U.S. Department of Labor

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

BRB No. 20-0092 BLA

JAMES L. SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 01/29/2021
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-06104) 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 subsequent claim filed on October 16, 2017.[1]

The administrative law judge credited Claimant with 33.78 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[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.

On appeal, Employer argues the administrative law judge erred in finding Claimant totally disabled and, therefore, invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

[1] This is Claimant's second claim for benefits. The district director denied his first claim, filed on November 24, 2010, because he failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1.

[2] Where 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 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). The district director denied Claimant's prior claim because he failed to establish a totally disabling respiratory or pulmonary impairment; therefore, to obtain review of the merits of his subsequent claim, he had to establish this element of entitlement. Director's Exhibit 1.

[3] 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established 33.78 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 32.

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).

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.[6] *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.[7] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Arterial Blood Gas Studies

When considering arterial blood studies, an administrative law judge must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.105; *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). The administrative law judge weighed five blood gas studies conducted on January 3, 2018, July 19, 2018, September 18, 2018, October 9, 2018, and January 6, 2019. 20 C.F.R. §718.204(b)(2)(ii);

[5] 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); Hearing Transcript at 18.

[6] The administrative law judge found Claimant's usual coal mine employment was working as a "mobile bridge operator, which required him to constantly crawl or bend over, and frequently lift or carry up to 100 pounds." Decision and Order at 12. The administrative law judge found this work "involved very heavy manual labor." *Id*. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711.

[7] 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 12-13.

Decision and Order at 13-14. All five studies produced non-qualifying[8] results at rest. Director's Exhibit 12; Claimant's Exhibits 1, 3; Employer's Exhibits 3, 4. The January 3, 2018 and October 9, 2018 studies produced qualifying results with exercise, while the July 19, 2018 and September 18, 2018 studies produced non-qualifying results with exercise. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 3, 4. The January 6, 2019 study was not conducted during exercise. Claimant's Exhibit 3.

Dr. Dahhan conducted the September 18, 2018 exercise blood gas study and testified he obtained the blood sample from Claimant ten seconds after he stopped exercising. Employer's Exhibit 13 at 21-22. Because the regulations provide that "[i]f an exercise blood-gas test is administered, blood shall be drawn during exercise," the administrative law judge found this study not in substantial compliance with the quality standards and thus invalid for assessing total disability. 20 C.F.R. §718.105(b); *see* Decision and Order at 15. The administrative law judge also found the January 3, 2018, October 9, 2018, and January 6, 2019 studies valid. Decision and Order at 14-15. He specifically found Dr. Rosenberg's opinion unpersuasive that the exercise studies are not qualifying after taking into account the altitude where the studies were done. *Id.*

In resolving the conflict between the valid blood gas studies, the administrative law judge assigned greater weight to those taken during exercise over those taken at rest because he found studies taken with exercise "are a better predictor of the Claimant's ability to perform his last coal mine job." Decision and Order at 16. Moreover, he assigned the greatest weight to the October 9, 2018 qualifying exercise study because it is the most recent and was taken under the most "strenuous exercise" conditions "in terms of workload and duration," thus best reflecting "Claimant's oxygen levels during very heavy manual labor." Decision and Order at 16-17. Because two of the three valid exercise studies are qualifying, and the administrative law judge found the October 9, 2018 qualifying exercise study the most probative of the three, he found Claimant established total disability based on the blood gas studies. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16-17.

Employer does not challenge the administrative law judge's finding the September 18, 2018 non-qualifying exercise blood gas study invalid because Dr. Dahhan drew blood after Claimant stopped exercising. 20 C.F.R. §718.105(b); Decision and Order at 15. Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] An arterial blood gas study is "qualifying" for total disability if it yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

Employer argues, however, the administrative law judge erred in failing to evaluate whether the January 3, 2018 and October 9, 2018 qualifying exercise studies suffered from the same defect. Employer's Brief at 14-15. It asserts Claimant's hearing testimony establishes that when these studies were taken, the administering medical professionals drew blood only after he stopped exercising. *Id*. Employer argues the Board should remand this case for the administrative law judge to address this testimony. *Id*.

We disagree, as Employer mischaracterizes Claimant's testimony. When Employer's counsel asked Claimant if all the doctors conducted the exercise blood gas testing the same way, Claimant responded that for the "last one," the doctor didn't draw the blood, the "nurses [drew] it." Hearing Transcript at 29-30. He further stated "the last one had a hard time getting [the needle] in" and they "had to keep sticking to get it. So, the last doctor didn't do it [himself]." *Id*. Employer's counsel then asked, "[h]ow long did it take to get the gas, ten seconds, fifteen seconds?" *Id*. Claimant responded that "the last one was twenty-five seconds maybe." *Id*. When asked how long it "took to get the gas" for the other studies, Claimant stated "[i]t was pretty quick on the others. But, they had trouble getting the artery." *Id*. Employer's counsel then asked Claimant a series of questions as follows:

> Q. They [would] be able to get the blood, what, ten seconds after you stopped exercising?
> A. The first did, yes.
> Q. Okay. And when you exercised, you exercised on a bicycle?
> A. Bicycle.
> Q. And then, they'd say exercise as long as you can. And then, you'd stop exercising and they'd draw the – the blood?
> A. Yes. Yeah, they'd draw the blood.
> Q. Okay.

Id.

At no point during the questioning between Employer's counsel and Claimant did Claimant specifically state the medical professionals who conducted the January 3, 2018 and October 9, 2018 exercise studies drew blood only after he stopped exercising. Hearing Transcript at 29-30. Although Claimant agreed with Employer's counsel that, for the "first one," the administering medical professional was "able to get the blood" about "ten seconds after [he] stopped exercising," Claimant did not specify what test he was referring to as "the first one." *Id*. Moreover, even if we assume Claimant's reference to the "first one" refers to the earliest chronological test admitted into evidence in this claim, taken on January 3, 2018, we decline to remand this case for the administrative law judge to address

this aspect of Claimant's testimony. As discussed above, the administrative law judge assigned controlling weight to the October 9, 2018 qualifying exercise study as the most reflective of Claimant's ability to perform the very heavy manual labor required of his coal mining job. Decision and Order at 16-17. Thus Employer has not explained how exclusion of the results of the January 3, 2018 study "could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Moreover, the administrative law judge accurately recognized that Dr. Green ordered the January 3, 2018 blood gas study and found it valid, and Dr. Nader ordered the October 9, 2018 study and similarly opined this study is valid. Decision and Order at 14-16. Dr. Green explained how his office administers exercise blood gas testing: "[o]n the bicycle we tend to do single sticks. We make sure they're still pedaling before that stick is done usually from the radial artery, usually the right radial artery while they're pedaling the bicycle and while they're short of breath." Employer's Exhibit 6 at 24-25. He testified Claimant was "still pedaling vigorously" when the nurse drew blood for the January 3, 2018 study. *Id*. When Employer's counsel asked him to address a timestamp discrepancy in the results, Dr. Green indicated the equipment used to exercise Claimant had a different clock than the equipment used to analyze his blood. *Id*. at 25-26. Dr. Green nonetheless stated he was "physically present" when Claimant exercised, and "the blood gas was drawn during exercise." *Id*. at 26. He reiterated the blood gas test was done while Claimant was "pedaling the bike and not afterwards." *Id*.

Dr. Nader also set forth how his office conducted the October 9, 2018 exercise blood gas study. Employer's Exhibit 12 at 20. He testified his office obtained Claimant's blood through a single stick method, and the technician that drew the blood did so in the doctor's presence. *Id*. When Employer's counsel asked if Claimant was exercising or had stopped when the technician drew the blood, Dr. Nader stated Claimant "was exercising." *Id*. Dr. Nader reiterated that his office does not "let [patients] stop" exercising before drawing blood "because if they stop the oxygen improve[s]. So we cannot catch hypoxemia." *Id*. Thus, substantial evidence supports the administrative law judge's finding the January 3, 2018 and October 9, 2018 exercise blood gas studies valid. *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.); *Siwiec*, 894 F.2d at 638; *Mangifest*, 826 F.2d at 1326; Decision and Order at 14-15.

Because Employer does not challenge the administrative law judge's finding the January 3, 2018 and October 9, 2018 exercise blood gas studies qualifying, the exercise testing more probative than the testing taken at rest, and the October 9, 2018 exercise study most probative of Claimant's condition, we affirm these findings. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-

31-32 (1984); *Skrack*, 6 BLR at 1-711; *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Decision and Order at 16-17. We therefore affirm his finding Claimant established total disability based on the blood gas studies. 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

The administrative law judge next weighed the opinions of Drs. Green and Nader that Claimant is totally disabled from his usual coal mine employment and Drs. Rosenberg and Dahhan that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-31; Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 3-4, 6, 11, 13. He found the opinions of Drs. Green and Nader well-reasoned and documented. Decision and Order at 17-31. In contrast, he assigned diminished weight to the opinions of Drs. Rosenberg and Dahhan. *Id*. He found Dr. Rosenberg's opinion unpersuasive that Claimant's blood gas testing does not support a disabling impairment when accounting for the specific altitude of the location where the testing was conducted. *Id*. With respect to Dr. Dahhan, the administrative law judge explained the doctor did not adequately address why the January 3, 2018 and October 9, 2018 exercise blood gas study results do not support a disabling blood gas exchange impairment, and relied instead on the invalid September 18, 2018 blood gas study. *Id*. Thus the administrative law judge found Claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 31.

Employer argues the administrative law judge erred in discrediting Dr. Rosenberg's opinion as contrary to his finding the weight of the exercise blood gas testing qualifying for total disability. Employer's Brief at 5-13. It contends he did not adequately address Dr. Rosenberg's explanation that, even if the blood gas studies were qualifying, they do not support the conclusion that Claimant is totally disabled. *Id*. Employer's argument has no merit.

Dr. Rosenberg opined Claimant's pulmonary function testing revealed a mild obstructive impairment and his arterial blood gas testing evidenced reduced oxygenation with exercise. Employer's Exhibit 3. He noted, however, that Claimant's blood gas testing with exercise improved from his January 3, 2018 study that produced qualifying values to his July 19, 2018 study that produced non-qualifying values. *Id*. He opined Claimant is not totally disabled because his more recent pulmonary function and arterial blood gas studies are non-qualifying. *Id*.

During his deposition, Dr. Rosenberg testified that, even if a blood gas study evidenced an oxygenation impairment, one must still account for the precise barometric pressure of the location where the study was conducted "to get a better understanding of the actual degree of oxygenation abnormality." Employer's Exhibit 1 at 11. He explained

testing conducted at lower barometric pressures produces lower pO2 values. *See id*. at 14-15. Although the January 3, 2018 blood gas study Dr. Green conducted reflected reduced pO2 values with exercise, Dr. Rosenberg stated it did not evidence a disabling impairment when accounting for the fact that it was conducted at a lower barometric pressure than the July 19, 2018 study. *Id*. With respect to Dr. Nader's October 9, 2018 blood gas study, Dr. Rosenberg again opined it does not evidence an impairment when accounting for barometric pressure. *Id*. at 21-22. Thus, although Dr. Rosenberg concluded Claimant has a mild oxygenation impairment with exercise, he concluded Claimant is not totally disabled because his blood gas testing is non-qualifying when accounting for barometric pressure. *Id*. at 24.

Contrary to Employer's argument, the administrative law judge specifically addressed this rationale. Decision and Order at 14-16, 25. He correctly noted Dr. Green testified that the "blood gas analyzer" used to conduct the January 3, 2018 study is "a closed system not affected by barometric pressure," and it provided "a reproducible reading that is independent of the actual barometric pressure." Employer's Exhibit 6 at 23; *see* Decision and Order at 14-15. Dr. Nader similarly testified that the October 9, 2018 study was unaffected by the barometric pressure because he conducted it using equipment that adjusts according to the barometric pressure and oxygen level. Employer's Exhibit 12 at 18-19; *see* Decision and Order at 15-16. The administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because the January 3, 2018 and October 9, 2018 qualifying exercise studies were obtained independent of barometric pressure. *See Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 14-16. The administrative law judge also permissibly found Dr. Rosenberg's rationale unpersuasive because the regulations already account for the effects of elevation in Appendix C to Part 718. *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); Decision and Order at 14-16. Thus we affirm the administrative law judge's rejection of Dr. Rosenberg's opinion.

Moreover Employer does not challenge the administrative law judge's conclusion that Dr. Dahhan's opinion is unpersuasive and thus entitled to reduced weight. Decision and Order at 17-31. Nor does it challenge his finding the opinions of Drs. Green and Nader diagnosing total disability well-reasoned and documented, and entitled to probative weight. Thus we affirm these findings. *Skrack*, 6 BLR at 1-711.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the arterial blood gas studies and medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 31-32. We further affirm his conclusion that the evidence, when weighed together, establishes total disability and, therefore, Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 31-32.

Moreover, because Employer does not challenge the administrative law judge's finding that it failed to rebut the presumption, we affirm the award of benefits. *Skrack*, 6 BLR at 1-711; Decision and Order at 10-17.

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

DANIEL T. GRESH
Administrative Appeals Judge