U.S. Department of Labor

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

BRB No. 19-0345 BLA

BILLY R. ENGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAXXIM SHARED SERVICES, c/o ANR INCORPORATED	)	
	)	
and	)	DATE ISSUED: 06/30/2020
	)	
BRICKSTREET 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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (18-BLA-05335) of Administrative Law Judge Jason A. Golden rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on May 17, 2016.

The administrative law judge found claimant has thirty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Therefore, he found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that Section 1556 of the Patient Protection and Affordable Care Act, which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution." Employer's Brief at 2; *see* Public L. No. 111-148, §1556 (2010). On the merits of entitlement, employer argues the administrative law judge erred in finding claimant established total disability and thus erroneously invoked the Section 411(c)(4) presumption. Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to decline to entertain employer's unidentified constitutional objections.[2]

The 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

[1] Section 411(c)(4) of the Act presumes a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant has thirty years of underground coal mine employment. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; Hearing Tr. at 6, 15.

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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

As a threshold matter, we agree with the Director that employer failed to provide any specific argument for its constitutional objection to Section 411(c)(4). Employer merely submits a one sentence, unsupported conclusion that revival of the presumption violates Article II. Employer's Brief at 2. Thus, we decline to address it. 20 C.F.R. §802.211(b); *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 1-107, 1-109 (1983).

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. *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 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 the relevant evidence supporting total disability against the 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). Notwithstanding the non-qualifying blood gas studies, the administrative law judge found claimant established total disability based on the pulmonary function studies, Dr. Ajjarapu's medical opinion, and his weighing of the evidence as a whole.[4] Decision and Order at 11, 14; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

The administrative law judge considered the results of six pulmonary function studies, dated February 29, 2016, June 13, 2016, July 14, 2016, February 9, 2017, July 24,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 13, 20.

[4] The administrative law judge found the record insufficient to establish cor pulmonale with right-sided congestive heart failure. Decision and Order at 5; 20 C.F.R. §718.204(b)(2)(iii). He also determined claimant does not suffer from complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.204(b)(1); Decision and Order at 5.

2017, and February 13, 2018.[5] Decision and Order at 6-11. The February 29, 2016 study Dr. Broudy conducted, the June 13, 2016 study Dr. Ajjarapu conducted, and the February 13, 2018 study contained in treatment records produced qualifying results[6] before and after the administration of a bronchodilator. Director's Exhibits 12, 21; Claimant's Exhibit 6. The July 14, 2016 and July 24, 2017 studies Dr. Ajjarapu conducted produced qualifying pre-bronchodilator results, but did not include post-bronchodilator results. Director's Exhibit 20; Claimant's Exhibit 5. The February 9, 2017 study Dr. Westerfield conducted produced non-qualifying pre-bronchodilator results, but did not include post-bronchodilator results. Director's Exhibit 22.

The administrative law judge found the February 29, 2016 and February 9, 2017 studies unreliable. Decision and Order at 7, 9, 10; Director's Exhibit 21, 22. In contrast, he found the June 13, 2016, July 14, 2016, July 24, 2017, and February 13, 2018 studies reliable and sufficient to establish total disability at Section 718.204(b)(2)(i). Decision and Order at 8, 10, 11; Director's Exhibits 12, 20; Claimant's Exhibit 5.

Employer argues the administrative law judge erred in rejecting Dr. Broudy's opinion that the qualifying results of the June 13, 2016 pulmonary function study are invalid. Employer's Brief at 4, 5. Employer asserts the administrative law judge offered no reason for rejecting Dr. Broudy's opinion other than Dr. Ajjarapu's unsupported statement that Dr. Broudy "used an improper method in assessing the post-bronchodilator results in the February 29, 2016 study."[7] Employer's Brief at 3. We disagree. Drs.

[5] The administrative law judge permissibly resolved the height discrepancy recorded on five of the pulmonary function studies, finding claimant's average height is 70.85 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 6.

[6] 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).

[7] Dr. Broudy opined the February 29, 2016 pulmonary function study is invalid due to poor effort. Employer's Exhibit 2. Dr. Ajjarapu also reviewed the February 29, 2016 study and stated that Dr. Broudy did not "indicate any information as to what predicted values he used" and he commented that claimant took "two puffs of Ventolin for bronchodilation." Director's Exhibit 24. Noting that the "proper way to conduct the test is to give albuterol nebulizer treatment, wait for 15 minutes and do post test maneuver," Dr. Ajjarapu opined Dr. Broudy's test conditions were not that of the normal protocol for post-bronchodilation. *Id*. She further stated that despite poor testing conditions, claimant's values still showed severe pulmonary impairment. *Id*. The administrative law judge noted Dr. Ajjarapu did not validate the February 29, 2016 study but provided additional reasons

Ajjarapu and Gaziano opined the June 13, 2016 pulmonary function study is valid. Director's Exhibits 12, 15. Dr. Broudy also reviewed this study and stated that its "results were far lower" than the results Dr. Westerfield obtained "some 8 months later in February of 2017." Employer's Exhibit 2 at 2. He opined the lower results of the study indicated either suboptimal effort or marked improvement in claimant's condition. *Id*. The administrative law judge permissibly found Dr. Broudy's invalidation opinion equivocal and accorded it little weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000)*; Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995); Decision and Order at 8. Moreover, he permissibly found Dr. Broudy's criticisms of the qualifying studies "too vague and unreasoned to give serious weight."[8] Decision and Order at 11; *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). Thus we reject employer's assertion that the administrative law judge erred in finding the June 13, 2016 pulmonary function study reliable.

Employer further argues the administrative law judge erred in finding the February 9, 2017 pulmonary function study invalid. Employer's Brief at 4, 5. Contrary to employer's assertion, the administrative law judge did not find this study invalid under the quality standards at 20 C.F.R. §718.103(b). Rather, he found the February 9, 2017 study unreliable. Decision and Order at 10. The administrative law judge noted Dr. Broudy reviewed the February 9, 2017 study and opined that its "considerably higher" results than those of the other studies indicated either a change in claimant's condition or an "effort related" difference. Decision and Order at 8. He also noted Dr. Ajjarapu reviewed the February 9, 2017 study and observed the technician stated that claimant took his inhaler five hours prior to the study but did not report which respiratory medication he used. *Id*.

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to discredit it as she questioned the predicted value set used and the testing conditions. Decision and Order at 7. As the administrative law judge found the February 29, 2016 study "not sufficiently reliable" to form a disability opinion, we hold any error in his weighing of Dr. Broudy's and Dr. Ajjarapu's opinions regarding the validity of this study is harmless. *Id*.; *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[8] The administrative law judge noted Dr. Broudy stated that claimant's "effort appeared to have been satisfactory" on the July 14, 2016 study and he did not provide an opinion regarding the validity of the July 24, 2017 study. *Id*. at 11. As employer does not contest the administrative law judge's findings that the July 14, 2016 and July 24, 2017 pulmonary function studies are reliable, they are affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 11.

He further noted Dr. Ajjarapu stated that although "the half[-]life of clearance of the medicine from the system depends on the type of medicine," the "test is being performed under treated condition" even if "it is short acting" and it "should not be used in this evaluation" as claimant was "possibly medicated during the entire testing."[9] *Id*. Noting the results of the February 9, 2017 study may be artificially elevated because claimant was medicated with bronchodilators five hours before the study, the administrative law judge permissibly found the study unreliable.[10] *Id*. at 9-10; *see J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008).

Finally, employer argues the administrative law judge erred in relying on the results of the February 13, 2018 pulmonary function study from claimant's treatment records because it is "impossible to determine" their validity under the quality standards at 20 C.F.R. §718.103(b) and Appendix B(2)(ii), as no tracings accompanied the values and there was no indication each maneuver was repeated three times.[11] Employer's Brief at 5. We need not address employer's contention because any potential error would be harmless given that all of the remaining valid pulmonary function studies were qualifying for total disability. Employer has failed to show how exclusion of this test's qualifying results from the administrative law judge's analysis could have made a difference. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[9] This criticism of the study was not contradicted.

[10] As the administrative law judge provided a valid reason for finding the February 9, 2017 pulmonary function study unreliable, we need not address employer's argument he erred in according less probative weight to the study because Dr. Ajjarapu stated it used CRAPO predicted values rather than Knudson predicted values. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 4-5; Decision Order at 8. Any error by the administrative law judge in also discounting the study on this basis consequently would be harmless. *See Larioni*, 6 BLR at 1278.

[11] We reject employer's assertion the administrative law judge erred in considering the February 13, 2018 pulmonary function study because the parties did not designate it as evidence. Employer's Brief at 5. The administrative law judge admitted the treatment records containing the February 13, 2018 study into the record. Decision and Order at 2; Claimant's Exhibit 6. Because there are no evidentiary limitations for treatment records, claimant was not required to designate this study as affirmative evidence for it to be considered. 20 C.F.R. §725.414(a)(4).

Having found four of the five qualifying pulmonary function studies reliable and the sole non-qualifying pulmonary function study unreliable, the administrative law judge found the preponderance of the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11. As the administrative law judge permissibly discounted the sole non-qualifying study, his conclusion that the preponderance of the pulmonary function study evidence established total disability is supported by substantial evidence. That is so even if we were to accept employer's contention that one of the qualifying studies was invalid. Consequently, it is affirmed. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984).

The administrative law judge next considered the medical opinions of Drs. Ajjarapu, Broudy, and Westerfield. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-14. Dr. Ajjarapu[12] opined claimant is totally disabled, while Drs. Broudy[13] and Westerfield[14] opined he is not. Director's Exhibits 12, 21, 22, 24; Employer's Exhibit 2. The administrative law judge found Dr. Broudy's and Dr. Westerfield's opinions not well-reasoned. Decision and Order at 12, 13. Finding Dr. Ajjarapu's opinion well-reasoned, the administrative law judge determined the preponderance of the medical opinion evidence supports a finding of total disability. *Id*. at 13, 14.

We reject employer's assertion Dr. Ajjarapu relied on an invalid pulmonary function study. Employer's Brief at 5. The administrative law judge noted "Dr. Ajjarapu's opinion is based upon relevant histories, physical examination, and objective testing." Decision and Order at 13. Dr. Ajjarapu based her initial disability opinion on the June 13, 2016 pulmonary function study the administrative law judge found reliable. Director's Exhibit 12. She subsequently confirmed her earlier disability opinion based, in part, on her review of Dr. Broudy's and Dr. Westerfield's pulmonary functions studies. Director's Exhibit 24. Dr. Ajjarapu noted the overall pulmonary function study results showed severe pulmonary impairment. *Id*. She also stated that the February 9, 2017 pulmonary function study "should not be used in this evaluation." *Id*. Contrary to employer's assertion, the administrative law judge permissibly found Dr. Ajjarapu's opinion well-reasoned and

[12] Dr. Ajjarapu opined claimant does not have the pulmonary capacity to do his previous coal mine employment. Director's Exhibits 12, 24.

[13] Dr. Broudy opined claimant retains the respiratory capacity to do his previous work or work requiring similar effort. Director's Exhibits 21.

[14] Dr. Westerfield opined claimant retains the breathing capacity to return to his previous position in coal mine employment. Director's Exhibits 22.

documented because it is consistent with "the preponderant weight of objective testing." Decision and Order at 13, 14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Director's Exhibits 12, 24. Further, the administrative law judge permissibly found Dr. Broudy's and Dr. Westerfield's opinions not well-reasoned because they are based on objective testing he found unreliable. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000); *Peabody v. Hill*, 123 F.2d 412 (6th Cir. 1997); Decision and Order at 12, 13. Thus we reject employer's assertion the administrative law judge selectively evaluated the evidence.

We therefore affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). We further affirm his finding that all of the relevant evidence, when weighed together, established total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 14.

Because we have affirmed the administrative law judge's findings that claimant established thirty years of underground coal mine employment and a totally disabling respiratory impairment, we affirm his determination claimant invoked the Section 411(c)(4) presumption. We further affirm, as unchallenged, his finding employer did not rebut the presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-19, 22. 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

JONATHAN ROLFE
Administrative Appeals Judge