U.S. Department of Labor

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

BRB No. 20-0042 BLA

HERSHELL PERRIGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 01/27/2021
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer/Carrier.

Rita A. Roppolo (Stanley E. Keen, Deputy Solicitor for National Operations; 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2017-BLA-05361) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Claimant filed his subsequent claim on August 27, 2014.[1]

The administrative law judge found Claimant established twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant

[1] Claimant filed three prior claims. The district director denied his most recent prior claim for failure to establish any element of entitlement. Director's Exhibit 3.

[2] Under Section 411(c)(4), Claimant is entitled to rebuttable presumption that he 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); 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 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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's most recent prior claim was denied for failure to establish any element of entitlement, he had to submit new evidence establishing any element of entitlement in order to proceed with his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

established total disability and thereby invoked the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding the presumption unrebutted.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, asserting Employer's arguments with regard to the pulmonary function study evidence are without merit.

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 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).

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

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).

Employer challenges the administrative law judge's findings that Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole.

[4] We affirm, as unchallenged, the administrative law judge's finding that Claimant established twenty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 27.

Pulmonary Function Studies

The administrative law judge considered six pulmonary function studies.[6] He found three studies conducted by Dr. Copley on September 13, 2014, Dr. Fino on April 21, 2016, and Dr. McSharry on February 12, 2018, are invalid because they do not conform to the quality standards. Decision and Order at 10; Director's Exhibits 12, 13; Employer's Exhibit 5. He found the remaining three studies, conducted by Dr. Werchowski on March 25, 2015, Dr. Nader on February 11, 2017, and Dr. Green on April 15, 2017, valid and qualifying,[7] before and after bronchodilation. Decision and Order at 10; Director's Exhibit 12; Claimant's Exhibits 1, 2. Thus, the administrative law judge found Claimant established total disability by a preponderance of the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

Citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008), Employer contends the administrative law judge did not properly consider the opinions of Drs. McSharry and Fino that the pulmonary function studies do not reflect total disability based on Claimant's age.[8] Employer's Brief at 13-14. We disagree. The Board held in *Meade* that, in the absence of contrary probative evidence, pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced would be qualifying for a 71 year old. *Meade*, 24 BLR at 1-147. The Board indicated that contrary probative evidence, such as using the Knudson formula to extrapolate different predicted values for a person over the age of 71, "relates to the

[6] The administrative law judge noted the studies recorded different heights for Claimant, ranging from 65 to 70 inches and he averaged them to find an actual height of 67.9 inches. Decision and Order at 8, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Because Claimant's actual height of 67.9 inches falls between the table heights of 67.7 and 68.1 inches at Appendix B, the administrative law judge correctly applied the closest greater table height of 68.1 inches. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995); Decision and Order at 11.

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

[8] The administrative law judge noted accurately that Claimant's pulmonary function tests were conducted when he was 78 to 82 years old, but the tables at Appendix B stop at the age of 71. Decision and Order at 9 n.7. He therefore applied the table values for a 71 year old male in determining whether the pulmonary function studies were qualifying for total disability. *Id.*

credibility of the pulmonary function study results as an indicator of total disability" and likened it to evidence "challenging the technical validity" of a study.[9] *Id.*

Although Drs. McSharry and Fino opined Claimant's pulmonary function study results were normal for his age, neither physician set forth what they considered to be appropriate predicted values for the March 25, 2015, February 11, 2017, and April 15, 2017 studies, based on Claimant's age at the time those tests were performed, for comparison with Appendix B.[10] Director's Exhibit 13; Employer's Exhibits 5, 6. Because they do not explain their general assertions that the Appendix B table values are unreliable, we decline Employer's request to remand this case for further consideration of their opinions under *Meade.* Moreover, while Employer's post-hearing brief to the administrative law judge raised various challenges to the pulmonary function study evidence, it did not allege that the table values for a 71 year old should not be used to determine whether Claimant's testing is qualifying at 20 C.F.R. §718.204(b)(2)(i). We therefore affirm the administrative law judge's reliance on the table values for a 71 year old male at Appendix B in assessing whether the pulmonary function studies are qualifying for total disability. *Meade*, 24 BLR at 1-147.

Employer also contends the administrative law judge erred in determining an average height for Claimant of 67.8 inches instead of relying on Dr. McSharry's recorded height of 65 inches. Employer's Brief at 4-11. Employer notes Dr. McSharry is the only physician who took two measurements as part of his test, both of which were 65 inches,

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[9] Employer misconstrues the Board's holding in *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008) as requiring the administrative law judge to credit Drs. McSharry's and Fino's opinions. The administrative law judge is only required to consider any contrary probative evidence and determine whether it is credible to prove that the table values for a 71year old male at Appendix B are unreliable under the specific facts of the case. In *Meade*, unlike here, the physicians extrapolated predicted table values for the miner's age beyond the Appendix B values for a 71 year old male.

[10] Dr. McSharry evaluated Claimant's pulmonary function study results based on "N-Hanes values," which he described as the "national values," but he did not state what those predicted values were for comparison with Claimant's test results. Employer's Exhibit 6 at 33-34. Dr. Fino stated "it is not medically reasonable to use tables for a 71 year-old when the patient is actually 80 years old." Director's Exhibit 13 at 8. He noted predicted values on the April 21, 2016 pulmonary function study report, taken in conjunction with his examination of Claimant, but ultimately stated the issue was "moot" given that the study was invalid. *Id.* He did not describe predicted values for the other studies in the record.

and specifically testified that he believed his measurements were accurate because Claimant appeared similar in height to himself (five foot and five inches tall). Employer's Exhibit 6 at 17-18. Employer contends the case must be remanded for the administrative law judge to specifically address Dr. McSharry's opinion. We disagree.

An administrative law judge may rely on any reasonable method to resolve conflicts in recorded heights. *See Meade*, 24 BLR at 1-44. Claimant performed six pulmonary function tests and his height was measured as 70 inches once, 68.5 inches once, 68 inches three times, and 65 inches once. The administrative law judge permissibly resolved the conflict in the reported heights by averaging them. Decision and Order at 6; *see Meade*, 24 BLR at 1-44. Although Dr. McSharry testified he believed his measurement of 65 inches was accurate, he also specifically stated he was "not discounting the accuracy of the other [heights]" that the other physicians reported. Employer's Exhibit 6 at 18. Thus, we affirm the administrative law judge's permissible use of an averaged height to evaluate the pulmonary function studies. Decision and Order at 6; *see Meade*, 24 BLR at 1-44.

Additionally, Employer argues that, contrary to the administrative law judge's determination, when applying the table values for a 71year old male and an average height of 67.8 inches (rounded up to the table height of 68.1 inches at Appendix B), Dr. Green's April 15, 2017 study is non-qualifying because the FVC value exceeds the table value. Employer's Brief at 8. While Employer is correct that the FVC value is non-qualifying, the administrative law judge properly found the overall study qualifying under the regulations because both the FEV1 and MVV values exceed the table values.[11] 20 C.F.R. §718.204(b)(2)(i)(A), (B) (total disability established by FEV1 value, together with FVC *or* MVV value meeting table values); Director's Brief at 2. Thus, we reject Employer's assertion.

Because the administrative law judge permissibly weighed the pulmonary function studies and his finding that Claimant established total disability is supported by substantial evidence, we affirm it. 20 C.F.R. §718.204(b)(2)(i).

[11] For a 71year old male that is 68.1 inches tall, a qualifying FEV1 value is 1.73 or below and a qualifying MVV is 69 or below. 20 C.F.R. Part 718. Dr. Green's test showed a pre-bronchodilator FEV1 value of 1.46 and pre-bronchodilator MVV value of 27. Claimant's Exhibit 2. The post-bronchodilator FEV1 value was 1.53 and the post-bronchodilator MVV was 34. *Id*.

Medical Opinions

In evaluating the medical opinion evidence for total disability,[12] the administrative law judge noted Claimant worked as a roof bolter which required him to lift 60 to 70 pounds. Decision and Order at 8 and n.4. He credited Drs. Copley's, Green's, and Nader's opinions that Claimant is totally disabled from performing his usual coal mine work over the contrary opinions of Drs. McSharry and Fino.[13] Director's Exhibits 12, 14; Claimant's Exhibits 1, 2.

Initially, we reject Employer's assertion that the administrative law judge erred in rejecting Drs. McSharry's and Fino's opinions that Claimant is not totally disabled. Employer's Brief at 12-13, 17. The administrative law judge permissibly found their opinions less credible because they do not account for the qualifying pulmonary function studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22. Further, the administrative law judge permissibly found that, while Dr. McSharry stated Claimant could work as a roof bolter "pretty much as well as any 82-year-old man could," he did not adequately explain his opinion in view of the objective evidence and the exertional requirements of Claimant's usual coal mine work. Decision and Order at 22, *quoting* Employer's Exhibit 6 at 22; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Thus, we affirm the administrative law judge's determination to give Dr. McSharry's opinion less weight. Decision and Order at 22.

Employer also contends the administrative law judge erred in crediting Drs. Copley's, Nader's, and Green's opinions that Claimant is totally disabled because they

[12] The administrative law judge found all of the blood gas studies non-qualifying and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §§718.204(b)(2)(ii), (iii); Decision and Order at 7 n.3, 11-12. He further found Claimant did not establish complicated pneumoconiosis and, thus, is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 6.

