned "prediction" that Claimant's blood gas values would improve with exercise constitutes a request for the Board to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 10.

Because Employer does not raise any additional error regarding the administrative law judge's finding that the blood gas studies and the evidence as a whole established total disability, we affirm this finding.[4] 20 C.F.R. §718.204(b). We also affirm, as unchallenged, the administrative law judge's finding of seventeen years of underground coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5. Thus, we affirm her finding that Claimant invoked the Section 411(c)(4) presumption.

[4] In considering Dr. Porterfield's opinion that Claimant is totally disabled, the administrative law judge conflated total disability and disability causation by rejecting his opinion, in part, for being unable to "establish with absolute certainty if coal dust exposure is responsible for Claimant's mild disease[.]" Decision and Order 15. Whether Claimant has a totally disabling respiratory or pulmonary impairment sufficient to invoke the Section 411(c)(4) presumption, and the cause of that impairment, are separate issues. 20 C.F.R. §§718.204(b), (c), 718.305(d)(1)(ii). Any error in rejecting Dr. Porterfield's diagnosis of total disability is harmless, however, as we otherwise affirm the administrative law judge's finding of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Moreover, because Employer does not challenge the administrative law judge's finding that it failed to rebut the presumption, we also affirm this finding and the award of benefits. *See* S*krack*, 6 BLR at 1-711.

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

MELISSA LIN JONES
Administrative Appeals Judge