U.S. Department of Labor

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

BRB No. 20-0257 BLA

WILLIAM R. BRANHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ESTEP COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/29/2021
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-06110) rendered on a claim filed on February 8, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 12.52 years of underground coal mine employment and therefore concluded he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering entitlement without the benefit of the presumption, the administrative law judge found that Claimant established he is totally disabled due to clinical and legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c).

On appeal, Employer contends the administrative law judge erred in finding Claimant established clinical and legal pneumoconiosis, total disability, and disability causation. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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.[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, 361-62 (1965).

Without the benefit of the Section 411(c)(4) presumption,[3] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment);

[1] 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.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 25.

[3] The administrative law judge accurately observed that none of Claimant's x-ray readings or medical opinions diagnosed complicated pneumoconiosis. Decision and Order

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).

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).

The administrative law judge found the pulmonary function study and blood gas study evidence alone insufficient to support a finding of total disability, but found the medical opinion evidence and the evidence as a whole established total disability.[4] 20 C.F.R. §718.204(b)(2); Decision and Order at 15-16. Employer argues the administrative law judge erred in finding the April 6, 2017 pulmonary function study qualifying and in finding Dr. Green's opinion reasoned and documented because it was based in part on his reliance on that study. Employer's Brief at 6-8. We disagree.

Pulmonary Function Study Evidence

The administrative law judge considered three pulmonary function studies conducted on April 6, 2017, December 22, 2017, and July 10, 2019, which listed Claimant's height as 68.5 inches, 67 inches, and 66 inches respectively. 20 C.F.R.

---

at 7, 11-12. Thus, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

[4] The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii); however, no party alleges that the record contains evidence of cor pulmonale with right-sided congestive heart failure.

§718.204(b)(2)(i); Decision and Order at 7. Based on the administering physicians' reported heights and values, she found the April 6, 2017 pre-bronchodilator results qualifying, the December 22, 2017 and July 10, 2019 studies non-qualifying, and noted Dr. Sargent's opinion that the December 22, 2017 pulmonary function study showed a moderate obstructive lung defect. *Id.* at 7-8, 14-15. She also noted the treatment records and Claimant's hearing testimony establish he is seventy inches tall, but applying that actual height did not change her findings as to the qualifying or non-qualifying values of the pulmonary function study evidence. *Id*. at 8. Because only Dr. Green's April 6, 2017 pre-bronchodilator test was qualifying, she concluded the pulmonary function studies alone are insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14-15.

Employer alleges the administrative law judge erred because she did not "average" the heights of the actual tests submitted by the parties, which would be 67.15 inches based on the recorded heights of 68.5, 67, and 66 inches. Employer's Brief at 7-8; Director's Exhibits 13, 24; Employer's Exhibit 1. Contrary to Employer's contention, the administrative law judge was not required to average the heights of the pulmonary function studies; rather, she had discretion to use any reasonable method to resolve conflicts in the reported heights and permissibly found "the testimony of the Claimant and a review of the medical records" establishes his actual height is seventy inches. *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); Decision and Order at 8 n.7. At the hearing, Employer had the opportunity to challenge Claimant's testimony regarding his height but failed to do so. Hearing Transcript at 12, 13, 28-33. Moreover, the administrative law judge's finding that the treatment records support Claimant's testimony is supported by substantial evidence.[5] *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore reject Employer's argument that the case must be remanded for the administrative law judge to reconsider the credibility of Dr. Green's opinion in light of the pulmonary function study evidence. Decision and Order at 8; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why he did it, the

[5] Drs. Counts, Harris, Elgaried, and Nader, Claimant's treating physicians, each recorded his height as seventy inches on ten separate visits in 2003, 2004, 2005, 2006, 2015, 2018, and 2019. Claimant's Exhibit 1; Employer's Exhibits 2, 4, 7, 9 10, 13, 15. Nurses Veirs and Willis recorded Claimant's height as sixty-nine inches on four visits in 2016, 2017, 2018, and 2019, and Dr. Nader recorded Claimant's height at sixty-seven inches once in 2018. Director's Exhibit 24; Employer's Exhibits 18, 20, 23, 24.

duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999). .

Medical Opinion Evidence

We also reject Employer's contentions that the administrative law judge did not adequately explain why she credited Dr. Green's opinion that Claimant is totally disabled over Dr. McSharry's contrary opinion.[6] Employer's Brief at 8-12. Dr. Green conducted the Department of Labor's complete pulmonary evaluation on April 6, 2017. Director's Exhibit 13. He noted Claimant worked as a roof bolter, which required him to lift fifty to seventy pounds at any given time. *Id*. He also noted that Claimant complained of shortness of breath with exertion, mucus production, wheezing, and a cough. *Id*. He diagnosed a moderate respiratory impairment based on the pulmonary function testing and concluded that Claimant has a totally disabling impairment.[7] *Id*.

The administrative law judge permissibly credited Dr. Green's opinion because he found Dr. Green adequately understood the exertional requirement of Claimant's usual coal mine employment – lifting objects weighing fifty to seventy-five pounds. *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 15. The administrative law judge specifically noted Dr. Green's opinion "dovetails" with Claimant's uncontradicted testimony that as a roof bolter he crawled and dragged heavy tools and could not perform his job because he "would get out of breath . . . ha[d] to stop,

[6] In addition, the administrative law judge considered Dr. Sargent's opinion. Dr. Sargent initially opined Claimant has a disabling pulmonary impairment "with abnormal exercise blood gases" and pulmonary function study revealed a "mixed ventilator impairment." Director's Exhibit 24. In a subsequent report, Dr. Sargent opined Claimant is not totally disabled from a respiratory standpoint based on improved pulmonary function results. Decision and Order at 15-16; Employer's Exhibit 25. The administrative law judge found Dr. Sargent did not address why Claimant was no longer disabled based on the abnormal exercise blood gas study results Dr. Sargent mentioned in his initial report. Decision and Order at 16. Employer does not identify any specific error in the administrative law judge's discrediting of Dr. Sargent's opinion, and we therefore affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 16.

[7] Employer argues Dr. Green's opinion is not credible because he erroneously believed Claimant's pulmonary function study values qualified for total disability. Employer's Brief at 9. Having rejected Employer's contentions regarding the administrative law judge's pulmonary function study findings, this argument is meritless.

catch [his] breath and it'd take up too much time . . . could not do it anymore." Decision and Order at 15, *quoting* Hearing Transcript at 13, 27; *Hicks* 138 F.3d at 533.

In contrast, the administrative law judge permissibly found Dr. McSharry did not persuasively explain why Claimant's moderate respiratory impairment, shown on the objective tests, would not preclude Claimant from performing heavy manual labor.[8] *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 16. Although Employer highlights that Dr. McSharry reviewed Dr. Green's report and other evidence in preparing his opinion, it fails to explain why this review alters the administrative law judge's permissible finding that Dr. McSharry's opinion does not address "how [Claimant's] impairment could potentially impact" his ability to perform the specific duties of his usual coal mine work. Decision and Order at 16; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Employer's Brief at 11. Employer's general contention that Dr. McSharry's opinion is adequately reasoned on total disability is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Based on the administrative law judge's permissible crediting of Dr. Green's opinion as supported by Claimant's statements regarding his work duties and symptoms, we see no error in her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).[9] *See Looney*, 678 F.3d at 316-17; *Island Creek Coal Co. v.*

[8]The administrative law judge also noted the respiratory symptoms that Claimant described to Drs. McSharry and Green. Dr. McSharry reported that Claimant's last job as a roof bolter for eight to ten years required him "to bend the bolts and insert them into the holes drilled by the machine" and to work "at least [two] hours of heavy exertion in each day, although his work involved crawling and squatting for most of the day as well as carrying relatively heavy equipment around." Employer's Exhibit 1. He also noted that when he examined Claimant, he stated he was "barely able to do a [six]-minute walk in his pulmonary physician's office," estimated he "cannot walk more than 100 yards on level ground," and has shortness of breath that has gotten worse over time. *Id*. As the administrative law judge found, Dr. McSharry did not explain how Claimant would be able to perform heavy exertion.

[9] Employer argues Dr. Green's opinion cannot be credited because he did not specifically address "whether the [C]laimant would be able to perform 'comparable' work in a non-dusty environment." Employer's Brief at 10. Because Claimant established he cannot perform his previous coal mine work, however, it is Employer's burden to show that he can perform comparable work. *Taylor v. Evans and Gambrel Co., Inc*., 12 BLR 1-83 (1988) (the party opposing entitlement must actually identify the employment argued

Compton, 211 F.3d 203, 211 (4th Cir. 2000). Further, because substantial evidence supports the administrative law judge's overall finding that Claimant established total disability, we affirm it. 20 C.F.R §718.204(b)(2).

Legal Pneumoconiosis

To establish legal pneumoconiosis,[10] Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge considered the opinions of Drs. Green, Sargent, and McSharry. She credited Dr. Green's opinion that Claimant has legal pneumoconiosis over Dr. McSharry's contrary opinion. Decision and Order at 12-13. She found Dr. Sargent did not specifically address whether Claimant has legal pneumoconiosis.[11] *Id*. at 13.

Employer contends the case must be remanded for the administrative law judge to render a specific finding as to the length and quantity of Claimant's smoking history. Employer's Brief at 5-6. We disagree. The administrative law judge noted Claimant's hearing testimony that he was currently smoking about a half a pack a day but could be a pack a day, as well as his estimate that his smoking history is thirty years but could be closer to forty-five. *Id.*; Hearing Transcript at 28, 32. She also noted Employer's assertion that on three separate occasions Claimant's treating physicians recorded either a two or three pack a day smoking habit. Decision and Order at 4; Hearing Transcript at 30-32. She also summarized the medical opinion evidence that recorded substantial smoking histories: Dr. Green noted a "two packs/day" for thirty-five years (seventy pack years) smoking history; Dr. Sargent noted "60+" pack years; and Dr. McSharry considered a "long-time

---

to be "comparable and gainful" work and show that such work is available). We thus reject Employer's argument.

[10] "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).

[11] Employer does not challenge the administrative law judge's discrediting of Dr. Sargent's opinion, and we therefore affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 13.

heavy smoking history" of forty pack-years. Decision and Order at 8-9; Director's Exhibit 24; Employer's Exhibit 1.

Employer does not contest the accuracy of the administrative law judge's summaries. Moreover, as discussed below, she did not reject or credit any of the physicians' opinions based on their understanding of Claimant's significant smoking history; she weighed them according to whether they persuasively explained why Claimant's coal dust exposure did or did not significantly contribute, along with smoking, to his pulmonary disease.[12] Because Employer has failed to demonstrate why identification of a specific smoking history would have made any difference to the administrative law judge's credibility findings, we reject Employer's contention of error. *See Shinseki*, 556 U.S. at 413.

Employer next contends the administrative law judge erred in finding Dr. Green's opinion adequately reasoned because he relied on an inaccurate coal mine employment history. Employer's Brief at 13. This contention is also without merit. Dr. Green considered in his initial report that Claimant had twenty years of coal mine employment. Director's Exhibit 13. A claims examiner subsequently requested Dr. Green clarify his diagnosis because the Department of Labor found only 12.45 years of coal mine employment established. Director's Exhibit 20. Dr. Green indicated that 12.45 years of occupational coal dust exposure did not change his diagnosis of legal pneumoconiosis. Director's Exhibit 20. He explained Claimant's physical symptoms of chronic cough, shortness of breath, and mucus expectoration support the diagnosis of legal pneumoconiosis, that the etiology is multifactorial, and that 12.45 years of occupational history "is a significant factor" that contributes along with smoking to Claimant's chronic obstructive pulmonary disease (COPD). *Id.*

The administrative law judge found "Dr. Green did not ignore the Claimant's smoking history, but explained how the 12.45 years of coal mine employment is a significant factor that contributes to [his COPD/legal pneumoconiosis]."[13] Decision and

[12] Dr. Green considered that Claimant "[s]tarted smoking at age [twelve] years in 1979 and quit in 2014 smoking up to [two] packs/day." Director's Exhibit 13. Also, contrary to Employer's allegation that he failed to consider Claimant's smoking history, he specifically found that smoking was a "significant contributing factor" for Claimant's COPD. *Id.*; *see also* Director's Exhibit 20.

[13] We reject Employer's allegation Claimant established only seven years of coal mine employment. Employer failed to adequately brief its challenge to the administrative law judge's finding of 12.52 years of coal mine employment because it submitted nothing beyond its mere allegation to support its contention of error. *See* 20 C.F.R. §802.211(b);

Order at 13. She further found Dr. Green noted the "numerous articles that refer to environmental factors that contribute to airway dysfunction[, In the case of] coal dust inhalation [this] would be additive to the history of cigarette smoking." *Id.*; Director's Exhibit 20 at 4. Having rejected Employer's arguments, we therefore affirm the administrative law judge's decision to credit Dr. Green's opinion. *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 13.

We also reject Employer's argument the administrative law judge erred in her weighing of Dr. McSharry's opinion. Employer's Brief at 16. Dr. McSharry opined the medical evidence does not "support chronic lung disease caused by or aggravated by coal dust exposure." Employer's Exhibit 1. He acknowledged Claimant had "some evidence of lung disease" and "moderate airflow obstruction" suggestive of emphysema due to smoking. *Id.* He opined Claimant's pulmonary function abnormalities do not "suggest the presence of coal worker's pneumoconiosis" and "although coal workers' pneumoconiosis can cause obstructive lung disease and emphysema, this is an unusual pattern to see from pneumoconiosis."[14] *Id.*

Contrary to Employer's contention, we see no error in the administrative law judge's finding that Dr. McSharry's opinion is less persuasive in view of the science credited by the Department of Labor in the preamble to the 2001 regulatory revisions indicating that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that the risks of cigarette smoking and coal mine dust exposure may be additive. *See* 65 Fed. Reg. 79, 920, 79,940-43 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-16; *Stallard*, 876

Sarf v. Director, OWCP, 10 BLR 1-119 (1987)*; Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Skrack*, 6 BLR at 1-711; Decision and Order at 6; Employer's Brief at 15.

[14] Dr. McSharry opined:

> While emphysema is common among long-time smokers without any signs of scarring, the same is not true in coal dust exposure. Long-time coal miners who have not been smokers rarely demonstrate significant obstructive lung disease without radiographic evidence of pneumoconiosis. On the other hand, long-time smoking coal miners frequently have obstructive lung disease without evidence of pneumoconiosis. That is because the smoking is the difference between having and not having the obstructive lung disease in most cases.

Employer's Exhibit 1.

F.3d at 673-74; Decision and Order at 13. Thus, we affirm the administrative law judge's finding that Dr. McSharry's opinion is entitled to little probative weight on the issue of legal pneumoconiosis. Decision and Order at 13.

We therefore affirm as supported by substantial evidence the administrative law judge's determination that Claimant established legal pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 13.

Disability Causation

Finally, the administrative law judge considered whether Claimant proved that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially 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).

The administrative law judge credited Dr. Green's opinion that Claimant's disabling respiratory impairment is due smoking and coal dust exposure, over the contrary opinions of Drs. Sargent and McSharry. 20 C.F.R. §718.204(c); Decision and Order at 17. Employer raises no specific arguments regarding disability causation other than its assertion legal pneumoconiosis was not established, which we have rejected. We therefore affirm the administrative law judge's determination that Claimant established his total respiratory disability is due to legal pneumoconiosis.[15] 20 C.F.R. §718.204(c); *Skrack*, 6 BLR at 1-711; Decision and Order at 17.

[15] Because we affirm the administrative law judge's finding that Claimant is totally disabled due to legal pneumoconiosis, we need not address Employer's arguments related to clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12-13.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge