U.S. Department of Labor

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

BRB No. 20-0259 BLA

STANLEY HORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOSS FORK COAL COMPANY	)	
	)	DATE ISSUED: 06/29/2021
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, 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 Richard M. Clark's Decision and Order Awarding Benefits (2018-BLA-05216) rendered on a claim filed on June 2, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 38.32 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. Thus, he found Claimant invoked the 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 further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues that the administrative law judge erred in finding Claimant is totally disabled and in invoking the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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 a previous claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 38.32 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.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 9 n.5; Director's Exhibit 4.

into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 361-62 (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 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). Employer argues the administrative law judge erred in finding Claimant established total disability based on the medical opinion evidence.[5] 20 C.F.R. §718.204(b)(2)(iv). We disagree.

The administrative law judge considered the medical opinions of Drs. Nader, Fino, Raj, Green, and McSharry. He determined Dr. Nader failed to consider the later evidence of record and, therefore, his opinion that Claimant is totally disabled did not merit significant weight. Decision and Order at 11; Director's Exhibit 18. He further found Dr. Fino failed to address whether Claimant could return to his previous coal mine job. Decision and Order at 12; Director's Exhibit 23. We affirm these findings as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As for the remaining opinions, Drs. Raj and Green opined Claimant has a totally disabling pulmonary impairment, while Dr. McSharry stated he has a mild impairment, if any. Claimant's Exhibits 1, 2; Employer's Exhibit 6. The administrative law judge relied

[5] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies or blood gas studies. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 4-5, 10-11; Director's Exhibits 18, 23; Employer's Exhibit 5; Claimant's Exhibits 1, 2. He also found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11. Further, the administrative law judge found Claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis because the weight of the evidence does not establish he has complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 17-19.

on Drs. Raj's and Green's opinions to find total disability established. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12.

Employer asserts the administrative law judge erred in crediting the opinions of Drs. Raj and Green because their conclusions are contrary to his findings that the objective testing is non-qualifying for total disability. Contrary to Employer's argument, the fact that the administrative law judge found the weight of the pulmonary function study and blood gas study evidence to be non-qualifying does not preclude a finding of total disability based on a reasoned medical opinion. The regulations specifically provide that total disability may be established based on a physician's reasoned opinion that a miner cannot perform his or her usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying.[6] 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

Employer also contends their opinions are flawed because they diagnosed complicated pneumoconiosis, while the administrative law judge found Claimant did not establish the disease. The administrative law judge acknowledged that Drs. Raj and Green diagnosed complicated pneumoconiosis, but found they did not solely base their disability diagnoses on it. Instead, they further explained why Claimant is totally disabled based on the objective testing.[7] Decision and Order at 11-12. Dr. Green relied on the totality of objective studies showing abnormal gas exchange with hypoxemia and moderate airflow obstruction. Decision and Order at 7-8, 11-12; Claimant's Exhibit 2 at 3-4. Similarly, Dr. Raj relied on abnormal pulmonary function studies reflecting a moderate obstructive and restrictive defect, and resting and exercise blood gas studies demonstrating hypoxemia. Decision and Order at 6-7, 12; Claimant's Exhibit 1 at 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the opinions of Drs. Green and Raj are adequately reasoned to support a finding of total disability.[8] *See*

[6] 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).

[7] Drs. Raj and Green noted Claimant's usual coal mine work as a continuous miner operator required him to lift and carry fifty pounds. Claimant's Exhibits 1 at 1; 2 at 1.

[8] Employer generally asserts Dr. Raj's qualifying August 21, 2018 pulmonary function study must be due to faulty testing or poor effort, or reflect a temporary impairment, in part because Claimant's testing improved days later when conducted by Dr. Green. Employer's Brief (unpaginated) at 13. Thus, Employer alleges the credibility of

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 11-12; Claimant's Exhibit 1 at 4.

Employer also asserts Dr. McSharry's opinion that Claimant is not totally disabled is more credible in view of the non-qualifying objective tests. Employer notes Dr. McSharry explained that Claimant's impairment improved over time and is inconsistent with an irreversible impairment related to coal mine dust exposure. Employer's Brief at 14-15 (unpaginated). However, Employer conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(a), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

Dr. McSharry opined that Claimant, at most, has a mild respiratory impairment based on Dr. Green's August 24, 2018 pulmonary function testing, which he deemed "the best gauge currently of the claimant's lung function." Employer's Exhibit 6 at 3. He nevertheless opined that because this study did "not achieve the Department of Labor standards for disability," there is "no evidence of respiratory disability from any cause[.]" *Id*. The administrative law judge permissibly found Dr. McSharry's opinion unpersuasive because he "did not address the issue of whether, considering all the evidence and test results, regardless of whether they met the disability levels, Claimant retained the pulmonary capacity to perform his previous coal mine work." *See Cornett*, 227 F.3d at

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Dr. Raj's opinion is undermined by his reliance on the study. *Id*. However, Employer does not challenge the administrative law judge's findings regarding the pulmonary function study evidence, nor does it assert the administrative law judge erred by failing to find the August 21, 2008 study invalid. *Id.*; *see* Decision and Order at 4, 10-11. Moreover, its argument ignores that while Claimant's pulmonary function study results varied between Dr. Raj's testing and Dr. Green's testing, both physicians diagnosed a respiratory impairment and explained why Claimant is totally disabled. Even if Dr. Raj's opinion were discredited, we have upheld the administrative law judge's crediting of Dr. Green's opinion and his rejection Dr. McSharry's opinion. Because Dr. Green's opinion constitutes substantial evidence supporting a finding that Claimant is totally disabled, any error by the administrative law judge in also crediting Dr. Raj's opinion would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made a difference.").

578; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 12; Employer's Exhibit 6 at 3.

Employer does not identify any error in the administrative law judge's consideration of Dr. McSharry's opinion. Instead, it simply requests the Board to reweigh that evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, 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 the administrative law judge's determination that Claimant invoked the Section 411(c)(4) presumption.

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,[9] or that "no part of [his] 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). The administrative law judge found Employer failed to establish rebuttal by either method.

Employer has not alleged error in the administrative law judge's determination that it did not rebut the Section 411(c)(4) presumption. We therefore affirm it and the award of benefits. *See* 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 12-17.

[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). 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). "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).

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