U.S. Department of Labor

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

BRB No. 19-0501 BLA

BILLY J. FARRUGGIA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN/CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 01/27/2021
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 Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-05761) rendered on a subsequent claim filed on

December 5, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The administrative law judge accepted the parties' stipulation that Claimant has at least twenty-two years of qualifying coal mine employment. She found new evidence establishes he is totally disabled. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4)(2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed response brief.

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

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[1] This is Claimant's third claim for benefits. The district director denied his most recent prior claim because Claimant did not establish total disability. Director's Exhibit 2.

[2] 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 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.

[3] 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 "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). 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 most recent prior claim was denied because he did not establish total disability. Director's Exhibit 2. Consequently, he had to submit new evidence establishing total disability to proceed with his claim. *See* 20 C.F.R. §725.309(c).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant has at least twenty-two years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

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).

Invocation of the Section 411(c)(4) Presumption – 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 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). The administrative law judge found Claimant established total disability based on the blood gas studies and medical opinions.[6] Decision and Order at 12, 24-25.

The administrative law judge considered five blood gas studies. The January 9, 2017 study Dr. Jin administered yielded qualifying values at rest and with exercise.[7] Director's Exhibit 14. The November 8, 2017 and November 12, 2018 studies Drs. Zaldivar and Green administered, conducted only at rest, produced non-qualifying values. Employer's Exhibits 1, 6. The study Dr. Nader performed on January 21, 2019 produced non-qualifying values at rest and both non-qualifying and qualifying values on three tests conducted with exercise.[8] Claimant's Exhibit 4. With the February 13, 2019 study, Dr.

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[6] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies and there was no evidence of cor pulmonale with right-sided congested heart-failure. Decision and Order at 6-7 & n.4; 20 C.F.R. §718.204(b)(2)(i), (iii).

[7] 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).

[8] Dr. Nader performed three blood gas studies while Claimant exercised. Claimant's Exhibit 4. The first study produced non-qualifying values, while the second and third

Raj performed three blood gas studies, all with exercise. Claimant's Exhibit 5. The first and third studies yielded non-qualifying values, while the second produced qualifying values. *Id.*

The administrative law judge determined the resting blood gas studies were preponderantly non-qualifying. Decision and Order at 12. Considering the exercise studies, she found the January 9, 2017 and January 21, 2019 studies entitled to "normal probative weight," whereas the February 13, 2019 study was inconclusive and merited "no probative weight." Decision and Order at 9, 11. She therefore determined the preponderance of the exercise studies were qualifying and, giving greater weight to the exercise blood gas studies, concluded the overall weight of the arterial blood gas studies supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Employer argues the administrative law judge erred in giving no weight to the February 13, 2019 blood gas study and thus erred in finding the weight of the blood gas studies established total disability.[9] Employer's Brief at 4-6. We disagree.

Contrary to Employer's argument, the administrative law judge did not find the February 13, 2019 blood gas study invalid, and she did not disregard the study merely because Dr. Raj drew multiple samples. *See* Decision and Order at 11-12; Employer's Brief at 5-6. Rather, she permissibly found the study inconclusive and entitled to no weight because, as she explained, Dr. Raj did not explain the discrepancies between the results or indicate which value, if any, represented Claimant's "true blood gas exchange during exertion," and she could therefore not determine whether any one test result of the three was more probative than the others. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); Decision and Order at 11. She likewise permissibly found Dr. Vuskovich's opinion did not resolve the question of which of the February 13, 2019 studies was most probative

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studies, which Dr. Nader indicated were drawn at "peak exercise," produced qualifying values. *Id.* at 4. The administrative law judge considered only the second and third samples, explaining that, because Dr. Nader's report indicated the second and third samples were drawn at peak exercise, she found them more representative of Claimant's blood gas exchange during physical exertion. Decision and Order at 10; Claimant's Exhibit 14. Employer does not challenge the administrative law judge's evaluation of the January 21, 2019 blood gas study. *See Skrack*, 6 BLR at 1-711.