[13] The administrative law judge found Claimant's usual coal mine job was working as a roof bolter requiring heavy manual labor. Decision and Order at 8. Dr. Copley opined Claimant's pulmonary function study showed severe obstruction and that he is unable to perform his usual coal mine work as a roof bolter. Director's Exhibits 12, 14. Drs. Nader and Green diagnosed moderate airflow obstruction and opined Claimant could not perform his usual coal mine work as a roof bolter, which required regular lifting of fifty pounds. Claimant's Exhibits 1, 2.

relied on pulmonary function study values that do not account for Claimant's correct age and height. Employer's Brief at 17. Because we have rejected Employer's arguments regarding the administrative law judge's use of Appendix B, his averaging of Claimant's recorded heights, and his determination that Claimant established total disability based on qualifying pulmonary function studies, we reject Employer's contention of error.[14] Employer also argues these physicians failed to take into account Claimant's prior job duties. We reject this contention as well, since Claimant's coal mining work is set forth in each physician's report and Employer has not demonstrated any of the physicians failed to consider it. Director's Exhibits 12, 14; Claimant's Exhibits 1, 2.

We therefore affirm the administrative law judge's finding that Claimant established a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22. We further affirm his overall finding that Claimant established total disability and, thus, invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305; 725.309; Decision and Order at 22-23.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[15] or "no part of [his] 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)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

[14] Employer argues the administrative law judge erred in crediting the opinions of Drs. Copley, Raj, and Green. Employer's Brief at 14. Since the record contains no medical opinion from Dr. Raj, we construe employer's argument to be a challenge to the administrative law judge's crediting of Dr. Nader's opinion.

[15] "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). "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).

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, 159 (2015) (Boggs, J., concurring and dissenting).

Employer initially argues the administrative law judge applied an improper legal standard by requiring Drs. McSharry and Fino to completely exclude coal mine dust exposure as a causative factor for Claimant's disabling respiratory impairment. Employer's Brief at 25-26. We disagree. The administrative law judge properly noted Employer has the burden to disprove Claimant's respiratory impairment is not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 24; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, as discussed, *infra*, he did not reject Drs. McSharry's and Fino's opinions based on application of a particular legal standard but permissibly found them not adequately reasoned. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); Decision and Order at 25-26.

Employer also argues the administrative law judge gave improper reasons for discounting the opinions of Drs. McSharry and Fino and mischaracterized the evidence. Employer's Brief at 24. We disagree.

The administrative law judge accurately noted Dr. McSharry opined Claimant does not have legal pneumoconiosis, in part, because he believed Dr. Nader's February 11, 2017 pulmonary function study showed only a mild restrictive and obstructive impairment consistent with Claimant's prior smoking history and the possibility of congestive heart failure. Claimant's Exhibit 5 at 2; Claimant's Exhibit 6 at 23. The administrative law judge permissibly found Dr. McSharry's rationale unpersuasive given that the three valid pulmonary function studies are qualifying, including Dr. Nader's study, and Dr. Nader specifically diagnosed a moderate obstructive impairment based on the February 11, 2017 test. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Claimant's Exhibit 5.

The administrative law judge also permissibly found that, while Dr. McSharry stated Claimant's pulmonary function study results "can be explained either by [Claimant's] remote but long smoking history or by congestive heart failure and pulmonary edema related to that cardiac dysfunction," he did not adequately address why Claimant's coal mine dust exposure of over twenty-four years was not an additive factor in his respiratory impairment (i.e., why it did not significantly relate to or substantially aggravate Claimant's impairment). Employer's Exhibit 5 at 2; *see* 65 Fed. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). Thus, we affirm the administrative

law judge's determination that Dr. McSharry's opinion is not sufficiently reasoned to satisfy Employer's burden of proof. *See Looney*, 678 F.3d at 313-14; *Hicks*, 138 F.3d at 533.

Contrary to Employer's contention, the administrative law judge also accurately found Dr. Fino did not offer a specific opinion as to whether Claimant has legal pneumoconiosis. Decision and Order at 25; Director's Exhibit 13. Dr. Fino stated only that Claimant's lung volumes were normal, his pulmonary function studies invalid, and there is "no evidence of disability in this case." Director's Exhibit 13 at 15. The administrative law judge permissibly found that, "[e]ven assuming that Dr. Fino's [disability] finding is tantamount to a finding that Claimant does not have legal pneumoconiosis," it is not credible because Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 25; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Employer failed to establish Claimant does not have legal pneumoconiosis. Decision and Order at 26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the [Claimant's] disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *see W.Va. CWP Fund v. Bender*, 782 F.3d 129, 135 (4th Cir. 2015). Contrary to Employer's argument, the administrative law judge permissibly discredited Drs. McSharry's and Fino's opinions on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26-27; Employer's Brief at 28-29. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing that no part of Claimant's disability was caused by legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 27.

[16] Because we affirm the administrative law judge's finding that Employer did not disprove legal pneumoconiosis, we need not address its contentions regarding clinical pneumoconiosis. Employer's Brief at 15-19.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge