U.S. Department of Labor

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

BRB No. 19-0369 BLA

CHARLIE VERNON MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	
	)	DATE ISSUED: 07/31/2020
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2017-BLA-05815) rendered on a claim filed pursuant to the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a miner's subsequent claim filed on April 20, 2016.[1]

The administrative law judge found Claimant established thirty-nine years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore 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. 30 U.S.C. §921(c)(4); 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 challenges the administrative law judge's determination Claimant established total disability, thereby invoking the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a 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 evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman 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

[1] Claimant filed two prior claims. He withdrew his first claim. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). Claimant's second claim, filed on March 5, 2013, was finally denied on February 11, 2014, because he did not establish total disability. Director's Exhibit 2.

[2] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Claimant's most recent coal mine employment occurred in Kentucky. Decision and Order at 4; Director's Exhibit 39 at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 finding Claimant established total disability based on the pulmonary function studies and medical opinions.

Pulmonary Function Study Evidence

Total disability may be established based on pulmonary function studies showing a forced expiratory volume in one second (FEV1) value that is equal to or less than those listed in Table B1 (Males), Appendix B, 20 C.F.R. Part 718, "for an individual of the miner's age, sex, and height" if such tests also show either a forced vital capacity (FVC) or a maximum voluntary ventilation (MVV) value that is equal to or less than the applicable table values, or an FEV1/FVC ratio of fifty-five percent or less. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge considered four pulmonary function studies conducted by Dr. Raj on June 7, 2016, Dr. Rosenberg on September 14, 2016, Dr. Dahhan on September 21, 2016, and Dr. Alam on July 26, 2017.[4] Decision and Order at 9. The first three studies were performed before and after use of a bronchodilator, while no bronchodilator was administered during the July 26, 2017 study. Director's Exhibits 14, 24, 28; Claimant's Exhibit 6. Because the studies reported conflicting heights for Claimant ranging from sixty-six inches to sixty-eight inches, the administrative law judge used an average height of sixty-seven inches[5] in determining whether the results qualified for total disability. Decision and Order at 8-9; *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Using the table height of 68.1 inches at Appendix B, the administrative law judge found the June 6, 2016, September 14, 2016, and September 21, 2016 studies had qualifying FEV1 and MVV values before and after use of a bronchodilator, except for Dr. Rosenberg's September 14, 2016 post-bronchodilator study. Decision and Order at 9 and n.28. He also found the July 26, 2017 study had qualifying FEV1 and FVC values. *Id.* The administrative law judge concluded Claimant established total disability by a

[4] The administrative law judge misstated that the pulmonary function study was dated July 27, 2017, when it is actually dated July 26, 2017. Claimant's Exhibit 6.

[5] We affirm, as unchallenged, the administrative law judge's determination that claimant's average height is sixty-seven inches. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9 and n.27; Employer's Brief at 4.

preponderance of the qualifying pre-bronchodilator values and based on the pulmonary function study evidence as a whole. *Id*. at 20.

Employer first contends the administrative law judge erred in using the table height of 68.1 inches at Appendix B and thus "mischaracterized the status of nearly the entirety [of] the pulmonary function study evidence as qualifying." Employer's Brief at 3, 4-5. Employer's argument has merit, in part.

When a miner's height falls between two heights listed in the table, an administrative law judge should use the greatest closest height to evaluate whether the results are qualifying. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (the Office of Workers' Compensation Programs directs use of the closest greater height when a miner's actual height falls between heights listed in the table). Because the administrative law judge determined Claimant's average height is 67 inches, the closest greater table height is 67.3 inches, not 68.1 inches as the administrative law judge stated. Using the table height of 67.3 inches and Claimant's recorded age of sixty-nine, neither the June 7, 2016 nor the September 14, 2016 post-bronchodilator FEV1 values qualify for total disability, contrary to the administrative law judge's finding.[6] Decision and Order at 9. However, using the table height of 67.3 inches and Claimant's recorded age of sixty-nine, the June 7, 2016, September 14, 2016, and September 21, 2016 *pre-bronchodilator* studies are qualifying with respect to the FEV1 and MVV values. Director's Exhibits 14, 24, 28. The September 21, 2016 post-bronchodilator study is also qualifying based on the FEV1 and FVC values using the same table criteria. Director's Exhibit 24. The July 26, 2017 post-bronchodilator study is also qualifying based on the FEV1 and FVC values, using Claimant's age of seventy at the time of the study, and a table height of 67.3 inches. Director's Exhibit 24; Claimant's Exhibit 6.

We consider the administrative law judge's error in using the wrong table height at Appendix B harmless, as he gave greatest weight to the pre-bronchodilator studies which he correctly found qualifying for total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The administrative law judge permissibly relied on pre-bronchodilator studies to find Claimant totally disabled as he determined they were a better indicator of whether Claimant could perform his usual coal mine work without the aid of medication. *See* 45 Fed. Reg. 13,678, 13,682 (Feb 29, 1980) (The Department of Labor

[6] Using the table height of 67.3 inches for a sixty-nine year old male, a pulmonary function study is qualifying if the FEV1 value is 1.7 or less and either the FVC value is 2.19 or less, the MVV value is 68 or less, or the FEV1/FVC ratio is fifty-five percent or less. *See* Appendix B to 20 C.F.R. Part 718. Using the table height of 67.3 inches for a seventy year old male, a pulmonary function study is qualifying if the FEV1 value is 1.68 or less and either the FVC value is 2.18 or less, the MVV value is 67 or less, or the FEV1/FVC ratio is fifty-five percent or less. *Id*.

has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."): *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 19-20. Thus, we deny Employer's request to remand this case for reconsideration of the pulmonary function study evidence under the correct table height at Appendix B.

Employer next contends the administrative law judge erred in finding the September 21, 2016 pulmonary function study valid when Dr. Dahhan specifically opined it was not valid due to Claimant's poor effort in performing the test. Employer's Brief at 5. Contrary to Employer's characterization, the administrative law judge gave "less weight" to the September 21, 2016 study based on Dr. Dahhan's statements that Claimant demonstrated less than optimal effort and the tracings showed premature termination of airflow and lack of plateau before and after use of a bronchodilator. Decision and Order at 19; *see* Director's Exhibit 24 at 5. The administrative law judge observed, however, that Dr. Dahhan described Claimant as having cooperated the best he could during testing. Decision and Order at 19, *citing* Director's Exhibit 40 at 10, 15. Thus, despite Dr. Dahhan's invalidation, the administrative law judge permissibly found "the actual results from this study . . . are consistent with other results demonstrated by Claimant on other [valid] pulmonary function studies."[7] Decision and Order at 19; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer further argues the administrative law judge erred in relying on any of the qualifying MVV values as Dr. Dahhan indicated a valid MVV value is difficult to obtain and the results are often unreliable.[8] Employer's Brief at 6. We disagree. The administrative law judge found all of the pulmonary function studies valid, with the exception of Dr. Dahhan's September 21, 2016 study. The regulations specifically provide that a pulmonary function study with a qualifying FEV1 and a qualifying MVV value will

[7] Employer also does not contest the validity of the qualifying pre-bronchodilator studies obtained by Dr. Raj on June 7, 2016, Dr. Rosenberg on September 14, 2016, or Dr. Alam on July 26, 2017. *See Skrack*, 6 BLR at 1-711. Thus, we consider any error by the administrative law judge in weighing the September 21, 2016 study harmless, as his finding of total disability is otherwise supported by substantial evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Employer notes Dr. Raj also observed an MVV is difficult to complete and is often invalid. Employer's Brief at 6; Claimant's Exhibit 23 at 30-31. However, Dr. Raj specifically concluded Claimant is totally disabled based on the FEV1 and MVV values he and Dr. Rosenberg obtained. Claimant's Exhibit 23 at 32. Dr. Raj did not invalidate either Dr. Rosenberg's MVV values or the ones he obtained.

support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i)(B). As the FEV1 and MVV values for the June 7, 2016 and September 14, 2016 pre-bronchodilator studies qualify under the regulatory criteria, we reject Employer's contention of error.

We therefore affirm the administrative law judge's finding that Claimant established total disability based on the pulmonary function study evidence, as it is supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20.

Medical Opinion Evidence

The administrative law judge credited the medical opinions of Drs. Alam, Raj and Chavda that Claimant is totally disabled over the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order at 23; Director's Exhibits 14, 24, 28, 31, 40; Claimant's Exhibits 10, 23, Employer's Exhibits 1, 2, 4-7. Employer contends the medical opinions should be "evaluated anew" given the administrative law judge's errors in weighing the pulmonary function studies. Employer's Brief at 6. However, because we have affirmed the administrative law judge's finding that Claimant established total disability based on the qualifying pre-bronchodilator studies, we reject Employer's contention.

Employer next contends the administrative law judge erred in relying on Dr. Raj's opinion because he "did not review the most recent evidence." Employer's Brief at 6. However, Employer does not identify the evidence Dr. Raj failed to consider or otherwise explain with specificity how the administrative law judge erred in weighing Dr. Raj's opinion.[9] Because the Board must limit its review to contentions of error the parties specifically raise, we affirm the administrative law judge's finding that Dr. Raj's opinion supports a finding Claimant is totally disabled. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order at 23.

Employer further argues the administrative law judge erred in relying on Dr. Chavda's opinion because he did not personally examine Claimant. Employer's Brief at 6. Contrary to Employer's contention, there is no requirement that a non-examining physician's opinion be given less weight than an examining physician's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). We see no error in the administrative law judge's finding that Dr. Chavda's opinion lends support to Dr. Raj's opinion that claimant

[9] Dr. Raj examined Claimant on June 7, 2016, and opined Claimant has a moderate impairment that precludes him from performing his usual coal mine work based on the pulmonary function results he, Dr. Dahhan, and Dr. Rosenberg obtained. Director's Exhibit 31.

is totally disabled.[10] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6 (6th Cir. 1983); Decision and Order at 23.

Employer raises no specific challenge to the administrative law judge's crediting of Dr. Alam's opinion that Claimant is totally disabled[11] or the administrative law judge's discrediting of the contrary opinions of Drs. Dahhan and Rosenberg. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23. We further affirm the administrative law judge's finding, taking into consideration the contrary evidence, that Claimant established total disability. *See Rafferty*, 9 BLR at 1-232; Decision and Order at 23. As Claimant established total disability, we affirm the administrative law judge's finding he 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) (2012); 20 C.F.R. §§718.204(b)(2), 718.305, 725.309; Decision and Order at 23-24.

Employer does not challenge the administrative law judge's finding it did not rebut the Section 411(c)(4) presumption and we therefore affirm that finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-29.

[10] Dr. Chavda opined the September 21, 2016 and July 26, 2017 pre-bronchodilator pulmonary functions studies show a moderately severe impairment that precludes Claimant from performing his usual coal mine employment. Claimant's Exhibit 10.

[11] Dr. Alam is Claimant's treating physician. He opined Claimant is totally disabled from his usual coal mine employment based on the July 26, 2017 pulmonary function study results. Claimant's Exhibit 9.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge