U.S. Department of Labor

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

BRB No. 20-0173 BLA

JOSEPH R. PARRISH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TANOMA MINING COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 08/20/2021
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Lauren C. Boucher's Decision and Order Denying Request for Modification (2019-BLA-05753) rendered on a claim filed on September 21, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In the initial decision denying benefits on May 24, 2018, Administrative Law Judge Lystra A. Harris accepted the parties' stipulation that Claimant has 23.41 years of coal mine employment, and found all of it occurred in underground mines. However, she found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Judge Harris therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, she denied benefits. Director's Exhibit 49.

Claimant timely requested modification. Director's Exhibit 80. In the Decision and Order that is the subject of this appeal, Judge Boucher (the administrative law judge) accepted the parties' stipulation that Claimant has 23.41 years of qualifying coal mine employment. However, she found Claimant did not establish total disability, 20 C.F.R. §718.204(b)(2), and therefore Claimant failed to establish a mistake of fact in the prior denial or a change in conditions since the prior denial. 20 C.F.R. §725.310(a). She thus found Claimant could not invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718, and denied benefits.

On appeal, Claimant contends the administrative law judge erred in finding the evidence did not establish a totally disabling respiratory or pulmonary impairment. Employer and its Carrier respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Modification of a denial of benefits may be granted if a change in conditions has occurred or there was a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310(a). When considering a modification request, the administrative law judge must consider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995).

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 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 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). Claimant contends the administrative law judge erred in finding the new medical opinion evidence and new evidence as a whole failed to establish total disability. Claimant's Brief at 4-7.

The administrative law judge considered two new pulmonary function studies conducted on July 18, 2018, and October 24, 2018. Decision and Order at 7-8. Both studies

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

produced qualifying values[3] before the administration of a bronchodilator, and non-qualifying values post-bronchodilator. Director's Exhibit 80; Employer's Exhibit 7. The administrative law judge found the July 18, 2018 study invalid,[4] a finding we affirm as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 8. However, she found the October 24, 2018 study valid and qualifying for total disability.[5] Decision and Order at 8; Employer's Exhibit 7. She therefore found the new pulmonary function study evidence "when considered alone, is sufficient to establish total disability . . . ." Decision and Order at 9; 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge further found the two new arterial blood gas studies are non-qualifying and, therefore, do not demonstrate total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9-10; Director's Exhibit 80; Employer's Exhibit 6. Additionally, she found no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure and, therefore, found he cannot establish total disability under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6 n.4. We affirm these findings as unchallenged on appeal. *See Skrack,* 6 BLR at 1-711.

The administrative law judge also considered the new medical opinions of Drs. Zlupko and Durrani. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-13. Dr. Zlupko opined Claimant is totally disabled from a respiratory standpoint, Claimant's Exhibit 1, while Dr. Durrani diagnosed a moderate but non-disabling respiratory

[3] A "qualifying" pulmonary function study or 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, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The administrative law judge found the July 18, 2018 study's pre-bronchodilator FEV1 values and post-bronchodilator MVV values excessively variable and thus not in substantial compliance with the applicable quality standards. 20 C.F.R. Part 718, Appendix B; Decision and Order at 7-8; Director's Exhibit 80.

[5] Dr. Durrani opined the October 24, 2018 pulmonary function study was invalid because of excess variability in its FVC values. Decision and Order at 7-8. The administrative law judge found that, while the quality standards require the variation between the two largest FEV1 values be no more than 5% of the largest FEV1 or 100ml, they include no such requirement for the FVC values. Decision and Order at 7-8; 20 C.F.R. Part 718, Appendix B (2)(ii)(G). Consequently, she found Dr. Durrani's opinion did not invalidate the October 24, 2018 study. Decision and Order at 8.

impairment. Employer's Exhibits 5, 8. The administrative law judge found Dr. Zlupko's opinion not well documented or reasoned, and found he was not as highly qualified as Dr. Durrani. Decision and Order at 12. Conversely, she found Dr. Durrani's opinion to be well reasoned and documented, and gave it additional weight based on his superior qualifications in Pulmonary Medicine. *Id.* at 13. She therefore found the new medical opinion evidence does not establish total disability. *Id.*

Claimant contends the administrative law judge erred in her weighing of the medical opinions. Claimant's Brief at 4-6. We disagree.

Initially, we reject Claimant's contention that the administrative law judge did not adequately explain her determination to accord Dr. Zlupko's opinion little weight. Claimant's Brief at 6. The administrative law judge permissibly found Dr. Zlupko, who is Board-certified in Internal Medicine, less qualified to offer an opinion on the existence of a pulmonary impairment than Dr. Durrani, who is Board-certified in both Internal and Pulmonary Medicine. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78 (3d Cir. 1997); Decision and Order at 13. She further accurately found that Dr. Zlupko based his opinion primarily on the July 18, 2018 pulmonary function study, which she found invalid. She permissibly accorded his opinion less weight for that reason. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990); Decision and Order at 10-11; Claimant's Exhibit 1. Because it is supported by substantial evidence, we affirm the administrative law judge's determination to accord little weight to Dr. Zlupko's opinion. *See Balsavage*, 295 F.3d at 396; *Lango*, 104 F.3d at 577-78; Decision and Order at 13.

We further reject Claimant's arguments that the administrative law judge erred in crediting Dr. Durrani's opinion that he is not totally disabled. Claimant's Brief at 5-6. As the trier-of-fact, the administrative law judge has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). The administrative law judge accurately noted Dr. Durrani opined the October 24, 2018 pulmonary function study's flow-volume loops appear to show significant variability in Claimant's efforts, the testing fails to include the actual data points necessary to accurately determine the degree of variability, and the loops show a "cough artifact" on the last test. Decision and Order at 12; Employer's Exhibit 8 at 32-33, 60. She found Dr. Durrani's opinion is not sufficient to establish the test did not comply with the quality standards, because the physician relied upon variability in the FVC, which is not a reason for finding a test technically invalid under the regulations. 20 C.F.R. Part 718, Appendix B; Decision and Order at 8-9. However, the administrative law judge permissibly found Dr. Durrani's decision as a pulmonologist not to rely upon the October 24, 2018 pulmonary function

study reasonable, because he explained his specific concerns over the reliability of the test. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163.

Moreover, the administrative law judge accurately noted Dr. Durrani's opinion that, even assuming Claimant's pulmonary function studies are valid, they demonstrate a moderate but non-disabling impairment.[6] Decision and Order at 11; Employer's Exhibit 8 at 55-57. Contrary to Claimant's assertion that Dr. Durrani did not understand the exertional requirements of his usual coal mine employment, the administrative law judge accurately noted Dr. Durrani opined Claimant would be able to perform heavy manual labor.[7] Decision and Order at 13; Employer's Exhibit 8 at 55-57. Having rejected Claimant's contentions of error, we affirm the administrative law judge's findings that Dr. Durrani was the better qualified expert and the only physician to have reviewed the entire record,[8] and his opinion was well-reasoned and documented and entitled to full probative weight. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 12-13. As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign them weight; the Board may not reweigh

[6] As the administrative law judge summarized, Dr. Durrani opined that individuals with qualifying pulmonary function study values will still have differences in their ability to tolerate heavy exertion that do not directly correlate with objective testing. Decision and Order at 13; Employer's Exhibit 8 at 55-57. In Claimant's case, Dr. Durrani noted he maintains a physically active lifestyle, denies shortness of breath with daily life, and has evidence of improved rather than worsening exercise tolerance. Employer's Exhibit 8 at 55-57.

[7] The administrative law judge found Claimant's usual coal mine employment as a section foreman required heavy manual labor. Decision and Order at 4. Dr. Durrani noted Claimant's employment required "significantly heavy and strenuous physical labor, including crawling within the mine shaft as well as digging coal, crushing coal, and transferring coal to outside the mine." Employer's Exhibit 8 at 23.

[8] Contrary to our dissenting colleague, the administrative law judge noted Dr. Durrani "based his opinion on other information (including his assessment of Claimant's physical condition based on his examination of Claimant) *in addition* to the [October 24, 2018 pulmonary function study]." Decision and Order at 13. Specifically, the administrative law judge noted "Dr. Durrani relied on his physical examination of Claimant, as well as the . . . [non-qualifying] arterial blood gas study results from July 2018 and October 2018" and "reviewed and considered all the newly submitted evidence on the issue of total disability," in addition to the October 24, 2018 pulmonary function study, in concluding Claimant is not totally disabled. Decision and Order at 12-13.

the evidence or substitute its own inferences for the administrative law judge's. *See Balsavage*, 295 F.3d at 396; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Therefore, we affirm the administrative law judge's determination that the new medical opinion evidence fails to establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13.

In weighing the evidence as a whole, the administrative law judge found the single qualifying and valid pulmonary function study and Dr. Zlupko's less probative medical opinion outweighed by the opinion of Dr. Durrani, and the non-qualifying arterial blood gas studies. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Rafferty*, 9 BLR at 1-232; Decision and Order at 14. Because we have rejected Claimant's arguments of error and it is supported by substantial evidence, we affirm the administrative law judge's determination that the new evidence as a whole does not establish total disability and thus does not establish a change in conditions. 20 C.F.R. §§718.204(b)(2), 725.310; *Rafferty*, 9 BLR at 1-232; Decision and Order at 13-14. As Claimant does not challenge the administrative law judge's additional finding that all the evidence, old and new, does not establish total disability and thus does not demonstrate a mistake of fact, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16. As Claimant failed to establish total disability, he did not invoke the Section 411(c)(4) presumption and failed to establish an essential element of entitlement. *Trent*, 11 BLR at 1-27. We therefore affirm the administrative law judge's denial of Claimant's request for modification, and her denial of benefits. 20 C.F.R. §725.310.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. The administrative law judge's reasons for crediting Dr. Durrani's opinion that Claimant is capable of performing his previous coal mine work are irrational and unsupported by the

evidence. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). I therefore would remand the claim for her to re-determine whether Claimant is totally disabled.

The record contains two newly-submitted pulmonary function study dated July 17, 2018 and October 24, 2018, both of which revealed values qualifying for total disability. Director's Exhibit 80; Employer's Exhibit 7; *see* 20 C.F.R. §718.204(b)(2)(i). The administrative law judge deemed the first study invalid under the regulatory quality standards and, therefore, not probative as to whether Claimant has a totally disabling impairment. Decision and Order at 7-8; *see* 20 C.F.R. §718.103(c) ("no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with [the regulatory quality standards]").

In an effort to dispute the second study's validity as an accurate measure of Claimant's impairment, Employer submitted the deposition testimony of Dr. Durrani. Employer's Exhibit 8; *see* 20 C.F.R. §718.103(c) (pulmonary function studies are presumed valid absent contrary probative evidence). He initially stated he "[could] not comment" on the study's validity because numerical data points were missing from the FVC flow volume loops. Employer's Exhibit 8 at 33. He nevertheless elaborated that it "appears" Claimant's effort was "quite variable" and the test "very likely" would be invalid "if the variability in the [FVC] loops is also demonstrated in the numbers." *Id*. According to Dr. Durrani, a "cursory review" of the FVC flow volume loops "appears" to show "more than 200 [cubic centimeters] of difference," which exceeds the variability permitted under "the Department of Labor guidelines." *Id*. at 60-62. Thus, "short of seeing the actual numbers," he was "concerned" and "not sure" about the validity of the data. *Id*. at 62.

The administrative law judge soundly rejected Dr. Durrani's opinion because, contrary to the physician's reasoning, the regulations do not contain any quality standards regarding excessive variability in the FVC values. 20 C.F.R. Part 718, Appendix B (2)(ii); Decision and Order at 9. In light of Dr. Durrani's failure to cite a credible reason for finding the study invalid, the administrative law judge rationally found it to be a reliable measure of claimant's total disability. 20 C.F.R. §718.103(c); *see Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990); 20 C.F.R. Part 718, Appendix B; Decision and Order at 9. Because the only valid pulmonary function study is qualifying, the administrative law judge rightfully found that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9.

Despite rejecting Dr. Durrani's opinion that the October 24, 2018 pulmonary function study is invalid on account of the physician's misapplication of the regulatory quality standards, the administrative law judge nevertheless credited his opinion that

Claimant is able to perform the heavy labor required of his previous coal mine work. According to the administrative law judge, Dr. Durrani's opinion is more credible than the qualifying pulmonary function study because he "explained the specific nature of his concern," i.e., that the October 24, 2018 FVC values reflected excessive variability. Decision and Order at 8-9, 12-13. This finding, however, directly conflicts with the administrative law judge's rejection of Dr. Durrani's opinion that the variability in FVC values is excessive and renders the pulmonary function study unreliable. *Id*. at 9. The administrative law judge speculates that variable FVC values "very well may present a problem from the perspective of a pulmonary evaluation" separate from the regulatory quality standards. *Id.* at 12. But, she cites nothing to support her conclusion that Dr. Durrani's "concern" about the FVC values arises from anything other than his discredited statement that the regulations prohibit variability greater than 200 cubic centimeters. *Id*. at 12. Therefore, the administrative law judge's findings are contradictory and do not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, in crediting Dr. Durrani's opinion that Claimant's disabling pulmonary function study values do not render him unable to perform the heavy manual labor required of his previous coal mine employment, the administrative law judge failed to consider the totality of the physician's opinion. Decision and Order at 13. As Claimant argues, Dr. Durrani based his opinion that Claimant is not totally disabled on the fact that Claimant is now working part-time as a courtesy driver at a car dealership.[10] Claimant's Brief at 5-6; Employer's Exhibits 5, 8. According to Dr. Durrani, Claimant's work driving a van for a few hours per day is "significant" in determining whether he is totally disabled because it "allude[s] to the fact that he's not bedbound" and demonstrates he is "able to be ambulating, doing his activities of daily living, and his activities of daily living include a place of employment." Employer's Exhibit 8 at 52-53. However, total disability is defined under the Act as an inability to perform one's usual coal mine work and not, as Dr. Durrani suggests, an inability to perform any work at all. *See* 20 C.F.R. §718.204(b)(1). Needless

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] In his October 30, 2018 report, Dr. Durrani opined Claimant is not disabled, noting that Claimant's exercise tolerance has improved as demonstrated by his return to part-time work. Employer's Exhibit 5. During his September 26, 2019 deposition, he further explained that Claimant works twenty-five to thirty hours per week as a valet or shuttle driver for a car dealership. Employer's Exhibit 8 at 25.

to say, Claimant's ability to drive a van part-time or perform basic activities of daily living tells us little about whether he is capable of performing his previous coal mine work which, among other duties, "involved extensive crawling" in thirty-inch coal seams and "lifting and carrying at least [fifty] to [sixty] pounds on a daily basis."[11] Decision and Order at 5. While the administrative law judge briefly summarized this aspect of Dr. Durrani's opinion, she failed to consider it when assessing its credibility. *See Wojtowicz*, 12 BLR at 1-165; *see also Balsavage*, 295 F.3d at 397. I therefore would vacate her determination that Dr. Durrani's opinion is reasoned.

Because the administrative law judge erred in crediting Dr. Durrani's opinion that Claimant is not totally disabled, I would vacate her findings that the evidence as a whole does not establish total disability and remand the case for further consideration of this issue.

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge

[11] Dr. Durrani acknowledged that Claimant's usual coal mine work required heavy exertion, including extensive crawling and lifting heavy weights. Employer's Exhibit 8 at 23.