U.S. Department of Labor

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

BRB No. 19-0385 BLA

BRUCE E. HALL Claimant-Respondent v. EXCEL MINING, LLC and MAPCO, INCORPORATED c/o ALLIANCE RESOURCE PARTNERS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/05/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2018-BLA-05336) of Administrative Law Judge John P. Seller, III, rendered on a claim filed pursuant to the provisions of 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 November 24, 2015.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with seventeen years of underground coal mine employment. He further found claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and invoked the rebuttable presumption he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.305(c). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant established a totally disabling respiratory or pulmonary impairment and, thus, erred in finding claimant invoked the Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in determining employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary 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 that claimant had seventeen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

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 Associates, 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 with qualifying[4] pulmonary function studies or 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 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies performed on March 3, 2016, March 29, 2018, April 9, 2018, September 26, 2018, and September 28, 2016. The studies reflecting qualifying values include the pre-bronchodilator study dated March 3, 2016, the post-bronchodilator study dated April 9, 2018, and the pre- and post-bronchodilator studies dated March 29, 2018, and September 26, 2018. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 2 at 14-25, 3 at 8-13. The non-qualifying tests consist of the post-bronchodilator study performed on March 3, 2016, the pre-bronchodilator study performed on April 9, 2018, and the pre- and post-bronchodilator studies performed on September 28, 2018. Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibit 3 at 8-13.

The administrative law judge initially considered whether the pulmonary function studies conformed to the quality standards at 20 C.F.R. §718.103 and Appendix B to 20 C.F.R. Part 718. Then, he accorded little weight to Dr. Jarboe's opinion that the qualifying results of the March 29, 2018 post-bronchodilator study were invalid. Decision and Order

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

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

at 19; Employer's Exhibit 2 at 14. Similarly, he discredited Dr. Vuskovich's invalidation of the qualifying studies conducted on September 26, 2018, and the non-qualifying studies conducted on September 28, 2018. Decision and Order at 19-20; Employer's Exhibits 6, 7. The administrative law judge therefore determined all of the studies a reviewing physician found to be invalid and the remaining studies of record conform to the quality standards. Decision and Order at 21.

Employer alleges the administrative law judge erred in giving little weight to Dr. Jarboe's opinion that the March 29, 2018 qualifying post-bronchodilator pulmonary function study is invalid, maintaining that Dr. Jarboe explained why the maximum voluntary ventilation (MVV) value failed to conform to the quality standards. Employer's Brief at 6. We disagree. The quality standards require that if the MVV is reported, "two tracings of the MVV whose values are within 10% of each other shall be sufficient." 20 C.F.R. §718.103(a). In addition, the standards provide "[t]he effort shall be judged unacceptable" when the variation between the two largest MVVs of the three satisfactory tracings exceeds 10 percent. Appendix B to 20 C.F.R. Part 718, ¶(2)(iii)(D). Dr. Jarboe stated:

> [Claimant's] FEV1 falls below the Federal Limits for Disability. However, to qualify under the Federal Guidelines, he must also have a qualifying FVC or FEV1/FV[C] ratio or MVV. Neither his FVC nor his FEV1/FVC ratio are qualifying. The MVV is qualifying but inspection of the traces both before and after dilator show that it is not valid. [Claimant's] MVV is clearly not valid. The respiratory rate on the pre-dilator study [was] 30 breaths per minute and on the post-dilator study was also 30 breaths per minute, both values far below the requisite 90 breaths per minute needed for validity. It is my reasoned opinion, the MVV is not valid and cannot be used to assess the claimant's ventilatory function.

Employer's Exhibit 2 at 6. As the administrative law judge determined, however, Dr. Jarboe did not indicate why the MVV tracings were invalid and there is nothing in the quality standards identifying a required number of breaths per minute during the maneuver. Thus, the administrative law judge permissibly found "Dr. Jarboe's statements with regard to the validity of the MVV fail to identify non-compliance with the quality standards for administration and interpretation of pulmonary function tests, and are contradicted by the technician's account of the [c]laimant's good effort and understanding." Decision and Order at 19; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014).

Employer also argues the administrative law judge erred in finding the record contained a qualifying post-bronchodilator pulmonary function test Dr. Nader administered on March 9, 2018, and in failing to mention a non-qualifying pre-bronchodilator test Dr.

Nader administered on April 9, 2018. Employer's Brief at 4-5. In addition, employer contends the administrative law judge erred in relying, in part, on post-bronchodilator tests to find the pulmonary function studies established total disability. *Id*. at 5.

As employer suggests, the administrative law judge's reference to a March 9, 2018 study Dr. Nader performed appears to been an inadvertent clerical error in light of the fact that the actual date of the study, April 9, 2018, is correctly reported in the administrative law judge's summary of the pulmonary function study evidence and elsewhere in his decision. Decision and Order at 5, 22; Employer's Exhibit 3 at 8-13; Employer's Brief at 4-5. Regardless of whether the administrative law judge referred to the non-qualifying pre-bronchodilator test dated April 9, 2018 when making his finding that the preponderance of the pulmonary function study evidence was qualifying, any error would be harmless as his conclusion remains correct even if the April 9, 2019 pre-bronchodilator test is included.[5] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Finally, the administrative law judge did not err in relying on both qualifying pre-bronchodilator and post-bronchodilator study results to find total disability established by the pulmonary function study evidence. There is nothing in the language of 20 C.F.R. §718.204(b)(2)(i)[6] requiring the administrative law judge to distinguish between the results of pre-bronchodilator or post-bronchodilator studies for the purposes of assessing qualifying studies.

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[5] The administrative law judge referred to the April 9, 2018 pre-bronchodilator study when summarizing the pulmonary function study evidence. Decision and Order at 21. When rendering his finding on the weight of the pulmonary function study evidence, he listed only the qualifying studies. *Id*. at 22. The record contains six qualifying pulmonary function tests and four non-qualifying tests. Director's Exhibit 12; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 2.

[6] The regulation provides, in relevant part:

> In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability: (i) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV1 test; if, in addition, such tests also reveal the values specified in either paragraph (b)(2)(i)(A) or (B) or (C) of this section.

20 C.F.R. §718.204(b)(2)(i).

Because none of employer's allegations of error has merit, we affirm the administrative law judge's determination the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 23.

The administrative law judge further found the medical opinion evidence supported a finding of total disability.[7] Decision and Order at 27. The record contains the opinions of Drs. Forehand, Raj, Dahhan, and Jarboe. Drs. Forehand and Raj determined claimant has a totally disabling respiratory or pulmonary impairment, while Drs. Dahhan and Jarboe reached the contrary conclusion. Director's Exhibits 12, 24; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3. The administrative law judge discredited the opinions of Drs. Forehand, Dahhan, and Jarboe, and accorded greatest weight to the opinion of Dr. Raj.[8] Decision and Order at 27. He therefore concluded the medical opinions established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer maintains on appeal that the opinions of Drs. Dahhan and Jarboe are "clearly" entitled to greater weight than Dr. Raj's opinion, which is based on examinations performed within two days of each other and reflects bias "as he would tend to reflect the opinions he reached in his first exam on the second exam." Employer's Brief at 8; Claimant's Exhibits 1, 2; Hearing Transcript at 15-17. We reject employer's allegation Dr. Raj's diagnosis of a totally disabling impairment is biased; the allegation is not based on any evidence and rests on speculation. Because the remainder of employer's assertions do not identify specific errors in the administrative law judge's consideration of the medical opinions, they constitute a request for a reweighing of the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's determination the medical opinion evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 27.

[7] The administrative law judge found the five arterial blood-gas studies of record are non-qualifying and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 18, 23. Thus, claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(ii), (iii).

[8] The administrative law judge discredited Dr. Forehand's opinion because he did not have the opportunity to review the more recent medical evidence. Decision and Order at 24; Director's Exhibits 12, 24. He accorded "little weight" to the opinions of Drs. Dahhan and Jarboe because they did not have an accurate understanding of the pulmonary function study evidence. Decision and Order at 26, 28; Director's Exhibit 20; Employer's Exhibits 1, 2, 4.

We further affirm the administrative law judge's finding the evidence of total disability outweighed the contrary probative evidence of record. Decision and Order at 27-28. Accordingly, we also affirm the administrative law judge's determination claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(i), (iii); Decision and Order at 28.

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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[9] or by establishing that "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)(i), (ii). In this case, the administrative law judge found employer failed to rebut the presumption by either method. Decision and Order at 29-34.

Legal Pneumoconiosis

To disprove the existence of legal pneumoconiosis, employer must establish that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds this standard requires employer establish that claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522, at *4 (6th Cir. Jan 21, 2020).

The administrative law judge addressed the medical opinions of Drs. Raj, Forehand, Dahhan, and Jarboe. Drs. Raj and Forehand diagnosed chronic obstructive pulmonary

[9] 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 encompasses any chronic respiratory or pulmonary disease or impairment "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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

disease and identified coal dust exposure as a contributing cause. Director's Exhibits 12, 24; Claimant's Exhibits 1, 2. Dr. Dahhan diagnosed an obstructive impairment caused by cigarette smoking and Dr. Jarboe diagnosed chronic bronchitis due to cigarette smoking. Director's Exhibit 20; Employer's Exhibits 1, 2, 4, 5.

The administrative law judge discredited the opinions of Drs. Dahhan and Jarboe because they relied on premises that conflict with the preamble to the 2001 regulatory revisions.[10] Decision and Order at 31-34. He then recognized, "[a]s Drs. Forehand and Raj opined that the Claimant has legal pneumoconiosis, their opinions do not assist the Employer in rebutting the presumption of legal pneumoconiosis." *Id.* at 34.

Employer argues the administrative law judge erred in crediting Dr. Raj's and Dr. Forehand's diagnoses of legal pneumoconiosis. Employer's Brief at 11-12. Employer further alleges: "Dr. Jarboe and Dr. Dahhan explained how they arrived at their conclusion that coal dust exposure did not significantly contribute to his impairment and why the impairment has been caused by something else. Clearly, it was error for the ALJ to discredit the opinions of Dr. Dahhan and Dr. Jarboe." *Id*. at 12. Employer's contentions do not have merit.

Contrary to employer's allegation, the administrative law judge did not credit the opinions of Drs. Raj and Forehand that claimant has legal pneumoconiosis and give them greater weight than the contrary opinions of Drs. Dahhan and Fino. Rather, because employer has the burden to disprove legal pneumoconiosis, the administrative law judge permissibly determined their opinions diagnosing legal pneumoconiosis do not assist employer in satisfying its burden. 20 C.F.R. §718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-154-56; Decision and Order at 34.

Regarding the administrative law judge's discrediting the opinions of Drs. Dahhan and Jarboe, employer has failed to identify any specific error the administrative law judge made in rendering his credibility determinations. Employer's Brief at 5. The Board must

[10] The administrative law judge found Dr. Dahhan relied on assumptions contrary to the Department of Labor's views, including: coal dust rarely causes significant losses in FEV1 values on pulmonary function testing; and dust exposure is not additive to smoking in its negative effects on lung function. Decision and Order at 31-33, *citing* 65 Fed.Reg. 79,920, 79,938-41 (Dec. 20, 2000). Similarly, he determined Dr. Jarboe based his opinion on premises in conflict with the Department's views that: pneumoconiosis is a latent and progressive disease; coal dust can cause obstructive lung disease at the same rate and severity as smoking; and coal dust can have an additive effect with smoking. Decision and Order at 33-34, *citing* 65 Fed.Reg. at 79,920, 79,940.

limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *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). As employer's brief raises no specific allegations of error regarding the administrative law judge's discrediting of its experts' opinions, we affirm the administrative law judge's finding employer failed to disprove legal pneumoconiosis. *See Sarf*, 10 BLR at 1-120-21; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We further affirm, therefore, the administrative law judge's finding employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In its brief on appeal, employer makes no reference to the administrative law judge's determination it failed to establish that "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); Decision and Order at 34-35. Thus, we affirm this finding as unchallenged on appeal. 20 C.F.R. §802.211, 802.301; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore further affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption by either method. Decision and Order at 29-34.

[11] Because employer must rebut both legal and clinical pneumoconiosis, the administrative law judge's finding that employer did not disprove legal pneumoconiosis precluded rebuttal under 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's allegation that the administrative law judge erred in finding it failed to disprove clinical pneumoconiosis as any error by the administrative law judge would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 31.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge