U.S. Department of Labor

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

BRB No. 20-0093 BLA

KENNETH SHORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STOLLINGS TRUCKING COMPANY, INCORPORATED	)	
	)	
	)	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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Kathleen H. Kim (Kate S. O'Scannlain, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge John P. Sellers, III's, Decision and Order Awarding Benefits (2018-BLA-06298) rendered on a claim filed on June 13, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted the parties' stipulation that Claimant had thirty-four years of surface coal mine employment and found his surface coal mine employment occurred in conditions substantially similar to those in an underground mine. He also found Claimant has a totally disabling respiratory or pulmonary impairment, and therefore invoked the presumption that his disability is due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption, but nevertheless contends the administrative law judge improperly invoked the presumption based on erroneous findings that Claimant's surface coal mine employment occurred in conditions substantially similar to those in an underground coal mine, and that Claimant established total disability. Employer further argues he erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers Compensation Programs, filed a limited response urging the Benefits Review Board to reject Employer's contention that the Section 411(c)(4) presumption is unconstitutional.

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.[2] 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).

[1] Section 411(c)(4) 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.

[2] 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); Hearing Transcript at 43; Director's Exhibit 3.

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

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional and the award of benefits should be vacated and the case remanded for consideration of entitlement absent the presumption. Employer's Brief at 23-26. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd, Stacy*, 671 F.3d at 383 n.2, 391; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Section 411(c)(4) Presumption: Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish at least fifteen years of coal mine employment either in "underground coal mines" or in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if . . . the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge accepted the parties' stipulation that Claimant has thirty-four years of surface coal mine employment. Decision and Order at 13; Hearing Transcript at 10-11, 44. We affirm that finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). He further found Claimant's

testimony credibly established "he was regularly exposed to coal mine dust during his entire tenure as a coal miner." Decision and Order at 14. Thus, he found Claimant established greater than fifteen years of qualifying coal mine employment. *Id*.

Employer contends the administrative law judge erred in finding Claimant's hearing testimony was sufficient to establish his surface coal mine employment occurred in conditions substantially similar to those in underground mines, asserting Claimant's testimony was not sufficiently detailed to establish the frequency or intensity of his dust exposures at each of his jobs. Employer's Brief at 6-10. We disagree. Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does he have to prove he "was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Rather, Claimant need only establish he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

Claimant testified he began his career running a lube truck before learning to run a rock drill, which he did for six years at Sigman Coal Company and seven or eight years at Starfire, as well as running other equipment such as a rock truck and dozer. Hearing Transcript at 15-18. He then began bossing, a job that required him to fill in for equipment operators when the job was short-handed. *Id.* at 17-22. He testified all of his job sites were dusty, with coal mine dust flying in the air, and indicated that, though perhaps not every day, he would come out of the mines covered in rock and coal dust, especially on days when he loaded coal. *Id.* at 24, 26. He indicated he still breathed in some dust even after masks were introduced to his worksites, and that when he ran equipment with enclosed cabs, the dust would leak around the doors and seams of the equipment, and no matter "how hard you try to get them sealed . . . you always got some dust in." *Id*. at 21, 34. He further testified that at his jobs there was dust "flying all the time," and that in July and August, the water truck could only dampen the dust for around five minutes. *Id*. at 21.

The administrative law judge found Claimant established regular exposure to coal mine dust throughout the entirety of his coal mine employment, providing "ample testimony" describing the dusty nature of his job and his physical condition at the end of the day. Decision and Order at 14. He found Claimant consistently testified that all of his jobs were dusty, and he was exposed to dust even when wearing a mask or while working in an enclosed cab. *Id*. Thus, he permissibly found Claimant worked in conditions substantially similar to those in underground coal mines. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014); *Summers*, 272 F.3d at 479; Decision and Order at 14. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See*

Underwood v. Elkay Mining, Inc., 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board cannot substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, because it is based on substantial evidence, we affirm the administrative law judge's finding that Claimant's surface mine employment constitutes qualifying coal mine employment.[3] 20 C.F.R. §718.305(b)(2); *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014).

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. *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 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 pulmonary function studies and the medical opinions, and when weighing the evidence as a whole.[4] Decision and Order at 7,

[3] Contrary to Employer's argument that Claimant did not provide sufficient evidence regarding his dust exposure at certain specific employers, Claimant testified that all of his jobs involved significant dust exposure and that, for every employer, he finished the day covered in dust. Hearing Transcript at 24, 26.

[4] The administrative law judge found the arterial blood gas studies were non-qualifying for total disability and there is 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 5, 7.

A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

12-13. Employer contends the administrative law judge erred in finding the medical opinion evidence and the evidence as a whole establishes total disability.[5]

Prior to determining whether the medical opinion evidence establishes total disability, the administrative law judge found Claimant's usual coal mine employment "required medium to heavy manual labor" and required him to lift, on average, 100 pounds. Decision and Order at 6. Employer contends the administrative law judge's determination is not supported by substantial evidence and is not adequately explained. Employer's Brief at 10-14. We disagree.

The administrative law judge considered Claimant's Department of Labor Form CM-913, Description of Coal Mine Work and Other Employment, and his testimony at the May 23, 2019 hearing. Decision and Order at 5-6. On Claimant's Form CM-913, he stated he worked as a foreman and equipment operator doing the mining planning, running the job, and operating rock trucks, drills, dozers, graders, and loaders. Director's Exhibit 5. Although he stated his job required him to sit for twelve hours a day, he did not provide further description of the exertional requirements of the job. *Id*.

At the hearing, Claimant testified that he primarily worked as a "boss" or "superintendent" in the mines, which required him to fill in for other positions as needed, and he ran heavy equipment throughout his career. Hearing Transcript at 15-25. He testified that, while running a piece of equipment, he was usually sitting for up to twelve hours a day, but that a twelve hour shift was short for him. *Id.* at 32-33. He consistently testified that each of his jobs required him to fill in for other workers and required him to lift fifty to 100 pounds. Hearing Transcript at 17, 18, 19, 21, 25. According to Claimant, at his last coal mine job, "the biggest thing" he was required to do in terms of lifting was to help pick up 100-pound seed to put into the hydroseeder.[6] *Id*. at 25. The administrative

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[6] During examinations on September 22, 2017, and on July 5, 2018, Claimant explained to Drs. Forehand and Jarboe that he worked as a boss or superintendent, but also continued to run equipment to fill in when needed. Director's Exhibit 14; Employer's Exhibit 1. During an examination on November 9, 2018, Claimant explained to Dr. Baker that his job required him to mostly sit while operating the equipment, but he did have to walk short distances and lift up to 100 pounds. Director's Exhibit 44. In answers to

law judge permissibly credited Claimant's uncontradicted[7] testimony that his regular coal mine work required him to fill in for other employees and lift and carry up to 100 pounds.[8] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); Decision and Order at 6.

The administrative law judge next considered the medical opinions of Drs. Forehand, Baker, Jarboe, and Dahhan. Drs. Forehand and Baker opined Claimant is totally disabled based upon his qualifying pulmonary function studies. Director's Exhibit 14; Claimant's Exhibits 6, 7; Employer's Exhibit 5. Dr. Jarboe initially concluded Claimant is totally disabled based upon his qualifying pulmonary function studies which demonstrated a moderate impairment. Employer's Exhibit 1. However, Dr. Jarboe changed his opinion after reviewing the March 20, 2019 pulmonary function study, which he characterized as non-qualifying. Employer's Exhibit 6 at 43. He opined Claimant could still perform his supervisory work as he did not record any heavy manual labor at his job

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interrogatories on April 29, 2019, Claimant stated his last coal mine job required him to lift or carry up to eighty pounds. Employer's Exhibit 10.

[7] Employer asserts Claimant's testimony "contradicts" his Form CM-913 and the administrative law judge did not resolve this conflict. Employer's Brief at 12-13. Contrary to Employer's contention, there is no conflict in this evidence. As Employer acknowledges, Claimant's Form CM-913 is silent as to the lifting and carrying requirements of his last coal mine job. *See Id.* at 11-12; Director's Exhibit 5. The record reflects Claimant left that section of the form blank. Director's Exhibit 5. Claimant's testimony therefore could not have contradicted his statements on his Form CM-913 regarding the lifting requirements of his last coal mine job as the information had not previously been provided.

[8] Employer also asserts the administrative law judge erred in finding Claimant's last coal mine work required "medium to heavy manual labor" without defining what he meant by medium or heavy labor. Employer's Brief at 13-14. We need not resolve this issue. The administrative law judge expressly determined Claimant's last coal mine job required he lift 100 pounds and found he was unable to perform this work. Decision and Order at 6, 12-13. The determination that Claimant could not perform the lifting duties of his usual coal mine work is a finding he is totally disabled, regardless of whether the administrative law judge were to label the lifting "medium" or "heavy." *See* 20 C.F.R. §718.204(b)(1)(i). Moreover, the administrative law judge expressly determined the qualifying pulmonary function testing demonstrated Claimant is totally disabled from performing any coal mine employment, regardless of the exertional requirements of his last job. Decision and Order at 6. Therefore, any error in not defining "medium" or "heavy" manual labor was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

on his CM-913 Form. *Id*. at 43-44. Similarly, Dr. Dahhan, who conducted the March 20, 2019 pulmonary function study, opined the study was non-qualifying. Employer's Exhibit 7. He testified that Claimant has a moderate obstructive impairment and can perform mild to moderate labor with infrequent bursts of heavy labor. Employer's Exhibit 8 at 17. The administrative law judge credited the opinions of Drs. Forehand and Baker, but found the opinions of Drs. Jarboe and Dahhan entitled to no weight. Decision and Order at 12. Consequently, he found the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer contends the administrative law judge erred in his weighing of the medical opinions. Employer's Brief at 17-21. We disagree. Contrary to Employer's arguments, the administrative law judge did not err in finding the opinions of Drs. Forehand and Baker supported by the objective testing despite Claimant's non-qualifying arterial blood gas studies. Employer's Brief at 17-18. Rather, the physicians acknowledged the non-qualifying blood gas studies but still found total disability established by the pulmonary function testing, and the administrative law judge permissibly found the testing supported their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 9.

The administrative law judge also permissibly discredited Dr. Jarboe's opinion because he did not understand the exertional requirements of Claimant's usual coal mine employment,[9] and the opinions of both Drs. Jarboe and Dahhan because they relied on the erroneous belief that the March 20, 2019 pulmonary function study was non-qualifying.[10]

[9] Dr. Jarboe indicated he understood Claimant's work to require no heavy lifting or manual labor, contrary to the administrative law judge's finding that Claimant's usual coal mine employment required lifting and carrying 100 pound bags, and that, regardless, Claimant was incapable of performing any coal mine employment based on his qualifying objective tests. Decision and Order at 6; Employer's Exhibit 6 at 43-44, 56.

[10] Dr. Dahhan, who conducted the March 20, 2019 pulmonary function study, opined the study was non-qualifying based upon Claimant's recorded height of 72.5 inches, rounded down to 72.4 inches for evaluation with the tables at 20 C.F.R. Part 718, Appendix B. Employer's Exhibit 7. Dr. Jarboe conceded he relied on Dr. Dahhan's interpretation of the March 20, 2019 pulmonary function study. Employer's Exhibit 6 at 43. However, in finding the pulmonary function studies qualifying, the administrative law judge permissibly relied upon an average height for Claimant of 73.25 inches, rounded to 73.2 inches, for use with the tables, and Employer does not challenge this finding. *See*

See Hicks, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 11-12. Consequently, we affirm the administrative law judge's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv).

Finally, contrary to Employer's contentions, the administrative law judge properly weighed the blood gas studies while considering the evidence as a whole, finding the non-qualifying blood gas studies did not call into question the qualifying pulmonary function studies because they measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 12-13; Employer's Brief at 15-17. We therefore affirm the administrative law judge's finding that the medical evidence as whole established a totally disabling respiratory or pulmonary impairment, and that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305(b).

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 had neither legal[11] nor clinical pneumoconiosis,[12] or that "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.

We affirm, as unchallenged, the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis. S*ee Skrack*, 6 BLR at 1-711; Decision and Order at 19. The administrative law judge also determined Employer failed to rebut the existence of legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i)(A), finding the opinions of Drs.

Protopappas v. Director, OWCP, 6 BLR 1-221 (1983); *see also Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[11] "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).

[12] "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).

Jarboe and Dahhan that Claimant does not have legal pneumoconiosis neither well-reasoned nor documented. Decision and Order at 24. He further found the opinions of Drs. Forehand and Baker did not assist Employer in rebutting the presumption. *Id*. Employer does not challenge these findings, but instead argues that, to the extent the administrative law judge credited the opinions of Drs. Forehand and Baker that Claimant has legal pneumoconiosis, his finding is irrational and not supported by substantial evidence. Employer's Brief at 21-23. As the administrative law judge properly considered whether Employer rebutted the presumption of legal pneumoconiosis and not whether Claimant affirmatively established the disease, we reject Employer's assertion and affirm the administrative law judge's determination that Employer did not rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24.

The administrative law judge also found Employer failed to establish "no part of [Claimant'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); Decision and Order at 24-25. We affirm this finding as unchallenged on appeal. S*ee Skrack*, 6 BLR at 1-711; Decision and Order at 24-25. Because we have affirmed the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption by either method, 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

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with the decision to affirm the award of benefits. However, I would not address Employer's arguments regarding how the administrative law judge determined the exertional requirements of Claimant's usual coal mine employment. The administrative law judge permissibly found Claimant is incapable of performing any coal mine employment based on his qualifying pulmonary function studies regardless of the exertion required by his job as a foreman and heavy equipment operator. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 7, 12-13. Therefore, any error in the administrative law judge's exertional requirement determination is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). For these reasons, I concur in the result.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge