U.S. Department of Labor

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

BRB No. 20-0024 BLA

JOHNNY G. RIGGS Claimant-Petitioner v. LODESTAR ENERGY, INCORPORATED and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/15/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Timothy J. McGrath's Decision and Order Denying Benefits on Remand (2015-BLA-05432) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018)(Act). This case involves a miner's claim filed on December 4, 2013, and is before the Benefits Review Board for the second time.

In its previous decision, the Board affirmed the administrative law judge's finding that Claimant has twenty-one years of coal mine employment, including nineteen years in underground mines.[1] *Riggs v. Lodestar Energy, Inc.*, BRB No. 17-0522 BLA, slip op. at 2 n.3 (July 23, 2018)(unpub.). The Board vacated, however, the administrative law judge's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv) and remanded the case for further consideration. *Id.* at 5. The Board instructed the administrative law judge on remand to consider whether the pulmonary function study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(i), (iv). *Id.* at 6. Further, the Board instructed the administrative law judge to determine whether all of the relevant evidence weighed together established total disability if necessary. *Id.* If Claimant established total disability at 20 C.F.R. §718.204(b)(2), the Board noted he will have invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4),[2] and the administrative law judge must determine whether Employer rebutted the presumption. *Id.* However, the Board noted the administrative law judge must deny benefits if he found the evidence does not establish Claimant is totally disabled at 20 C.F.R. §718.204(b). *Id*.

On remand, the administrative law judge found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and denied benefits.

On appeal, Claimant argues the administrative law judge erred in finding he failed to establish total disability at 20 C.F.R. §718.204(b)(2) and, thus, erred in finding he did not invoke the presumption at Section 411(c)(4). Employer responds, urging affirmance

[1] The Board also affirmed the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii) or complicated pneumoconiosis at 20 C.F.R. §718.304. *Riggs v. Lodestar Energy, Inc.*, BRB No. 17-0522 BLA, slip op. at 3 n.4, 6 n.12, 9 n.13 (July 23, 2018)(unpub.).

[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) (2018); *see* 20 C.F.R. §718.305.

of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant replies, reiterating his prior contentions.

The 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.[3] 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).

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. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Claimant contends the administrative law judge erred in finding he did not establish total disability based on the pulmonary function study and medical opinion evidence. We disagree.

In its prior decision, the Board vacated the administrative law judge's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i) because his analysis of the pulmonary function study evidence did not comport with the Administrative Procedure Act requirements. *Riggs*, BRB No. 17-0522 BLA, slip op. at 5. The Board noted the administrative law judge did not address the weight accorded to Dr. Chavda's testimony regarding Claimant's effort when he considered the validity of the January 22, 2014 pulmonary function study.[4] *Id*. The Board therefore remanded the case for further consideration of the pulmonary function study evidence.

Consistent with the Board's remand instructions, the administrative law judge considered the opinions of Drs. Chavda and Vuskovich regarding the validity of the January 22, 2014 pulmonary function study.[5] Decision and Order on Remand at 4. The administrative law judge noted Dr. Chavda's post-test comments indicated Claimant provided "[g]ood efforts and cooperation" and the "results of this test meet the [American Thoracic Society] standards for acceptability and repeatability." *Id*. He also noted Dr. Chavda testified he did not observe a lack of effort by Claimant in the January 22, 2014 qualifying pulmonary function study.[6] Further, he found it unclear what evidence supports

[4] Prior decisions referred to the date of this pulmonary function study as January 23, 2014. On remand, however, the administrative law judge referred to the date of the pulmonary function study as January 22, 2014. Decision and Order on Remand at 3-6. While Dr. Chavda's Report of Ventilatory Study indicates the date of the pulmonary function study is January 23, 2014, medical records from Muhlenberg Community Hospital indicate the study was administered on January 22, 2014. Director's Exhibit 9 at 18-24. Further, in his January 23, 2014 medical report, Dr. Chavda listed the date of the pulmonary function study as January 22, 2014. *Id*. at 35-38.

[5] The administrative law judge noted the Board determined he permissibly accorded less weight to Dr. Gaziano's opinion because the doctor checked a box to indicate the study was valid without offering any explanation for his opinion. Decision and Order on Remand at 4.

[6] The administrative law judge also noted Employer's expert, Dr. Tuteur, reported the data from Dr. Chavda's January 22, 2014 pulmonary function study are valid. Decision and Order on Remand at 4.

Dr. Vuskovich's opinion that non-identical results show Claimant had a lack of effort.[7] *Id*. at 5. Finding Dr. Vuskovich's opinion unpersuasive, the administrative law judge determined the January 22, 2014 pulmonary function study Dr. Chavda conducted is valid. *Id*.

The administrative law judge then considered the results of the three valid pulmonary function studies dated January 22, 2014, May 13, 2014, and October 7, 2014.[8] Decision and Order on Remand at 4-5; Director's Exhibit 9, 11; Claimant's Exhibit 2. The January 22, 2014 study produced qualifying[9] pre-bronchodilator values, and included no post-bronchodilator results. Director's Exhibit 9. The May 13, 2014 study produced non-qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 11. Finally, the October 7, 2014 study produced non-qualifying pre-bronchodilator results, and included no post-bronchodilator results. Claimant's Exhibit 2. The administrative law judge accurately noted only one of the three studies produced qualifying values. Decision and Order at 6. According greater weight to the two most recent non-qualifying studies, administrative law judge found the preponderance of pulmonary function study evidence did not establish total disability at Section 718.204(b)(2)(i). Decision and Order on Remand at 6.

Claimant argues the administrative law judge erred in relying on the most recent non-qualifying pulmonary function studies because all of the studies were administered within months of each other. Claimant's Brief at 21-22; Claimant's Reply Brief at 8-10. In crediting the May 13, 2014 and October 7, 2014 non-qualifying pulmonary function studies, however, the administrative law judge did not rely solely on their recency. Rather, he permissibly relied on a qualitative and quantitative evaluation of the studies. *See*

[7] The administrative law judge noted Dr. Vuskovich observed discrepancy between Claimant's vital capacity measured with spirometry and his vital capacity measured with lung determinations. Decision and Order on Remand at 4-5. He also noted Dr. Vuskovich opined these results should be approximately equal and the configurations of Claimant's flow-volume loops were consistent with sub-maximum initial efforts which artificially lowered his FEV1 results. *Id*. at 5.

[8] The Board previously affirmed the administrative law judge's finding the March 9, 2016 pulmonary function study produced invalid results. *Riggs*, BRB No. 17-0522 BLA, slip op. at 3, 4, 5 n.8; Claimant's Exhibits 1, 2; Employer's Exhibit 3.

[9] A "qualifying pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Schetroma v. Director, OWCP, 18 BLR 1-19, 1-22 (1993); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); Decision and Order on Remand at 6. Qualitatively, he followed the Board's remand instructions and, as described, determined the three pulmonary function studies were valid and equally reliable. Decision and Order on Remand at 6. Quantitatively, he then noted only one of the three valid studies produced qualifying results. *Id*. Because substantial evidence supports the administrative law judge's finding that two out of the three valid pulmonary function studies were non-qualifying, we affirm his determination Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.); Decision and Order on Remand at 6.

The administrative law judge next considered the medical opinions of Drs. Chavda, Vuskovich, and Tuteur. Dr. Chavda opined Claimant is totally disabled, while Drs. Vuskovich and Tuteur opined he is not. Director's Exhibit 9; Claimant's Exhibit 3; Employer's Exhibits 1, 3. The administrative law judge found Dr. Chavda's opinion conflicting and inherently unreliable. Decision and Order on Remand at 7-8. Finding Dr. Vuskovich's and Tuteur's opinions well-reasoned and supported by the objective evidence,[10] the administrative law judge credited their opinions over that of Dr. Chavda. *Id*. at 8. Thus he found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

We reject Claimant's assertion the administrative law judge mischaracterized Dr. Chavda's opinion. The administrative law judge reviewed Dr. Chavda's reports and deposition. Decision and Order on Remand at 6-7. Dr. Chavda performed a Department of Labor-sponsored pulmonary evaluation on January 23, 2014 and opined the FEV1 of 1.55 and MVV of 61 produced on the January 22, 2014 pulmonary function study are "reduced enough" to demonstrate total respiratory disability. Director's Exhibit 9. In a supplemental report dated December 18, 2014, Dr. Chavda reviewed the pre-bronchodilator FEV1 of 1.85 and MVV of 57 produced on the May 13, 2014 pulmonary function study Dr. Tuteur conducted and opined Claimant "does not have enough lung capacity that he could do 8 hours of a job in a coal mine that he has to do." *Id.* He further opined:

> Especially when coal mining job includes exposure to dust. When a miner gets exposed to dust, his lung function at rest [of] 1.85[] could go down

[10] As the administrative law judge's evaluation of Dr. Vuskovich's and Dr. Tuteur's opinions is not challenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 8.

> to a much lower level and he would not be able to perform his job if he has to go back to coal mining employment. If he had to work in a dust free environment, [an] FEV1 of 1.85 and MVV of 57 would be appropriate for him to perform a job.

Id.

At an April 8, 2016 deposition, Dr. Chavda testified he looked at all the pulmonary function studies and opined Claimant still has a "substantial reduction in F-E-V-1 and M-V-V that he would not be able to perform his coal mine job."[11] Claimant's Exhibit 3 at 22; Employer's Exhibit 4 at 24. In discussing the administration of normal blood gas studies in "room air" rather than in the mines, Dr. Chavda further testified:

> So we have to look at the variability that if he goes in the mines, even with [an] F-E-V-1 of 1.9 which is best, if he has to stoop down and if he has to wear a mask or he get[s] exposed to coal dust, then those value[s] may change and not hold true that he's not totally disabled.
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> ***
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> But we speculate that if he goes to the mine, what would happen to his lung even with F-E-V-1 which his best one was 1.95.

Claimant's Exhibit 3 at 31-32; Employer's Exhibit 4 at 33-34.

The administrative law judge determined Dr. Chavda's opinion "is beset by his own conflicting statement." Decision and Order on Remand at 7. He permissibly found Dr. Chavda's opinion that Claimant could work in a dust free environment "greatly

[11] Dr. Chavda testified the pre-bronchodilator FEV1 and MVV results produced on the January 22, 2014 pulmonary function study met the total disability criteria. Claimant's Exhibit 3 at 10; Employer's Exhibit 4 at 12. He also testified the pre-bronchodilator FEV1 and MVV results produced on the May 13, 2014 pulmonary function study were "low enough that [Claimant] would not be able to perform his job as a miner continuously for eight hours if he has to do so." Claimant's Exhibit 3 at 15; Employer's Exhibit 4 at 17. Further, he testified he did not believe Claimant would be able to return and do his job in the coal mines based on the FEV1 and FVC results produced on the October 7, 2014 pulmonary function study. Claimant's Exhibit 3 at 16-17; Employer's Exhibit 4 at 18-19.

undermines" his opinion that Claimant is totally disabled. Decision and Order on Remand at 7; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (a recommendation against further dust exposure is not a diagnosis of total respiratory or pulmonary disability disability).

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999). The Board cannot substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As substantial evidence supports the administrative law judge's finding that "Dr. Chavda's credibility is discounted by his conflicting opinion,"[12] we affirm his determination to credit Dr. Vuskovich's and Dr. Tuteur's opinions over Dr. Chavda's contrary opinion. Decision and Order on Remand at 7; *see Martin*, 400 F.3d at 305.

Because we reject Claimant's arguments with respect to the weighing of the pulmonary function test evidence and the credibility of Dr. Chavda's opinion, we affirm the administrative law judge's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, we affirm his finding that the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2)*; see Rafferty*, 9 BLR at 1-232; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 8.

Because Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), he did not invoke the Section 411(c)(4) presumption or establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; Decision and Order on Remand at 8.

[12] Because the administrative law judge gave a valid reason for discounting Dr. Chavda's opinion on total disability, we need not address Claimant's assertion the administrative law judge improperly discounted Dr. Chavda's reliance on the DLCO value from the March 9, 2016 pulmonary function study. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Claimant's Brief at 22-24.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge