U.S. Department of Labor

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

BRB No. 19-0548 BLA

CHARLES R. CUMBERLIDGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 12/15/2020
	)	
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 on Remand Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Andrea L. Berg and Kathy L. Synder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge Natalie A. Appetta's Decision and Order on Remand Awarding Benefits (2016-BLA-05626) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2018) (Act). This case involves a miner's claim filed on March 28, 2014, and is before the Benefits Review Board (the Board) for the second time.

In her initial Decision and Order Awarding Benefits, the administrative law judge credited Claimant with twelve years of coal mine employment and therefore found he 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).[1] Considering entitlement under 20 C.F.R. Part 718,[2] she found Claimant failed to establish the existence of clinical pneumoconiosis but established the existence of legal pneumoconiosis.[3] 20 C.F.R. §718.202(a). She further determined Claimant established total respiratory or pulmonary disability and total disability due to pneumoconiosis, and therefore awarded benefits. 20 C.F.R. §718.204(b), (c).

Pursuant to Employer's appeal, the Board affirmed the administrative law judge's finding that Claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board vacated, however, her determination that the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) because she did not explain her rationale for resolving the conflicting

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge previously determined there is no evidence of complicated pneumoconiosis and Claimant therefore cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Cumberlidge v. Valley Camp Coal Co.*, Case No. 2016-BLA-05626, slip op. at 13 n.12 (June 28, 2017).

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

evidence. Because her pulmonary function study findings influenced her consideration of the medical opinions, the Board also vacated her total respiratory or pulmonary disability determination at 20 C.F.R. §718.204(b)(2)(iv),[4] as well as her determination that Claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Thus, the Board vacated the award of benefits and remanded the case for reconsideration of total disability and total disability causation. *Cumberlidge v. Valley Camp Coal Co.*, BRB No. 17-0566 BLA (Sept. 10, 2018) (unpub.).

On remand, the administrative law judge again found Claimant established total respiratory or pulmonary disability and total disability due to pneumoconiosis, and therefore awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and total disability causation. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). In the absence of contrary probative evidence, pulmonary function studies, arterial blood gas studies,[6] evidence of pneumoconiosis and

[4] The Board noted, in its initial Decision and Order, the administrative law judge found the arterial blood gas study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii) and the record contained no evidence of cor pulmonale with right-sided congestive heart failure to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Cumberlidge*, BRB No. 17-0566 BLA, slip op. at 6.

[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); Director's Exhibit 4.

[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.

cor pulmonale with right-sided congestive heart failure, or medical opinions can establish total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds a claimant has established disability under one or more subsections, she must weigh that evidence against any contrary probative evidence. *See Defore v. Ala. By-Products Corp*., 12 BLR 1-27, 1-28-29 (1988); *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 the pulmonary function study evidence in equipoise and therefore concluded Claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 3-4. Employer contends, however, that the administrative law judge erred in making this determination, as she again failed to adequately explain the rationale for her finding. Employer's Brief at 7.

The administrative law judge considered the results of two pulmonary function studies, dated August 20, 2014, and November 11, 2015. Decision and Order on Remand at 3-4. The August 20, 2014 pulmonary function study produced qualifying results before the administration of a bronchodilator and non-qualifying results after the administration of a bronchodilator, while the November 11, 2015 pulmonary function study produced non-qualifying results both pre- and post-bronchodilator. Decision and Order on Remand at 3; Director's Exhibits 10-11. She accorded "no weight" to the post-bronchodilator results of both studies based on the Department of Labor's recognition that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability [although] it may aid in determining the presence or absence of pneumoconiosis." Decision and Order on Remand at 3, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *see also Cumberlidge*, BRB No. 17-0566 BLA, slip op. at 10. She found both tests equally reliable and therefore in equipoise, and concluded the pulmonary function study evidence failed to support a finding of total disability. Decision and Order on Remand at 4.

Relying on the Board's decision in *Conley v. ICG Knott County, LLC*, BRB No. 18-0574 BLA (Oct. 28, 2019) (unpub.), where it held an administrative law judge permissibly found a span of "slightly more" than nine months between studies "significant for purposes of determining Claimant's most recently ascertainable condition," Employer argues the administrative law judge's failure to explain why a period of over a year is "insignificant"

Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

does not comply with the Administrative Procedure Act (APA).[7] Employer's Brief at 7-8, *quoting Conley*, slip op. at 4. We disagree.

Because pneumoconiosis is a progressive and degenerative disease, the fact that a diagnostic test or a physician's examination of a miner is the most recent is a salient factor to be considered in weighing conflicting tests and medical reports. *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985). Thus, the administrative law judge properly considered this factor. *See Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-754-55 (1985). Bare reliance on recency, however, without further explanation is insufficient. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-2 (4th Cir. 1992).

In evaluating the pulmonary function study evidence, the administrative law judge permissibly found the span of "just over a year apart" between the qualifying August 20, 2014 study and the non-qualifying November 11, 2015 study to be "insignificant." *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); Decision and Order on Remand at 4. In her role as the fact-finder the administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). Because Employer has not shown she has abused her discretion, we reject employer's allegation of error.[8] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As Employer raises no further error with respect to the administrative law judge's weighing of the pulmonary function studies, we affirm her determination that the pulmonary function study evidence is in equipoise and thus does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order on Remand at 4.

The administrative law judge then reconsidered whether Dr. Saludes' opinion diagnosing Claimant with a totally disabling respiratory impairment is sufficient to

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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).

establish total disability.[9] Decision and Order on Remand at 4-6. She determined even with the pulmonary function study evidence in equipoise, Dr. Saludes provided a reasoned and documented opinion that Claimant is totally disabled. *Id*.

Employer argues the administrative law judge erred in crediting Dr. Saludes' opinion without explaining what "acceptable diagnostic techniques" he based his opinion on other than Claimant's symptoms. Employer's Brief at 8. Employer further asserts the administrative law judge's crediting of Dr. Saludes' opinion was flawed as his disability opinion is primarily based on Claimant's pulmonary function testing and the administrative law judge determined the preponderance of the pulmonary function study evidence failed to demonstrate total respiratory or pulmonary disability. *Id*. at 8-9. Additionally, Employer contends she failed to explain how his opinion is still entitled to "average" weight on remand, when she had found it was "not especially persuasive" when she believed the pulmonary function study evidence supported his opinion in her original Decision and Order. *Id*. at 9. Employer's arguments lack merit.

Contrary to Employer's contention, even if total disability cannot be established at 20 C.F.R. §718.204(b)(2)(i), "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" him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

In compliance with the Board's remand instructions, the administrative law judge reconsidered Dr. Saludes' opinion, taking into account his medical expertise, examining the underlying documentation for his opinion, and analyzing the explanation for his conclusions. Decision and Order on Remand at 4-6. We affirm, as unchallenged, her decision to give "significant weight" to his opinion based on "his high qualifications as a

[9] The Board previously affirmed the administrative law judge's findings that Dr. Spagnolo's opinion was entitled to "no weight" because he did not address total disability and Dr. Basheda's opinion was "unpersuasive" because he relied on post-bronchodilator testing, which the administrative law judge determined is unreliable. *See Cumberlidge*, BRB No. 17-0566 BLA, slip op. at 9-10.

pulmonary specialist"[10] and her finding Dr. Saludes "understood the nature of Claimant's coal mine work and that it required heavy labor." *Id*. at 4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge observed Dr. Saludes' references to Claimant's physical examination findings of "markedly diminished breath sounds, diminished air exchange but no crackles or wheezes," his qualifying August 20, 2014 pulmonary function study demonstrating "moderate airflow obstruction consistent with moderate COPD [chronic obstructive pulmonary disease] and mild restriction," and "the absence of hypoxemia or hypercapnia" on his arterial blood gas study. Decision and Order on Remand at 4, *citing* Director's Exhibit 10. Acknowledging Dr. Saludes "does not discuss the bases for his opinion at length" and that she determined the pulmonary function study evidence is in equipoise, the administrative law judge nevertheless permissibly determined Dr. Saludes disability opinion remained sufficiently documented and reasoned due to his reliance on Claimant's symptoms,[11] physical examination findings, and the exertional requirements of his usual coal mine work. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order on Remand at 4-6; Director's Exhibit 10. Further, she noted his diagnosis of totally disabling COPD was consistent with Claimant's treatment records. Decision and Order on Remand at 5. Because substantial evidence supports the administrative law judge's bases for crediting Dr. Saludes' opinion, and there is no contrary probative medical opinion evidence, we affirm her permissible finding that the physician opinion evidence, considered in isolation, would establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 6.

[10] The administrative law judge found Dr. Saludes is Board-certified in internal medicine with a subspecialty in pulmonary disease medicine. Decision and Order on Remand at 4; Director's Exhibit 10. She further observed Dr. Saludes has demonstrated expertise in pulmonary medicine as he is the Director of the Respiratory Department at East Ohio Regional Hospital and the Director of the Pulmonary Rehabilitation Department at Reynolds Memorial Hospital. *Id.* Additionally, she noted Dr. Saludes currently maintains a private practice in pulmonary medicine in West Virginia and Ohio. *Id.*

[11] Dr. Saludes noted Claimant's symptoms consisted of sputum production, wheezing, dyspnea, and severe coughing episodes. Director's Exhibit 10.

We further affirm, as supported by substantial evidence, the administrative law judge's finding the weight of the evidence established total pulmonary disability. *See Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 6. Contrary to Employer's assertion, the administrative law judge considered all of the evidence of total disability from all categories together. Employer's Brief at 10-11. Employer's challenge to this finding is essentially a request to re-weigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Total Disability Causation

Employer next argues the administrative law judge erred in relying on Dr. Saludes' opinion to find Claimant's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). Employer's contention lacks merit.

To establish this element, Claimant must prove that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The administrative law judge considered Dr. Saludes' opinion, finding Claimant's legal pneumoconiosis, in the form of COPD arising out of his coal mine employment, contributed to his total disability and the contrary opinions of Drs. Basheda and Spagnolo. Decision and Order on Remand at 6-7; Director's Exhibits 10-11; Employer's Exhibit 8. Having determined Claimant established the existence of legal pneumoconiosis, she rationally found the opinions of Drs. Basheda and Spagnolo unpersuasive. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of the doctor's mistaken belief that the miner did not have pneumoconiosis); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 7. In contrast, for the same reasons she credited Dr. Saludes' opinion on legal pneumoconiosis, the administrative law judge permissibly credited his opinion regarding the etiology of the Claimant's disabling respiratory or pulmonary impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

In addition, contrary to Employer's contention that the administrative law judge did not address Dr. Saludes' failure to consider alternate causes for his pulmonary condition, she recognized that he noted Claimant has never smoked and addressed the effect of claimant's obesity on his pulmonary condition. Decision and Order on Remand at 5; Employer's Brief at 12; Director's Exhibit 10. Specifically, when summarizing his opinion at total disability, she highlighted his observation that "[c]laimant's dyspnea could be 'multifactorial secondary to his body habitus and increased weight, but this should not be

a contributing factor in the development of [his] chronic obstructive pulmonary disease.'"[12] Decision and Order on Remand at 5. Consequently, we affirm the administrative law judge's determination that Claimant established total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990) (claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order on Remand at 6-7. We therefore affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decision to affirm the award of benefits in this case. I write separately, however, to express my view the administrative law judge did not have the discretion to mechanically credit the November 2015 pulmonary function study over

[12] In our previous decision affirming the administrative law judge's crediting of Dr. Saludes' diagnosis of legal pneumoconiosis, we held that "Dr. Saludes addressed the effect of claimant's obesity on his pulmonary condition" and the administrative law judge permissibly found he "adequately explained why he considered legal pneumoconiosis to be the most likely diagnosis . . . ." *Cumberlidge*, BRB No. 17-0566 BLA, slip op. at 4.

the August 2014 study solely because it was conducted more recently, even if she had determined a "significant" amount of time separates the tests.

The United States Court of Appeals for the Fourth Circuit, which has jurisdiction over this case, has held it irrational to credit evidence solely because of its recency where the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the 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. *Adkins*, 958 F.2d at 52. 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*. An administrative law judge must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id*.

It thus would be error to mechanically credit the November 2015 non-qualifying study over the August 2014 qualifying study, as Employer urges, for no other reason than the dates they were performed. Regardless of the amount of time that has passed between the tests, all things being equal, it is just as likely the single later result is wrong as the single earlier result. *Adkins*, 958 F.2d at 52 (In other words, under the circumstances presented here, "'[l]ater is better' is not a reasoned explanation").

Employer makes no argument why the November 2015 study is entitled to greater weight than the August 2014 study other than simple chronological order. Employer's Brief at 7-8. For these reasons, I concur with my colleagues' decision to affirm the finding the studies are in equipoise.

JONATHAN ROLFE
Administrative Appeals Judge