U.S. Department of Labor

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

BRB No. 20-0353 BLA

MARK WARD, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOPPER GLO MINING, INCORPORATED	)	
	)	
and	)	
	)	
ARGONAUT INSURANCE COMPANY	)	DATE ISSUED: 07/30/2021
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Marshall W. Stair (Lewis, Thomason, King, Krieg & Waldrop, P.C.), Knoxville, Tennessee, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2019-BLA-5252) rendered on a claim filed

on July 19, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 33.1 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).[1] The administrative law judge also found Employer failed to rebut the presumption, and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant is totally disabled and that he invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a 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.[3] 33 U.S.C. §921(b)(3), as incorporated 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 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

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant has 33.1 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 12.

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). The administrative law judge found Claimant established total disability based on the pulmonary function studies and medical opinions.[4] Decision and Order at 12, 24-25.

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10, 16-18. The June 26, 2017 study produced non-qualifying pre-bronchodilator values and included no post-bronchodilator results.[5] Director's Exhibit 19. The August 21, 2017, May 7, 2018, and April 16, 2019 studies produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibit 13; Employer's Exhibits 3, 7. The June 5, 2018 study produced qualifying pre-bronchodilator results and included no post-bronchodilator results. Claimant's Exhibit 5.

The administrative law judge accurately observed that the technicians who administered Dr. Dahhan's May 7, 2018 study and Dr. Broudy's April 16, 2019 study indicated Claimant's effort was "poor."[6] Decision and Order at 17; Employer's Exhibits 3 at 12, 7 at 5. He therefore found both qualifying pre-bronchodilator tests invalid, but concluded the non-qualifying post-bronchodilator values were entitled to "probative weight."[7] Decision and Order at 17. However, when considering the evidence as a whole,

[4] The administrative law judge found Claimant did not establish total disability based on the blood gas studies and there was 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 17, 18.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] Although the administrative law judge cited the comments of the administering technicians, the record also reflects Drs. Dahhan and Broudy invalidated the results of their respective studies. Employer's Exhibits 5 at 2, 7 at 3.

[7] The administrative law judge explained that he found the non-qualifying studies probative, despite Claimant's poor effort, because "[h]ad the[C]laimant understood or

the administrative law judge gave greater weight to the pre-bronchodilator results over the post-bronchodilator results, noting "the question is whether the miner is able to perform his job, not whether he is able to perform his job after he takes medication." *Id*.; *see* 20 C.F.R. §718.204(b)(1). Because the two most recent of the valid pulmonary function studies obtained on June 26, 2017, August 21, 2017 and June 5, 2018 had qualifying pre-bronchodilator values, the administrative law judge found that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17-18.

Employer asserts the administrative law judge erred in finding the August 21, 2017 and June 5, 2018 pre-bronchodilator studies valid. Employer's Brief at 12. Employer argues that Dr. Mandviwala invalidated the August 21, 2017 study when he stated in his November 22, 2017 treatment report, "[t]he pulmonary function tests that that [sic] were performed at Stone Mountain [Health Services] had suggested a predominantly restrictive physiology, which is what was seen here as well, although the effort was very poor."[8] Claimant's Exhibit 7 at 1; *see* Employer's Brief at 12. The administrative law judge found Dr. Mandviwala's reference to poor effort did not refer to any specific pulmonary function study. Decision and Order at 11 n.59. Employer, however, asserts "we can presume" his statement refers to the August 21, 2017 study because it was administered at Stone Mountain Health Services shortly before Dr. Mandviwala treated Claimant on November 22, 2017. Employer's Brief at 12. Employer's argument is without merit.

Pulmonary function studies are presumed valid in the absence of evidence to the contrary, and the party challenging the validity of a study must affirmatively establish the results are suspect or unreliable. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). The administrative law judge accurately observed Dr. Mandviwala did not identify the date of any pulmonary function studies that allegedly showed poor effort, and he permissibly declined to draw any inference that Dr. Mandviwala was referring to the August 21, 2017 study. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011) (it is the function of the administrative law judge to weigh the evidence and make factual determinations; a reviewing court must uphold decisions that rest within the realm of rationality). As no physician specifically invalidated the August 21, 2017 qualifying study, the administrative

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cooperated more fully, the test results could only have been higher." Decision and Order at 17 (citing *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983)).

[8] On November 7 and 21, 2017, Dr. Mandviwala evaluated Claimant's exertional dyspnea; he issued a narrative treatment report dated November 22, 2017. Claimant's Exhibit 7.

law judge permissibly relied on it to find Claimant totally disabled.[9] *Vivian*, 7 BLR at 1-361; Decision and Order at 11 n.59, 17.

Employer also asserts the June 5, 2018 study is invalid because the results were "substantially similar to the [April 16, 2019] test where the Claimant gave poor performance." Employer's Brief at 12. Employer, however, did not dispute the validity of this study before the administrative law judge and we will not consider its challenge raised for the first time on appeal.[10] *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 586-87 (6th Cir. 2021); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987).

Because Employer raises no further challenges to the administrative law judge's weighing of the pulmonary function evidence, and his findings were permissible, we affirm his determination that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(1), (2)(i); *see Morrison*, 644 F.3d at 478; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *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).

Medical Opinion Evidence

The administrative law judge credited Dr. Ajjarapu's opinion that Claimant is totally disabled because he found it reasoned, documented, and supported by the valid qualifying pulmonary function study evidence. The administrative law judge rejected the opinions of Drs. Dahhan and Broudy because he found they relied on invalid pulmonary function studies in concluding Claimant is not totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19.

Employer asserts the administrative law judge's findings regarding its experts are "illogical" because Drs. Dahhan and Broudy concluded the pulmonary function studies they obtained were invalid and thus based their opinions that Claimant is not totally disabled on other evidence. Even if we agreed with Employer that the administrative law judge erred, it has not shown why remand is required. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have

[9] Moreover, Dr. Ajjarapu conducted the study and certified that Claimant's effort and cooperation were "good." Director's Exhibit 13 at 12.

[10] Employer does not cite to any physician's opinion to support its assertion. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer's Brief at 13-14. Neither Dr. Dahhan nor Dr. Broudy addressed whether Claimant is totally disabled based on the August 21, 2017 and June 5, 2018 qualifying pulmonary function studies that the administrative law judge credited. As such, their opinions do not constitute contrary evidence to refute either the qualifying pulmonary function studies or Dr. Ajjarapu's opinion.[11] 20 C.F.R. §718.204(b)(2); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993).

Thus, we affirm the administrative law judge's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or "no part of [his] respiratory or pulmonary total disability is caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The administrative law judge found Employer failed to establish rebuttal by either method.[13]

[11] Having rejected Employer's contention that Dr. Ajjarapu's qualifying pulmonary function study is invalid, we further conclude Employer fails to explain why the administrative law judge erred in crediting her opinion that Claimant is totally disabled.

[12] "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[13] The administrative law judge found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 22.

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*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Broudy as to whether Claimant has legal pneumoconiosis. We disagree.

Dr. Dahhan evaluated Claimant on May 7, 2018, and reviewed Dr. Ajjarapu's August 29, 2018 supplemental report. Employer's Exhibit 5. He found "no evidence of legal pneumoconiosis" and attributed Claimant's restrictive impairment to advanced rheumatoid arthritis, which he described as a disease of the general population unrelated to coal mine dust exposure. Employer's Exhibits 5 at 2; 6 at 2.

Dr. Broudy evaluated Claimant on April 16, 2019, and opined the blood gas study demonstrated only a "slight abnormality," while the "best results" on the post-bronchodilator pulmonary function studies showed "only a mild restrictive defect." Employer's Exhibit 7 at 3. He stated Claimant's spirometry was invalid due to variable and suboptimal effort . . . making an accurate assessment of his pulmonary capacity not possible." *Id*. Dr. Broudy further stated that he would not diagnose legal pneumoconiosis based on the mild restrictive defect seen on the pulmonary function testing but noted additional testing could confirm the extent of Claimant's impairment. *Id*. He concluded, "the best results today, though, show only mild restrictive defect and therefore I will not make a diagnosis of legal pneumoconiosis." *Id*.

Contrary to Employer's contention, the administrative law judge permissibly found Dr. Broudy's opinion unpersuasive because it "appears to be predicated" on his belief that Claimant's restriction would have to be disabling in order to support a diagnosis of legal pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22. The administrative law judge also permissibly found that neither Dr. Dahhan nor Dr. Broudy adequately addressed whether Claimant's disabling respiratory impairment shown on the valid pre-bronchodilator pulmonary function testing was substantially

aggravated by coal mine dust exposure. *See Young*, 94 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22-23.

Although Employer contends that it should not be required to disprove that coal mine dust exposure substantially aggravated Claimant's respiratory condition, Employer's contention fails to recognize the definition of legal pneumoconiosis and its burden of proof on rebuttal. Employer's Brief at 16. Because Claimant invoked the Section 411(c)(4) presumption, he is entitled to a presumption that coal mine dust exposure significantly contributed to, or substantially aggravated, his disabling pulmonary or respiratory impairment. We see no error in the administrative law judge's finding that Employer did not provide sufficient evidence to rebut these presumed facts. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 94 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22-23. Thus, we affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Broudy are not well-reasoned. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Finally, we reject Employer's argument the administrative law judge erred in not finding Dr. Mandviwala's opinion sufficient to satisfy its burden of proof because he treated Claimant and did not diagnose legal pneumoconiosis. In a treatment report dated November 12, 2017, Dr. Mandviwala indicated Claimant was referred to him for evaluation of dyspnea and had been diagnosed with chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 7 at 1. He stated Claimant's pulmonary function studies show a "predominantly" restrictive impairment due to deconditioning and rheumatoid arthritis. *Id.* at 3. He also stated Claimant does not have "any significant underlying obstructive lung disease" but had experienced improvement in his dyspnea with breathing medications. *Id.* The administrative law judge rationally found that Dr. Mandviwala's opinion is not sufficiently explained to support a finding Claimant does not have legal pneumoconiosis. As the administrative law judge observed, although Dr. Mandviwala identified deconditioning and rheumatoid arthritis as "predominant" causes of Claimant's impairment, he did not exclude coal mine dust as a significant contributor; and, while he said Claimant did not have "significant" obstruction, he did not indicate whether he agreed with the diagnosis of COPD or discuss the cause of it. Decision and Order at 23; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge's credibility determinations were within his discretion and are supported by substantial evidence, we

affirm his finding that Employer failed to disprove legal pneumoconiosis.[14] 20 C.F.R. §718.305(d)(2)(i)(A); *Barrett*, 478 F.3d at 356. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge also considered whether Employer established "no part of the miner'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). Contrary to Employer's assertion, the administrative law judge permissibly discredited the disability causation opinions of Drs. Dahhan and Broudy because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that Employer failed to disprove the existence of the disease.[15] *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 23-24. We therefore affirm the administrative law judge's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24.

[14] We reject Employer's contention that the administrative law judge did not properly consider the negative x-ray for clinical pneumoconiosis in relation to whether Claimant's respiratory disability is due to legal pneumoconiosis. Employer's Brief at 19. Legal pneumoconiosis encompasses a broader set of conditions than clinical pneumoconiosis; a diagnosis of legal pneumoconiosis may be made independent of the presence of clinical pneumoconiosis and involves a determination of whether coal dust exposure sufficiently contributes to any of a miner's chronic lung diseases or impairments. 20 C.F.R. §718.201(a); *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

[15] Neither physician addressed disability causation separate and apart from their opinions that Claimant is not disabled and does not have legal pneumoconiosis. Employer's Exhibits 5 at 2, 6 at 2, 7 at 3.

[16] Because Dr. Mandviwala did not address whether Claimant has legal pneumoconiosis, his opinion is also insufficient to satisfy Employer's burden of disproving disability causation. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013); Employer's Brief at 18.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge