U.S. Department of Labor

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

BRB No. 19-0426 BLA

ALBON L. CLEVENGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUEGRASS MINING COMPANY	)	DATE ISSUED: 07/30/2020
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2018-BLA-05382) of Administrative Law Judge John P. Sellers, III, 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 miner's subsequent claim filed on January 9, 2017.[1]

Based on his finding Claimant established 12.95 years of coal mine employment, the administrative law judge concluded Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the new evidence established clinical and legal pneumoconiosis, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 725.309(c). He further found Claimant has a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, 20 C.F.R. §718.204(b)(2), (c), and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding Claimant has a totally disabling respiratory impairment, and that his total disability is due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, did not file response briefs.

The Benefit 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

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[1] Claimant's initial claim was denied on October 1, 1992, but the file was destroyed due to its old age. Director's Exhibit 1. Because the administrative law judge was unable to determine the reasons for denial of the initial claim, he assumed Claimant failed to establish any of the conditions of entitlement. Decision and Order at 8. Thus, he stated if Claimant presented new evidence sufficient to establish a condition of entitlement he would review the entire record *de novo* to determine whether Claimant is entitled to benefits. 20 C.F.R. §725.309(c); Decision and Order at 8.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

[3] Claimant's most recent coal mine employment occurred in Kentucky. Director's Exhibits 4, 11; Hearing Transcript at 14-15. 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).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Relevant to employer's appeal, the record contains medical opinions from Drs. Rosenberg, Jarboe, Dahhan, and Mettu. All four agree Claimant has clinical pneumoconiosis, but disagree as to the type, severity, and cause of his respiratory impairment. Dr. Rosenberg diagnosed legal pneumoconiosis in the form of a restrictive impairment due to coal mine dust exposure, and opined the restrictive impairment is totally disabling. Claimant's Exhibit 4. Dr. Jarboe also diagnosed legal pneumoconiosis in the form of a restrictive impairment due to coal mine dust exposure, but opined the restrictive impairment is not totally disabling. Employer's Exhibit 2. Dr. Dahhan diagnosed an obstructive impairment due to cigarette smoking, not coal mine dust exposure, and opined the obstructive impairment is not totally disabling. Employer's Exhibit 3. Finally, as part of the Department of Labor-sponsored pulmonary evaluation, Dr. Mettu initially diagnosed legal pneumoconiosis in the form of an obstructive impairment due to coal mine dust exposure, and opined the obstructive impairment is totally disabling. Director's Exhibit 17. After reviewing Dr. Dahhan's testing, however, he continued to diagnose legal pneumoconiosis but opined the obstructive impairment is not totally disabling. Employer's Exhibit 1.

Relying predominantly on Dr. Rosenberg's opinion, supported to varying degrees by the other physicians, the administrative law judge found Claimant established he is totally disabled, he has clinical and legal pneumoconiosis, and pneumoconiosis caused his totally disabling impairment. We address, in turn, Employer's challenges to each of these findings.

Total Disability

Employer first contends the administrative law judge erred in crediting Dr. Rosenberg's opinion that Claimant is totally disabled. We disagree.

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 pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv). Pursuant to 20 C.F.R. §718.204(b)(2)(iv), a medical opinion can establish total disability if the physician exercises reasoned medical judgment, based on medically acceptable diagnostic techniques, to conclude the miner's respiratory or pulmonary condition prevents him from performing his usual coal mine work.

Dr. Rosenberg examined Claimant on May 17, 2018 and reviewed the examination reports from Drs. Jarboe, Dahhan, and Mettu. Claimant's Exhibit 4. In concluding Claimant is totally disabled, he noted the pulmonary function tests he conducted demonstrated a pre-bronchodilator FEV1 value of only "[fifty-seven percent] predicted" with "no bronchodilator response" and a "severely reduced" diffusing capacity. Claimant's Exhibit 4; Decision and Order at 22. He added that "[b]ased on his ventilatory abnormalities, [Claimant] would be considered disabled from a pulmonary perspective" and clarified that while Claimant has a "minimal" obstructive component, "his predominant physiologic abnormality is restriction." Claimant's Exhibit 4. The administrative law judge gave "superior weight" to Dr. Rosenberg's opinion that Claimant has a totally disabling restrictive impairment with an obstructive component because he "considered more evidence than any other physician," including the most recent pulmonary function testing, and thus had a more complete understanding of Claimant's pulmonary condition. Decision and Order at 23.

Employer does not challenge the administrative law judge's finding Drs. Jarboe, Dahhan, and Mettu are entitled to "less probative weight" because they did not review Claimant's most recent objective testing. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, Employer contends the administrative law judge should not have credited Dr. Rosenberg's opinion because it is contrary to his finding the pulmonary function and blood gas studies as a whole do not establish total disability. Employer's Brief at 5-7. This allegation of error is without merit.

[4] The administrative law judge found the pulmonary function studies and blood gas studies did not establish total disability. Decision and Order at 16-20. He further found no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 16. Additionally, the administrative law judge determined Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis because he did not establish that he has complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16.

As the administrative law judge observed, total disability can be established with a reasoned medical opinion even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii) . . . of this section . . ." 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); Decision and Order at 20. He noted Dr. Rosenberg based his total disability diagnosis on the most recent pulmonary function testing, which post-dated earlier testing by nearly a full year and demonstrated non-qualifying pre-bronchodilator values and qualifying post-bronchodilator values. He further noted Dr. Rosenberg opined that Claimant is totally disabled by virtue of his pre-bronchodilator FEV1 that is "[fifty-seven percent] predicted" with "no bronchodilator response" and "severely reduced" diffusion capacity. Thus, although the pulmonary function testing as a whole did not establish total disability, the administrative law judge accurately found that fact "does not preclude [Dr. Rosenberg] from concluding that the Claimant was totally disabled."[5] Decision and Order at 20, 22; Claimant's Exhibit 4; *Cornett*, 227 F.3d at 587 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). We therefore affirm his finding that Dr. Rosenberg's opinion is "consistent with the evidence available to him" and based on testing "most reflective of the Claimant's condition at the time of the hearing." *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 22.

Employer also argues the administrative law judge erred in crediting Dr. Rosenberg's opinion because the physician "did not mention" Claimant's job requirements and did not conclude, as the administrative law judge stated, "Claimant's pulmonary function test was sufficiently low to preclude the Claimant from performing his last coal mine job." Employer's Brief at 6-7, quoting Decision and Order at 23. Contrary to

[5] In weighing the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted the pre-bronchodilator values from the pulmonary function study Dr. Rosenberg conducted were "low and very close to qualifying." Decision and Order at 20. Employer does not contest the accuracy of this statement but alleges it was improper because "[e]ither the values qualify or they don't." Employer's Brief at 5. Employer's contention is without merit, as in accordance with the tables listed in Appendix B to 20 C.F.R. Part 718, the administrative law judge properly characterized the pre-bronchodilator values of the May 17, 2018 pulmonary function study as non-qualifying and found the four pulmonary function studies of record insufficient, "by themselves, to establish total disability." *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 20. He again accurately noted, however, that a physician is "not preclude[d] . . . from opining that the Claimant is disabled notwithstanding [the pulmonary function studies'] non-qualifying nature." Decision and Order at 20.

employer's argument, and as the administrative law judge observed, Dr. Rosenberg noted Claimant's job requirements included operating a shuttle car, hanging cables, lifting as much as he could, and operating a miner and pinner. Claimant's Exhibit 4. Dr. Rosenberg opined Claimant's diffusing capacity is severely reduced, he has shortness of breath, and he is "disabled from a pulmonary perspective." *Id.* Thus, the administrative law judge permissibly concluded Dr. Rosenberg was sufficiently aware of the exertional requirements of Claimant's job, and adequately considered the abnormalities exhibited during his pulmonary function study and physical examination, in opining Claimant is totally disabled. *See Cornett*, 227 F.3d at 576; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 22-23. Consequently, we further affirm the administrative law judge's determination to credit Dr. Rosenberg's opinion that claimant has a totally disabling restrictive impairment at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23.

As Employer has not otherwise challenged the administrative law judge's weighing of the evidence concerning total disability, we affirm his findings Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 23, 25.

Pneumoconiosis

"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). The record contains four interpretations of three x-rays that were unanimously read as positive for clinical pneumoconiosis. Director's Exhibits 17, 19; Claimant's Exhibits 1, 2; Employer's Exhibit 2. Further, Drs. Rosenberg, Jarboe, Dahhan, and Mettu agree Claimant has the disease. Director's Exhibits 17, 22; Claimant's Exhibit 4; Employer's Exhibits 1, 2. We affirm, as unchallenged on appeal and supported by substantial evidence, the administrative law judge's finding Claimant has the disease. 20 C.F.R. §718.201(a)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710; 1-711 (1983); Decision and Order at 12, 15.

"Legal pneumoconiosis" is defined as "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).

Dr. Rosenberg diagnosed legal pneumoconiosis in the form of a restrictive impairment due to coal mine dust exposure.[6] Claimant's Exhibit 4. Dr. Jarboe similarly opined Claimant has legal pneumoconiosis in the form of a restrictive impairment due in part to coal mine dust exposure.[7] Employer's Exhibit 2. Dr. Mettu also diagnosed legal pneumoconiosis, but in the form of an obstructive impairment due in part to coal mine dust exposure. Director's Exhibit 17, Employer's Exhibit 1. In contrast, Dr. Dahhan opined Claimant does not have legal pneumoconiosis but has an obstructive impairment due to cigarette smoking. Employer's Exhibit 3.

The administrative law judge found the opinions of Drs. Rosenberg, Jarboe, and Mettu diagnosing legal pneumoconiosis reasoned and documented and entitled to "probative weight." Decision and Order at 14. In contrast, he found Dr. Dahhan's opinion that Claimant does not have the disease "not persuasive or consistent with the weight of the evidence of record." *Id.* Thus the administrative law judge concluded Claimant established the existence of legal pneumoconiosis by a preponderance of the medical opinion evidence. *Id.* While Employer asserts "[i]t was error for the [administrative law judge] to conclude that the Claimant had legal pneumoconiosis," it raises no specific allegations of error with regard to the administrative law judge's credibility determinations. 20 C.F.R. §802.211; *see 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); *Fish v. Director, OWCP*, 6 BLR

[6] Dr. Rosenberg diagnosed clinical pneumoconiosis based on "micronodularity related to past coal mine dust exposure" seen on x-ray and the presence of a restrictive impairment with severely reduced diffusing capacity. Decision and Order at 25, quoting Claimant's Exhibit 4. As the administrative law judge observed, while Dr. Rosenberg did not specifically state Claimant has "legal pneumoconiosis," he stated coal mine dust exposure "probably has contributed to his reduced lung volumes." Claimant's Exhibit 4; *see* Decision and Order at 25. Further, as the administrative law judge concluded, his attribution of Claimant's restrictive impairment to clinical pneumoconiosis, a coal mine dust-induced disease, also constitutes a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2) (defining legal pneumoconiosis as any chronic lung disease or impairment arising out of coal mine dust exposure); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306 (6th Cir. 2005), *rehearing en banc denied* (6th Cir. 2005) (holding that "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well"); Decision and Order at 14; Claimant's Exhibit 4.

[7] Dr. Jarboe diagnosed "legal pneumoconiosis based on the presence of a mild restrictive ventilatory defect, which has been caused by the clinical pneumoconiosis." Employer's Exhibit 2 at 7. He added Claimant's "clinical pneumoconiosis has been caused by his occupation as a coal miner." *Id.* at 6.

1-107, 1-109 (1983); Employer's Brief at 8. Thus we affirm the administrative law judge's reliance on the opinions of Drs. Rosenberg, Jarboe, and Mettu to find Claimant established legal pneumoconiosis.

Disability Causation

Finally, Employer argues the administrative law judge erred in finding Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c). It contends he "seemed to equate" the issues of whether Claimant has legal pneumoconiosis and whether his totally disabling respiratory impairment is caused by pneumoconiosis. Employer's Brief at 8. Employer's contentions lack merit.

The administrative law judge identified the correct standard for each element. He noted to establish the existence of legal pneumoconiosis a claimant must prove by a preponderance of the evidence that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2), (b); Decision and Order at 9.

The administrative law judge also correctly noted that to establish disability causation, Claimant must prove his pneumoconiosis is a "substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1); Decision and Order at 23-24. He further correctly observed pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); Decision and Order at 23-24.

As set forth above, the administrative law judge found Claimant established the existence of a totally disabling restrictive impairment with minimal obstruction based on the well-reasoned opinion of Dr. Rosenberg. He further found Claimant's totally disabling restrictive impairment *is* legal pneumoconiosis based on the credible opinions of Drs. Rosenberg and Jarboe that Claimant's coal dust-induced disease, i.e., clinical pneumoconiosis, caused the restriction. Decision and Order at 14; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 306 (6th Cir. 2005), *rehearing en banc denied* (6th Cir. 2005); Claimant's Exhibit 4; Employer's Exhibit 2; *see supra* n. 7 and n.8. Given these determinations, which we have affirmed, Claimant has necessarily established his disabling respiratory impairment is due to pneumoconiosis. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (disability causation element satisfied where claimant suffered from totally disabling pulmonary disease determined to be legal pneumoconiosis); *Ogle*, 737 F.3d at 1070; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255

n.6; Decision and Order at 24-25; Director's Exhibit 17. Thus, contrary to employer's contention, we see no error in the administrative law judge's finding Dr. Rosenberg's opinion, that Claimant's coal dust-related restrictive impairment is his "predominant physiologic abnormality," "weighs in favor" of establishing Claimant's pneumoconiosis had a material adverse effect on his respiratory condition. Decision and Order at 25; s*ee Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255 n.6.

Employer also asserts the administrative law judge erred in determining Dr. Mettu's opinion supports finding disability causation on the grounds that Dr. Mettu did not diagnose a disabling impairment. Decision and Order at 24; Director's Exhibit 17; Employer's Exhibit 1 at 13-14. However, Employer overlooks that Dr. Mettu, who was unaware of the later testing Dr. Rosenberg used in finding total pulmonary disability, diagnosed legal pneumoconiosis and identified it as the cause of claimant's obstructive impairment. *See* Director's Exhibit 17; Employer's Exhibit 1 at 14-15. Although Dr. Mettu changed his opinion on whether Claimant is totally disabled based on the testing of Dr. Dahhan, which in turn pre-dated the testing conducted by Dr. Rosenberg, he continued to attribute Claimant's impairment to coal mine dust exposure. Employer's Exhibit 1 at 14-15. Moreover, as noted, Claimant established total disability causation based on the administrative law judge's crediting of Dr. Rosenberg's opinion that Claimant has a totally disabling restrictive impairment with minimal contribution by obstruction and Drs. Rosenberg's and Jarboe's opinions that the restrictive impairment is caused by pneumoconiosis. Given the administrative law judge's permissible finding Claimant has a totally disabling respiratory impairment, as well as his unchallenged crediting of Dr. Mettu's opinion that coal mine dust significantly aggravated the obstructive component, employer has not explained how Dr. Mettu's opinion undermines the finding that pneumoconiosis caused Claimant's total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

As Employer raises no further challenge to the administrative law judge's determination pneumoconiosis substantially contributed to Claimant's totally disabling respiratory impairment, we affirm this finding as supported by substantial evidence. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847-48 (6th Cir. 2016); 20 C.F.R. §718.204(c); Decision and Order at 25. We therefore affirm the award of benefits.

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

MELISSA LIN JONES
Administrative Appeals Judge