U.S. Department of Labor

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

BRB No. 20-0131 BLA

DAVID L. CANTRELL Claimant-Respondent v. ROCKSPRING DEVELOPMENT, INCORPORATED and ANR, INCORPORATED, c/o HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/17/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer appeals Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05303) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case concerns Claimant's subsequent claim filed on December 27, 2016.[1] 20 C.F.R. §725.309.

The administrative law judge found Claimant established at least 18 years of qualifying coal mine employment and he is totally disabled due to a respiratory or pulmonary impairment. *See* Decision and Order at 4, 18-19. He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and consequently awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding Claimant totally disabled and entitled to the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. Employer also challenges the administrative law judge's finding that it did not rebut the presumption. Claimant filed a response brief, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has not filed a response.

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

[1] Claimant filed his first claim for benefits on April 10, 2008, which the district director denied on December 2, 2008, because Claimant failed to establish he had pneumoconiosis or was totally disabled. *See* Director's Exhibit 1 at 4-5. Claimant took no further action until filing the instant claim on December 27, 2016.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where he establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established more than 15 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." *See* 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment; therefore, to obtain review of the merits of his claim, Claimant had to establish one of these elements of entitlement.

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. 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).

The administrative law judge found none of the pulmonary function studies or blood gas studied produced qualifying values and there is no evidence of cor pulmonale. *See* Decision and Order at 5-6. He went on to review the medical opinion evidence to determine if Claimant established he is totally disabled. Dr. Shah examined Claimant and found his ventilatory studies show he has a mild impairment of his lung function which prevents him from performing the physical demands of his usual work, which involved heavy manual labor. *See* Director's Exhibit 14 at 5. She diagnosed Claimant with both clinical and legal pneumoconiosis caused in part by coal dust exposure. *Id.*; Director's Exhibit 42 at 2. She explained her opinion of Claimant's disability is based on his cardiopulmonary exercise stress test results and his VO2 maximum oxygen intake (VO2

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3.

max), which she described as "the gold standard evaluation on patients to match the demand or to evaluate the exertional requirements of their work." Claimant's Exhibit 4 at 16. The administrative law judge found Dr. Shah had a thorough understanding of the physical demands of Claimant's work and persuasively explained her use of the VO2 max measurement to conclude Claimant is totally disabled, in spite of the non-qualifying pulmonary function tests and blood gas studies. *See* Decision and Order at 10. In contrast, Dr. Tuteur, who also examined Claimant, concluded Claimant does not have pneumoconiosis and is not disabled due to a pulmonary impairment. *See* Employer's Exhibit 2 at 2-3. The administrative law judge found Dr. Tuteur did not demonstrate a complete understanding of the exertional requirements of Claimant's job and therefore gave Dr. Tuteur's opinion little probative weight. *See* Decision and Order at 12-13.

Dr. Rosenberg reviewed Claimant's medical records, concluded Claimant does not have pneumoconiosis and opined any pulmonary restriction Claimant suffers is due to his obesity and not coal dust exposure. *See* Employer's Exhibit 4 at 4. The administrative law judge found Dr. Rosenberg relied too heavily on the non-qualifying objective tests and did not adequately explain how Claimant could perform the heavy manual labor of his usual work with the mild impairment demonstrated on the pulmonary function studies. *See* Decision and Order at 14. He therefore gave Dr. Rosenberg's opinion little weight. *See id.* Dr. Sood also reviewed Claimant's medical records, concluding Claimant has simple clinical pneumoconiosis which is due to his work as a miner. *See* Claimant's Exhibit 5 at 9-12. Dr. Sood opined Claimant is totally disabled due to pneumoconiosis, explaining that his VO2 max result indicates Claimant would be able to perform only light or moderate work but not the heavy physical labor Claimant's usual work required. *See id.* at 10-11. The administrative law judge accepted Dr. Sood's corroboration of Dr. Shah's use of the VO2 max as well as Dr. Sood's reliance on the medical exertional level as stated under the 1986 American Thoracic Society guidelines for evaluating impairment. *See* Decision and Order at 17.[4] He therefore gave Dr. Sood's opinion probative weight. *See id.* In weighing all the medical opinions, the administrative law judge found all four physicians equally credentialed but found the opinions of Dr. Shah and Dr. Sood better reasoned and therefore more persuasive. *See id.* at 18. He therefore concluded Claimant established he has a totally disabling respiratory or pulmonary impairment and consequently invoked the rebuttable presumption of total disability due to pneumoconiosis. *See id.* at 19.

[4] Dr. Sood explained that under the American Thoracic Society guidelines for evaluating impairment, a worker doing manual labor could perform work at only 40 percent of his maximum rate for prolonged periods of time. He further stated Claimant's VO2 max indicated he would not be able to meet the median exertional level for coal miner work. *See* Claimant's Exhibit 5 at 10-11.

In contending the administrative law judge erred in finding Claimant established he is totally disabled, Employer first alleges Claimant's non-qualifying pulmonary function tests and blood gas studies are controlling. This contention is without merit. Under 20 C.F.R. §718.204(b)(iv), non-qualifying test results alone do not prove the absence of a totally disabling impairment and a claimant may establish total disability with reasoned medical opinions, even "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii), of this section…" 20 C.F.R. §718.204(b)(2)(iv). Having accurately noted that none of Claimant's pulmonary function tests and blood gas studies are qualifying, the administrative law judge correctly proceeded to weigh the entirety of the relevant evidence pertaining to the issue of total disability by considering the medical opinions. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997).

Employer next contends the administrative law judge erroneously relied on the opinions of Dr. Shah and Dr. Sood, although their opinions are not based on any of the objective tests listed in the regulations. We disagree. The list of objective tests in the regulations is not exhaustive and permits a doctor to diagnose total disability "based on medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §718.204(b)(2)(iv). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has confirmed that tests which are not specifically mentioned in the regulations, such as the exercise stress test Dr. Shah performed or the medical exertional level measurement Dr. Sood used, may be valid if a qualified physician or respected medical organization deems them medically acceptable. *See Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991). The administrative law judge acted within his discretion in accepting Dr. Shah's explanation that the exercise stress test and the VO2 max measurement are widely accepted in the medical community to determine pulmonary impairment. Dr. Sood's reliance on the VO2 max further supports this finding and, as the administrative law judge accurately noted, Dr. Rosenberg did not disagree with the acceptability or the validity of the stress test, only with Dr. Shah's interpretation of the results. *See* Decision and Order at 10. The administrative law judge also permissibly found Dr. Sood's explanation of Claimant's medical exertional level compared to the median exertional level for coal miners to be persuasive as support for Dr. Sood's conclusion that Claimant is unable to perform the heavy labor required of his usual work. The administrative law judge's finding that Dr. Shah and Dr. Sood persuasively explained their reliance on other objective test results aside from Claimant's non-qualifying pulmonary function tests and blood gas studies is rational and supported by substantial evidence, and is therefore affirmed.

Employer also challenges the administrative law judge's finding that Dr. Shah's opinion is well-reasoned, alleging it is based on a misunderstanding of the exertional requirements of Claimant's usual work. We reject Employer's contention. The

administrative law judge accepted Claimant's uncontradicted testimony that his usual work required him to lift air pumps which weighed at least a hundred pounds on a daily basis and also had to move rock dust bags weighing 80 pounds. *See* Decision and Order at 4-5; Tr. at 26-29. The administrative law judge permissibly concluded Claimant's usual work based on his testimony required heavy manual labor. *See* Decision and Order at 4-5. Contrary to Employer's argument, Dr. Shah's understanding of Claimant's job requirements is not premised on constantly lifting over 100 pounds. Rather, Dr. Shah accurately stated Claimant's job involved heavy labor, required him to lift up to 100 pounds, and Claimant's maximum oxygen consumption would permit him to do only medium work during an eight-hour day. *See* Claimant's Exhibit 4 at 14-15. Employer has not explained how Dr. Shah's statement that Claimant would only be able to perform medium work over an eight-hour day is inconsistent with her conclusion that Claimant is unable to perform his usual work. The administrative law judge found Dr. Shah demonstrated a thorough and accurate understanding of Claimant's usual coal mine employment, consistent with the administrative law judge's understanding of the exertional requirements of Claimant's job. *See* Decision and Order at 10. We affirm the administrative law judge's finding that Dr. Shah accurately understood the exertional requirements of Claimant's job as it is rational and supported by substantial evidence. *See Eagle v. Armco Inc.*, 943 F.2d 509 (4th Cir. 1991); *Walker*, 927 F.2d at 184.

We also reject Employer's assignment of error to the administrative law judge's finding that the opinions of Dr. Shah and Dr. Sood are well-documented and well-reasoned. The determination of whether a medical opinion is sufficiently reasoned so as to be given probative weight is solely the province of the administrative law judge. *See Harman Mining Co. v. Director, OWCP*, 678 F.3d 305 (4th Cir. 2012). Substantial evidence supports the administrative law judge's conclusion that Dr. Shah and Dr. Sood showed a more complete understanding of the physical requirements of Claimant's usual work. The administrative law judge also noted both Dr. Tuteur and Dr. Rosenberg relied too heavily on Claimant's non-qualifying objective tests in concluding Claimant is not totally disabled and did not acknowledge that even a mild impairment, which they agreed Claimant had, could affect Claimant's ability to perform heavy physical labor. *See* Decision and Order at 18. The administrative law judge permissibly determined Dr. Shah's and Dr. Sood's opinions are entitled to greater probative weight than the opinions of Dr. Tuteur and Dr. Rosenberg, and the Board is not empowered to reweigh the evidence.[5] *Island Creek Coal*

[5] We reject Employer's contention that Dr. Shah's opinion should have been given less weight because she misdiagnosed Claimant with chronic obstructive pulmonary disease (COPD), which Dr. Sood stated Claimant does not have. Employer misstates Dr. Shah's opinion. In her deposition, Dr. Shah explained that her initial diagnosis that Claimant's symptoms are suggestive of COPD referred to the "big umbrella of COPD … that could be in [Claimant's] case the COPD, the restrictive lung disease like interstitial

Co. v. Compton, 211 F.3d 203, 211-12 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Shah and Sood establish total disability under Section 718.204(b)(2)(iv).[6] The administrative law judge's conclusion that Claimant invoked the Section 411(c)(4) rebuttable presumption is affirmed.

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut it by establishing Claimant does not have either clinical or legal pneumoconiosis or that his total disability is not caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not rebut the presumption by any method. *See* Decision and Order at 21-27. On appeal, Employer does not challenge the administrative law judge's rejection of its rebuttal evidence. Its contentions concerning Claimant's evidence, previously discussed, cannot establish error in the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption. Therefore, we affirm the administrative law judge's conclusion that Employer did not rebut the Section 411(c)(4) presumption and consequently, the award of benefits.

pulmonary fibrosis," ultimately concluding Claimant suffers from a restrictive lung disease. *See* Claimant's Exhibit 4 at 8.

[6] We thus affirm the administrative law judge's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge