U.S. Department of Labor

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

BRB No. 20-0030 BLA

RALPH D. CHAPMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PATRICK PROCESSING LLC	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 02/26/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Cameron Blair and Andrew L. Kenney (Fogle Keller Walker PLLC), Lexington, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2018-BLA-05905) rendered on a subsequent claim filed on April 12, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).[1]

The administrative law judge found Claimant timely filed his claim and credited him with at least fifteen years of qualifying coal mine employment, based on the parties' stipulation. He further found Claimant established a totally disabling respiratory or pulmonary impairment, thus establishing a change in an applicable condition of entitlement,[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim. The district director denied his first claim on April 20, 1981 by reason of abandonment. Director's Exhibit 1. Claimant withdrew his second claim which is therefore considered "not to have been filed." 20 C.F.R. §725.306(b); Director's Exhibit 2.

[2] 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(c); *White v. New White Coal Co.*, 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(c)(3). The district director denied Claimant's prior claim as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding [Claimant] has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, Claimant must demonstrate at least one element of entitlement to obtain review of his subsequent claim. *White*, 23 BLR at 1-3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or

On appeal, Employer argues the administrative law judge erred in finding Claimant timely filed the claim. It further argues the administrative law judge erred in denying its motion to compel Claimant to undergo an Employer-sponsored arterial blood gas study and in finding Claimant established total disability.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to affirm the administrative law judge's finding that the claim was timely filed.

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.[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). The Board reviews the administrative law judge's procedural rulings for an abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Timeliness of the Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308(a), (c). To rebut this presumption, Employer must show, by a preponderance of the evidence, that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was

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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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established twenty-two years of coal mine employment, at least fifteen years of which was qualifying for purposes of invoking the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 8; Hearing Transcript at 13.

communicated to the Miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95 (6th Cir. 2013).

As part of Claimant's withdrawn second claim, Dr. Ammisetty conducted the Department-sponsored complete pulmonary evaluation of Claimant on February 24, 2011. Director's Exhibit 28 at 26-29. He diagnosed chronic bronchitis, chronic obstructive pulmonary disease, and pneumoconiosis. *Id.* at 29. He indicated coal mine dust exposure caused the pneumoconiosis and opined Claimant was totally disabled. *Id.* As part of his present claim, Claimant testified at an August 8, 2016 deposition that he remembered Dr. Ammisetty telling him he was disabled due to pneumoconiosis. Director's Exhibit 28 at 18. At the hearing, however, he testified he only recalled reading Dr. Ammisetty's report, and he did not recall Dr. Ammisetty telling him he was totally disabled due to pneumoconiosis. Hearing Transcript at 34-36.

Prior to the hearing, Employer moved to dismiss the claim on the grounds that Dr. Ammisetty informed Claimant in 2011 he was totally disabled due to pneumoconiosis and the three-year statute of limitations had therefore run before Claimant filed the present claim on April 12, 2016. Employer's Motion that Claim is Barred by Statute of Limitations. The administrative law judge denied Employer's motion, rejecting Employer's argument that Dr. Ammisetty's opinion triggered the statute of limitations. Decision and Order at 4. He determined that, though Dr. Ammisetty's report stated Claimant was totally disabled and that he had pneumoconiosis, it did not specifically attribute his total disability to pneumoconiosis. *Id.* The administrative law judge further found Claimant's testimony inconsistent regarding whether Dr. Ammisetty told him he was totally disabled due to pneumoconiosis. *Id.* Therefore, the administrative law judge found Employer failed to rebut the presumption that the claim was timely filed. *Id.* at 4-5.

Employer argues the administrative law judge erred in finding the three-year limitations period was not triggered. Employer's Brief at 15-20 (unpaginated). It alleges Dr. Ammisetty's report triggered the statute of limitations because he both diagnosed pneumoconiosis and opined Claimant is totally disabled. *Id.* at 17 (unpaginated). Employer further asserts the administrative law judge should have found Claimant's deposition testimony more credible than his hearing testimony and that it establishes Dr. Ammisetty told him in 2011 he was totally disabled due to pneumoconiosis. *Id.* at 17-20 (unpaginated). We disagree.

Whether evidence sufficiently rebuts the presumption of timeliness involves factual findings and credibility determinations by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). The administrative law judge correctly determined Dr. Ammisetty's report does not state Claimant is totally disabled due

to pneumoconiosis.[6] Decision and Order at 4; Director's Exhibit 28. He also permissibly found Claimant's testimony inconsistent and not credible as to whether Dr. Ammisetty told him he was totally disabled due to pneumoconiosis. The Board is not empowered to reweigh the evidence or render its own credibility determinations. *See Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 299-300 (6th Cir. 2018); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the administrative law judge has broad discretion in evaluating the credibility of evidence, including witness testimony); Decision and Order at 4.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that neither Claimant's testimony nor Dr. Ammisetty's report establish that a diagnosis of total disability caused by coal worker's pneumoconiosis was communicated to Claimant more than three years before he filed this claim. Decision and Order at 4; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (defining substantial evidence as relevant evidence that a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 4-5. We thus affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness. *See Duncan*, 889 F.3d at 299-300; *Brigance*, 718 F.3d at 594; *Clark*, 12 BLR at 1-152; 20 C.F.R. §725.308(a); Decision and Order at 4-5.

Denial of Employer's Motion to Compel

As part of the Department-sponsored complete pulmonary evaluation in the current claim, Dr. Green administered the only arterial blood gas study of record on July 9, 2016. Director's Exhibit 14. After Claimant refused to undergo subsequent blood gas testing with employer's expert, Dr. Dahhan, Employer filed a motion to compel Claimant's participation in an Employer-sponsored test. Employer's Motion to Compel Arterial Blood Gas Testing. Finding any further blood gas testing medically contraindicated, the administrative law judge denied Employer's motion. Order Denying Motion to Compel Arterial Blood Gas Testing. Employer argues the administrative law judge abused his discretion in denying its motion. Employer's Brief at 19-21 (unpaginated). We disagree.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en

[6] Contrary to Employer's argument, pneumoconiosis, total disability, and total disability due to pneumoconiosis are separate elements of entitlement, and an opinion that a miner has pneumoconiosis and is totally disabled does not necessarily demonstrate that his total disability is due to pneumoconiosis. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 217 (6th Cir. 1996); 20 C.F.R. §718.204(c)(1).

banc); *Clark*, 12 BLR at 1-152. Thus, a party seeking to overturn the disposition of a procedural or evidentiary issue must establish an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

While Employer is ordinarily entitled to obtain and submit two arterial blood-gas studies, 20 C.F.R. §725.414(a)(3)(i), the regulations provide that "[n]o blood-gas study shall be performed if medically contraindicated." 20 C.F.R. §718.105(a). The administrative law judge considered the statements of Drs. Johnson, Patnaik, and Dahhan. Drs. Johnson and Patnaik, Claimant's primary care physician and cardiologist, both indicated Claimant is medically contraindicated from undergoing additional arterial blood gas studies because he suffers from arteritis[7] and is at risk of experiencing serious complications. Claimant's Exhibit 2. Dr. Dahhan opined Claimant could safely undergo additional blood gas testing. Employer's Exhibit 6. Contrary to Employer's contention, the administrative law judge reasonably determined Drs. Johnson and Patnaik are better acquainted with Claimant's medical history and are therefore in a better position to evaluate whether further testing could cause him injury. *See Rowe*, 710 F.2d at 255; Order Denying Motion to Compel Arterial Blood Gas Testing. Detecting no abuse of discretion in the administrative law judge's decision to deny Employer's motion to compel, we affirm his ruling.[8] *See McClanahan*, 25 BLR at 1-175; *Clark*, 12 BLR at 1-153; *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); Order Denying Motion to Compel Arterial Blood Gas Testing.

[7] "Arteritis" is defined as "inflammation of an artery." Dorland's Illustrated Medical Dictionary 144 (32 ed. 2012).

[8] We decline to address Employer's allegation that the administrative law judge violated its right to due process in denying a "motion for extension" as it has not identified the motion or provided argument and authority concerning the issue. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994); Employer's Brief at 20 (unpaginated).

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

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[9] 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). The administrative law judge found Claimant established total disability based on the arterial blood gas testing and medical opinion evidence.[10]

As noted, Dr. Green administered the only blood gas study, conducted on July 9, 2016. Director's Exhibit 14. He performed four blood draws, one while Claimant was at rest, and three while he exercised. *Id.* at 19-23. The first exercise blood sample, identified by Dr. Green as having been drawn at "peak" exercise, produced qualifying values while the remaining resting and exercise blood samples produced non-qualifying values.[11] *Id*.

Dr. Gaziano validated the non-qualifying resting and qualifying exercise blood gas study, Director's Exhibit 19, whereas Drs. Dahhan and Jarboe opined the exercise study is invalid. Director's Exhibit 25; Employer's Exhibits 4, 5. The administrative law judge found Drs. Dahhan's and Jarboe's opinions concerning the validity of the exercise blood gas study speculative. Finding the exercise study more indicative of Claimant's level of disability, he concluded the July 9, 2016 arterial blood gas testing was valid and established total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20-22.

[9] The administrative law judge found Claimant's usual coal mine employment as a mine foreman required heavy labor. Decision and Order at 20. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[10] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 20.

[11] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Employer asserts the administrative law judge arbitrarily credited the qualifying results from the first blood sample drawn during the exercise study over the non-qualifying samples from the second and third blood draws. Employer's Brief at 25 (unpaginated). We disagree. The administrative law judge rationally determined that because the second and third exercise blood gas studies do not document the pulse rate at the time the blood sample was drawn, they do not substantially comply with the quality standards for arterial blood gas testing. *See* 20 C.F.R. §718.105(c)(8); Decision and Order at 22; Director's Exhibit 14 at 22-23. In contrast, he accurately found the blood gas study identified as having been performed at "peak" exercise meets the quality standards. *See* 20 C.F.R. §718.105(c)(8); Decision and Order at 22; Director's Exhibit 14 at 21. Thus, we affirm the administrative law judge's findings crediting the first, "peak" exercise blood gas study and discrediting the second and third exercise blood gas studies. 20 C.F.R. §718.105; Decision and Order at 22.

We also reject Employer's argument the administrative law judge erred in discounting Dr. Jarboe's opinion that the July 9, 2016 exercise blood gas study was invalid. Employer's Brief at 26-29. Dr. Jarboe indicated the blood gas study was invalid because: it was possible the blood sample could have contained venous blood; the sample may not have been drawn during peak exercise because peak exercise should occur at the end of exercise; it was possible there were delays in analyzing the sample which could affect the blood gas values; and the duration of exercise could not be determined because there was no start time recorded for the beginning of exercise. Employer's Exhibit 5 at 17-32.

The administrative law judge addressed each argument, correctly noting Dr. Jarboe acknowledged there is no specific evidence suggesting venous blood mixed with the sample. Decision and Order at 21. He also noted that the quality standards do not require an exercise blood gas study be conducted at the end of exercise, only that blood be drawn "during exercise." 20 C.F.R. §718.105(c); Decision and Order at 21. He further found Dr. Jarboe's suggestion that the sample may not have been evaluated within a sufficient time to accurately record Claimant's blood gas values inconsistent with the timestamp on the report printout as well as Dr. Green's supplemental report describing his test procedure. Decision and Order at 21; Director's Exhibit 14 at 21; Claimant's Exhibit 1. As Dr. Green explained, the timestamp on the printout of the blood gas report shows it was printed ten minutes after the blood sample was collected, and the analysis must therefore have been conducted within that ten minute period. *See* Decision and Order at 21; Director's Exhibit 14 at 21; Claimant's Exhibit 1.

As it is supported by substantial evidence, we affirm the administrative law judge's discrediting of Dr. Jarboe's opinion and his finding that Claimant's July 9, 2016 exercise

blood gas study is valid and produced qualifying values.[12] *See Clark*, 12 BLR at 1-155; *Rowe*, 710 F.2d at 255; Decision and Order at 21-22. We therefore affirm his finding that the arterial blood gas study evidence established total disability.[13] 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge next considered the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Drs. Green and Nader opined Claimant is totally disabled based on the hypoxia shown on the arterial blood gas study and a moderate airflow obstruction. Director's Exhibits 14 at 4; 21 at 1-2; Claimant's Exhibits 2 at 4-5; 3 at 3-4. Drs. Dahhan and Jarboe opined Claimant is not totally disabled. Director's Exhibit 25 at 6-7; Claimant's Exhibit 5 at 32. The administrative law judge credited the opinions of Drs. Green and Nader as documented and reasoned, but found the opinions of Drs. Dahhan and Jarboe entitled to little weight. Decision and Order at 22-23.

On appeal, Employer argues only that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Dahhan because their opinions conflict with his allegedly erroneous finding that the blood gas study evidence established total disability. Employer's Brief at 29 (unpaginated). Because we have affirmed the administrative law judge's finding that the blood gas study established total disability, Employer's argument has no merit. We thus affirm his finding that Claimant established total respiratory disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv).

As Employer raises no additional allegations of error, we affirm the administrative law judge's finding that the weight of the evidence as a whole established total 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 his findings that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4)

[12] We also affirm, as unchallenged on appeal, the administrative law judge's discrediting of Dr. Dahhan's opinion that Claimant's July 9, 2016 exercise blood gas study was invalid and his finding that the exercise blood gas study is more probative than the study conducted at rest because it is a better predictor of Claimant's ability to perform his coal mine work. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21-22.

[13] We reject Employer's argument that the administrative law judge abused his discretion by crediting the July 9, 2016 arterial blood gas study when Employer was unable to submit studies of its own. Employer was afforded and took advantage of the opportunity to submit two medical opinions interpreting the July 9, 2016 study to support its affirmative case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); 20 C.F.R. §718.204(b)(iv).

presumption. 20 C.F.R. §§718.305(b)(1)(iii), 725.309(c); Decision and Order at 5, 24. We further affirm his finding that Employer failed to rebut the presumption, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 31. We therefore affirm the award of benefits.

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