[9] We affirm, as unchallenged, the administrative law judge's finding that the blood gas studies conducted on January 9, 2017 and January 21, 2019 are valid. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9-11; Director's Exhibit 14; Claimant's Exhibit 4.

because he relied in part on his conclusion that, after adjusting for Claimant's age and the altitude of the testing facility, the values were "normal," which she noted was inconsistent with the tables contained in Appendix C of 20 C.F.R. Part 718. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1219 (10th Cir. 2019); *see also Cannelton Indus., Inc. v. Director, OWCP* [*Frye*], 93 F. App'x. 551 (4th Cir. 2004) (upholding the administrative law judge's discrediting of a physician's opinion that contradicted Appendix C); *Underwood*, 105 F.3d at 951; Decision and Order at 11-12. We therefore reject Employer's argument that the administrative law judge erred in finding the February 13, 2019 arterial blood gas study inconclusive. *See Underwood*, 105 F.3d at 949; *Mays*, 176 F.3d at 764; Decision and Order at 11-12.

Employer does not challenge the administrative law judge's analysis of the January 9, 2017 and January 21, 2019 blood gas studies, or her decision to accord greater weight to Claimant's exercise blood gas studies than to his resting studies. Decision and Order at 9-11. We therefore affirm those findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 12. We further affirm, as unchallenged on appeal, her finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Skrack*, 6 BLR at 1-711; Decision and Order at 24. We therefore affirm the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *See* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305, 725.309; Decision and Order at 24-25.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[10] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

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[10] "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).

in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.[11]

Employer relies on the opinions of Drs. Zaldivar and Vuskovich to disprove pneumoconiosis. Dr. Zaldivar opined Claimant does not have legal pneumoconiosis, attributed Claimant's restrictive impairment to his obesity, and related the variability seen in Claimant's breathing capacity to smoking.[12] Employer's Exhibits 1 at 3; 2 at 21, 23-25; 7 at 5. Dr. Vuskovich opined Claimant does not have legal pneumoconiosis, but has a mild ventilatory impairment due to obesity and smoking, and unrelated to coal mine dust exposure because of its stability over many years. Employer's Exhibit 8 at 24-25. The administrative law judge discredited both opinions, finding they did not explain why Claimant's history of coal mine dust exposure could not have exacerbated or substantially contributed to his impairment. Decision and Order at 33-34.

Employer argues that, in discounting the opinions of Drs. Zaldivar and Vuskovich, the administrative law judge applied an improper legal standard effectively requiring the doctors to "rule out" pneumoconiosis. Employer's Brief at 6-9. We disagree. To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Contrary to Employer's argument, the administrative law judge did not require its physicians to "rule out" any contribution from coal mine dust exposure to Claimant's impairment but rather permissibly found neither physician adequately explained why coal mine dust exposure did not contribute to, or aggravate, his obstructive impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); 20 C.F.R. §718.201(b); Decision and Order at 33-34.

We also reject Employer's contention that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Vuskovich. Employer's Brief at 8-9. Dr. Zaldivar opined Claimant does not suffer from legal pneumoconiosis because the variability of his restrictive impairment is inconsistent with a coal mine dust induced impairment. Employer's Exhibits 1 at 3; 2 at 21, 23-25; 7 at 5. The administrative law

[11] The administrative law judge found Employer established Claimant does not have clinical pneumoconiosis. Decision and Order at 31-32.

[12] The administrative law judge found Claimant smoked one pack of cigarettes per day for thirty-two years. Decision and Order at 4.

judge permissibly found Dr. Zaldivar did "not sufficiently explain why such variability necessitates the conclusion that Claimant's impairment was not caused in any significant part by coal dust exposure." *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (pneumoconiosis is a chronic condition and, on any given day, it is possible to perform better or worse on testing); 20 C.F.R. §718.201(b); Decision and Order at 33; Employer's Exhibits 1 at 3; 2 at 21, 23-25; 7 at 5. She further permissibly found Drs. Zaldivar and Vuskovich both failed to adequately explain why Claimant could not also have a coal mine dust-related disease in addition to a disease related to obesity and smoking or why Claimant's coal dust exposure did not substantially exacerbate any disease related to obesity and smoking. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 34.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations the experts give for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012). Employer's arguments are a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Employer failed to rebut the presumption by disproving the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

The administrative law judge next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). She permissibly discredited the disability causation opinions of Dr. Zaldivar and Dr. Vuskovich because neither diagnosed legal pneumoconiosis, contrary to her finding Employer failed to disprove Claimant has the disease. *See Hobet Mining v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 35-36. We therefore affirm the administrative law

judge's finding that Employer did not establish Claimant's disability is unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the award of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge