U.S. Department of Labor

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

BRB No. 20-0339 BLA

JAMES E. PIERCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RUSSELL COAL, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCE INSURANCE COMPANY	)	DATE ISSUED: 07/19/2021
	)	
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor Law, LLC), Tuscaloosa, Alabama, and Gina T. Cross (Nelson, Bryan & Cross), Jasper, Alabama, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Patrick M. Rosenow's Decision and Order Awarding Benefits (2018-BLA-05516) rendered on a subsequent claim filed on August 23, 2016, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1]

The administrative law judge found Claimant established 19.5 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Therefore, he found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The administrative law judge also found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge 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, has declined to file a substantive response.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant filed three prior claims for benefits. Director's Exhibits 1-3. The district director denied Claimant's most recent prior claim on September 30, 2013, for failure to establish total disability. Director's Exhibit 3.

[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) (2018); 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 19.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-7.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7-8.

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

Invocation of the Section 411(c)(4) Presumption – 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 alleges the administrative law judge erred in finding Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[5] Decision and Order at 20. We disagree.

The administrative law judge found Claimant's usual coal mine work as a serviceman required heavy manual labor.[6] Decision and Order at 18. He credited the opinions of Drs. O'Reilly and Connolly that Claimant is totally disabled from performing his usual coal mine work.[7] Decision and Order at 18-20; Director's Exhibits 17, 20, 24; Claimant's Exhibit 1; Employer's Exhibit 3.

[5] The administrative law judge found Claimant did not establish total disability based on the pulmonary function or blood gas studies, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9-10, 17-18. He further found Claimant's treatment records do not assess his pulmonary capacity. Decision and Order at 15-16, 20; Director's Exhibit 5; Employer's Exhibits 4, 5.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant's usual coal mine work involved heavy labor. *Skrack*, 6 BLR at 1-711; Decision and Order at 18.

[7] The record also contains medical opinions from Drs. Goldstein and Broudy. Dr. Goldstein opined Claimant does not have a pulmonary impairment, but has a totally disabling respiratory impairment due to congestive heart failure. Employer's Exhibit 3 at 2, 25. He explained the distinction between a "pulmonary impairment" and a "respiratory impairment" as: "[r]espiratory impairment means shortness of breath for any cause" as opposed to a lung-related cause. *Id*. at 25. He stated, "[f]rom a *respiratory* standpoint, this

Employer argues the administrative law judge erred in crediting Dr. O'Reilly's opinion without considering whether it is "supported by the evidence in the record as a whole." Employer's Brief at 8. Employer notes Dr. O'Reilly diagnosed a moderate to severe respiratory impairment based on Claimant's non-qualifying October 13, 2016 pulmonary function test but did not consider Dr. Goldstein's January 17, 2019 test, which was also non-qualifying, showed higher values and improved lung function.[8] It also argues Dr. O'Reilly's opinion is not credible because he relied on a qualifying blood gas study without addressing that Dr. Goldstein's January 17, 2019 blood gas study was non-qualifying. Employer's arguments are without merit.

Dr. O'Reilly opined Claimant's blood gas impairment is disabling on its own. Thus, we reject Employer's argument that his opinion is less credible for not reviewing Dr. Goldstein's pulmonary function study since pulmonary function studies and blood gas studies measure different types of impairments. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Employer's argument is also unavailing as Dr. Goldstein specifically opined Claimant has a disabling respiratory impairment based on the January 17, 2019 arterial blood gas study, consistent with Dr. O'Reilly's opinion. *See*

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gentleman could not return to his previous occupation. However, this is because of congestive heart failure and not because of clinical or legal pneumoconiosis." *Id*. at 26 (emphasis added). The administrative law judge gave little weight to Dr. Goldstein's opinion because he found Dr. Goldstein conflated the issues of total disability and disability causation. Decision and Order at 19; *see* 20 C.F.R. §718.204(b), (c) (differentiating between the existence of a respiratory or pulmonary impairment and the cause of that impairment). This finding is affirmed as unchallenged on appeal. *Skrack*, 6 BLR 1-711. Moreover, because Dr. Goldstein opined Claimant has a totally disabling blood gas impairment, his opinion does not refute Dr. O'Reilly's opinion that Claimant is totally disabled.

We also affirm, as unchallenged, the administrative law judge's discrediting of Dr. Broudy's opinion for failing to specifically address whether the impairment he diagnosed would preclude Claimant from performing the heavy levels of exertion required of his last coal mine job. *Skrack*, 6 BLR 1-711; Decision and Order at 19. Thus, his opinion does not undermine a finding that Claimant is totally disabled.

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Moreover, as Employer acknowledges, an administrative law judge is not required to discredit a physician's opinion for failing to review each piece of medical data in the record. Rather, he must determine if the physician's opinion is adequately reasoned and supported by the underlying documentation he relies on to reach his medical conclusions. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88, 1-89 n.4 (1993). The administrative law judge permissibly found Dr. O'Reilly's opinion reasoned and documented because he examined Claimant, discussed the objective testing he obtained, and explained that Claimant has a severe restrictive impairment and a blood-gas exchange impairment, each of which preclude Claimant from performing his usual coal mine work. Decision and Order at 11, 19; Director's Exhibits 17, 24; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."). We therefore affirm the administrative law judge's reliance on Dr. O'Reilly's opinion to find Claimant is totally disabled.

Employer also asserts the administrative law judge erred in crediting Dr. Connolly's opinion because he relied on objective testing that is not in the record. Employer's Brief at 7-8; Claimant's Exhibit 1; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc). However, as we have affirmed the administrative law judge's crediting of Dr. O'Reilly's opinion on total disability and there are no contrary, credible medical opinions of record, any error in also crediting Dr. Connolly's opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We therefore affirm, as supported by substantial evidence, the administrative law judge's findings that Claimant established total respiratory disability based on the medical opinion evidence at 20 C.F.R. 718.204(b)(2)(iv) and in consideration of the record as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; s*ee also Jordan*, 876 F.2d at 1460; Decision and Order at 16-17, 20. Consequently, we affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption.[9] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b); Decision and Order at 20.

[9] Because Claimant invoked the Section 411(c)(4) presumption, he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Rebuttal of the Section 411(c)(4) Presumption: Pneumoconiosis

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[10] nor clinical pneumoconiosis,[11] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[12] 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer asserts the administrative law judge erred in finding Dr. Goldstein's opinion insufficient to establish Claimant does not have legal pneumoconiosis.[13] Employer's Brief at 11-13. We disagree.

[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). This 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] "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).

[12] The administrative law judge determined Employer disproved clinical pneumoconiosis. Decision and Order at 24.

[13] Dr. Broudy diagnosed a restrictive pulmonary impairment, which he stated is "more likely" related to smoking and obesity than coal dust exposure. Director's Exhibit 20 at 3. We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. Broudy's opinion is not persuasive to disprove Claimant has legal pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 26.

Dr. Goldstein attributed Claimant's respiratory impairment to congestive heart failure (CHF) and cardiac disease. Employer's Exhibit 3 at 2, 25. He noted Claimant's arterial blood gases improved, which would be unusual if his pO_2 was reduced because of pneumoconiosis. *Id*. at 25. He concluded Claimant's CHF was the cause of his pulmonary function and arterial blood gas abnormalities, and his respiratory impairment was unrelated to his lungs. *Id*. The administrative law judge acknowledged that "Claimant's treatment records clearly reflect that he suffers from CHF and cardiac disease." Decision and Order at 26. However, he permissibly found Dr. Goldstein's opinion was not persuasive to establish Claimant's disabling respiratory impairment shown by his blood gas studies "is not related, at least in part, to his 19.5 years of coal mine dust exposure."[14] *Id*.; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020) (to disprove legal pneumoconiosis, an employer must show the miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis"); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (an administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460. Because the administrative law judge permissibly discredited the only medical opinions supportive of Employer's burden of proof,[15] we affirm his finding that Employer failed to disprove legal pneumoconiosis and rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 26.

[14] Employer contends the administrative law judge's additional statement that Dr. Goldstein did not explain why coal mine dust exposure was not "additive" to Claimant's heart conditions in causing his impairment reflects a misstatement of the preamble to the revised regulations which only addresses the additive effects of coal mine dust exposure and smoking. Employer's Brief at 12. The administrative law judge, however, did not reference the preamble when discussing Dr. Goldstein's opinion. The context of the administrative law judge's statement simply reflects his finding that Dr. Goldstein did not adequately explain why the fact that Claimant has CHF and heart disease supports his conclusion that coal mine dust exposure did not also contribute to Claimant's impairment. Decision and Order at 26.

[15] Because Employer bears the burden of proof on rebuttal, we need not address its arguments regarding the weight the administrative law judge gave the opinions of Drs. O'Reilly and Connolly that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In order to disprove disability causation, Employer must 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). Because Employer raises no specific allegations of error regarding the administrative law judge's findings on disability causation, we affirm his determination that Employer failed to establish no part of Claimant's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27-28.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge