U.S. Department of Labor

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

BRB No. 20-0349 BLA

JACK KORZUN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	DATE ISSUED: 06/28/2021
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Paul E. Frampton (Bowles Rice, LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (Elena S. Goldstein, Deputy 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: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-06036) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on August 1, 2018.[1] Director's Exhibit 4.

The administrative law judge found Claimant established at least twenty-nine years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4)(2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding total disability established and it failed to rebut the Section 411(c)(4) presumption.[3] It further argues the administrative law judge failed to make findings regarding its argument that Peabody Energy Corporation (Peabody) is not the correctly named responsible insurer and that Patriot Coal (Patriot) should have been named. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), filed a Motion to Remand, agreeing with Employer that the administrative law judge failed

---

[1] Claimant previously filed a claim in 1997. *See* Director's Exhibits 1-2, 4. The claim was denied and the Federal Records Center subsequently destroyed the file. *Id*.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 finding that Claimant established at least twenty-nine years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7.

to address Employer's arguments that liability should shift to Patriot.[4] The Director therefore requests that we remand this case for the administrative law judge to address the liability issue.

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.[5] 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).

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 pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the 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).

The administrative law judge considered two pulmonary function studies administered on October 4, 2018 and September 30, 2019, with values obtained before and after bronchodilators. Decision and Order at 18. The pre-bronchodilator values from the 2018 study did not qualify as disabling, while the remaining results of both studies all

---

[4] The Director filed a Motion to Accept Response to Employer's Petition for Review Although Filed Out of Time along with the Motion to Remand. On April 14, 2021, the Board granted the Director's motion, construed the pleading to be the Director's response brief, and accepted it as part of the record.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] The administrative law judge found the arterial blood gas studies did not support total disability, and there is 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 19.

qualified as disabling.[7] Decision and Order at 18; Director's Exhibit 14; Employer's Exhibit 3. The administrative law judge found the pulmonary function studies established total disability, as three of the four test values, including those from the most recent study, qualified for disability under the regulations. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18.

Employer argues the administrative law judge erred in relying on the September 30, 2019 pulmonary function study because it asserts the study is invalid.[8] Employer's Brief at 4. Employer, however, did not dispute the validity of this study before the administrative law judge. We will not consider such challenges for the first time on appeal. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). The administrative law judge rationally found the pulmonary function studies establish total disability because three of the four results obtained were qualifying, including both the pre- and post-bronchodilator results of the September 30, 2019 study, which was the most recent by almost one year.[9] *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-14 (1993); Decision and Order at 18. Thus, we affirm the administrative law judge's finding that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 18. *Id.* at 5.

Employer next argues that the administrative law judge's alleged error in weighing the pulmonary function studies undermines his finding that the medical opinions establish total disability. Employer's Brief at 5. We reject this argument given our affirmance of the administrative law judge's finding that the pulmonary function studies support total disability. Therefore, we affirm the administrative law judge's finding that the medical opinions established total disability as supported by substantial evidence.[10] *See Anderson*

[7] 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).

[8] Employer contends Claimant performed the September 30, 2019 pulmonary function study "at a time during or soon after an acute respiratory illness," contrary to the regulations. Employer's Brief at 4.

[9] The record reflects that Employer's medical experts, Drs. Basheda and Zaldivar, relied upon the September 30, 2019 pulmonary function study to opine that Claimant is totally disabled. Employer's Exhibits 10 at 20; 11 at 30.

[10] The administrative law judge found Dr. Jin's opinion that Claimant is not totally disabled to be undermined because he was unaware of the most recent, fully qualifying pulmonary function study. Decision and Order at 22. The administrative law judge

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989). Accordingly, we affirm the administrative law judge's determination that Claimant established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b); Decision and Order at 8, 22.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[11] nor clinical pneumoconiosis,[12] or "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.[13] Decision and Order at 15, 25.

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 Co*., 25 BLR 1-149, 159 (2015).

---

credited the opinions of Drs. Basheda and Zaldivar that Claimant is totally disabled based on the most recent pulmonary function testing. Decision and Order at 22; Employer's Exhibits 10 at 20; 11 at 30.

[11] "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).

[12] "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 but not legal pneumoconiosis. Decision and Order at 14-15. Employer must disprove both to establish rebuttal of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge considered Drs. Basheda's and Zaldivar's opinions that Claimant does not have legal pneumoconiosis.[14] Employer's Exhibits 3-4, 10-11. Dr. Basheda diagnosed Claimant with uncontrolled asthma unrelated to his coal mine dust exposure. Employer's Exhibits 3 at 11-12; 10 at 18. He indicated that miners can develop asthma, but when they do, they cannot continue to work in the mining environment without having "serious respiratory problems" and there is no evidence that Claimant had any such issues when he was a coal miner. Employer's Exhibits 3 at 12; 10 at 18. Dr. Zaldivar indicated Claimant is likely asthmatic and also potentially has congestive heart failure. Employer's Exhibits 4 at 3; 11 at 14-15, 28. He stated the decline in Claimant's lung function between 2018 and 2019 occurred too quickly to be due to a coal mine dust induced disease. Employer's Exhibits 4 at 3; 11 at 21-22. Dr. Zaldivar also stated "there is no history whatsoever . . . that this man acquired asthma in the course of his work." Employer's Exhibit 11 at 37.

The administrative law judge noted that while both Drs. Basheda and Zaldivar opined that Claimant has asthma unrelated to his coal mine dust exposure, the preamble to the 2001 revised regulations "links chronic obstructive pulmonary disease (including asthma and bronchitis) to coal mine dust exposure [and] . . . [u]nfortunately for both Dr. Basheda's and Dr. Zaldivar's opinions the Preamble does not differentiate between occupational and other forms of asthma." Decision and Order at 15 (citing 65 Fed. Reg. 79,920, 79,939 (Dec 20, 2000)). He further found Dr. Zaldivar's explanation that Claimant's impairment progressed too quickly to be pneumoconiosis undermined by the physician's failure to cite any supporting medical literature and contrary to the recognition that coal workers' pneumoconiosis is a progressive disease. Decision and Order at 15, 25. The administrative law judge also found Dr. Basheda's opinion that Claimant's asthma is unrelated to coal mine dust exposure because it is inconsistent with occupational asthma to be unsupported by reference to any medical literature. *Id.* at 25. Therefore, he found neither doctor's opinion sufficiently reasoned to rebut the presumption. *Id.* at 15.

Employer argues the administrative law judge applied an incorrect standard when considering the issue of legal pneumoconiosis, as he assumed a "finding of asthma ends the inquiry of whether the asthma is significantly contributed to by coal mine dust exposure." Employer's Brief at 6. Employer further argues the administrative law judge did not fully consider the physicians' opinions, ignoring Drs. Zaldivar's and Basheda's statements that Claimant's decrease in function was too sudden to be due to coal mine dust exposure and that his asthma did not fit the pattern of occupational asthma. *Id.* at 8-9. It also contends the administrative law judge's discrediting of the doctors' opinions as

[14] Dr. Jin, who examined Claimant on behalf of the Department of Labor, diagnosed legal pneumoconiosis. Director's Exhibit 14.

contrary to the latent and progressive nature of coal workers' pneumoconiosis is erroneous because there is no contrary evidence that a sudden drop in function can be due to a coal mine dust disease, and a doctor need not cite medical literature to provide a well-reasoned opinion. *Id.* at 9-10.

Contrary to Employer's contentions, the administrative law judge considered Dr. Zaldivar's opinion that Claimant's lung function declined too quickly to be due to coal mine dust exposure. He discounted it in part because Dr. Zaldivar provided no medical literature in support of his opinion. *Id.* As the regulations do not set forth any requisite time period for a decline in lung function to be relevant to whether a claimant's progressive disease is consistent with pneumoconiosis, the administrative law judge permissibly discounted Dr. Zaldivar's opinion because he cited no medical literature to support his reasoning that a "sudden" decline in function is inconsistent with pneumoconiosis. *See* 20 C.F.R. §718.201; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173 (4th Cir. 1997) (administrative law judge "may weigh the medical evidence and draw his own conclusions"); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) ("It is the role of administrative law judge, as the trier of fact, to determine both the credibility of the evidence and the inferences to be drawn from it.").

Similarly, the administrative law judge permissibly discredited Dr. Basheda's opinion that Claimant's asthma was inconsistent with asthma caused or aggravated by coal mine dust as unsupported by any medical literature, particularly in view of the preamble's conclusion that chronic obstructive pulmonary disease, including asthma, can be related to coal mine dust exposure.[15] *See Fagg*, 12 BLR at 1-79; Decision and Order at 25.

In addition, Employer's argument that the administrative law judge erred in discrediting their opinions because there were no contrary opinions or evidence is misplaced. It is the administrative law judge's role as the factfinder to consider the medical opinions and determine if they are well-reasoned and documented. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (administrative law judge is not bound to accept the opinion or theory of any medical expert). Further, it is Employer's burden to affirmatively establish rebuttal of the Section 411(c)(4) presumption, notwithstanding a

[15] Dr. Basheda indicated that "in my experience as a pulmonologist of over 25 years, caring for patients with occupational asthma, these patients cannot exist in a particular environment." Employer's Exhibit 3 at 12. He also acknowledged, however, that "I can't, off the top of my head, recall someone that left the coal mines because of asthma." Employer's Exhibit 10 at 22.

lack of contrary evidence. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015).

The administrative law judge permissibly found Drs. Basheda's and Zaldivar's opinions not credible and therefore do not support Employer's burden. As his findings are supported by substantial evidence, we affirm his determinations to discredit Drs. Basheda's and Zaldivar's opinions that Claimant does not have legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(A); *Compton*, 211 F.3d at 207-208. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.

Disability Causation

The administrative law judge next addressed whether Employer established rebuttal of disability causation. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found Drs. Basheda's and Zaldivar's opinions unpersuasive for the same reasons he rejected their opinions regarding legal pneumoconiosis. Decision and Order at 25.

In a footnote in its brief, Employer asserts the administrative law judge's application of the "no part" standard makes no sense when clinical pneumoconiosis is not present and the sole issue is legal pneumoconiosis. Employer's Brief at 5-6, n.2. Employer further argues that even if the administrative law judge was correct in applying the "no part" standard, his findings are contrary to the regulations and irrational. *Id.*

Contrary to Employer's assertion, the regulations provide that, to disprove disability causation when the Section 411(c)(4) presumption is invoked, Employer must establish "no part" of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, either clinical or legal. 20 C.F.R. 718.305(d)(1)(ii). Further, as we addressed above, the administrative law judge did not err in discounting Drs. Basheda's and Zaldivar's opinions that Claimant does not have legal pneumoconiosis. The administrative law judge thus rationally found the same reasons also undermined their

[16] The administrative law judge did not incorrectly presume that all asthma in coal miners constitutes legal pneumoconiosis. Rather, by operation of the Section 411(c)(4) presumption, Claimant is presumed to have legal pneumoconiosis, with the burden shifting to Employer to establish he does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by," coal mine dust. Moreover, the administrative law judge did not "end the inquiry" to find Claimant's asthma is necessarily legal pneumoconiosis, as Employer suggests. He considered the reasoning of Drs. Basheda and Zaldivar that Claimant's asthma did not constitute legal pneumoconiosis and found their opinions unpersuasive. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 15, 25; Employer's Brief at 6-8.

opinions that pneumoconiosis did not cause Claimant's disabling respiratory impairment. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). Therefore, we affirm the administrative law judge's finding that Employer did not establish that no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

Because we have affirmed the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and Employer did not rebut the presumption, Claimant has established his entitlement to benefits and, consequently, we affirm the award. 30 U.S.C. §921(c)(4) (2018).

Responsible Insurer

Employer argued before the district director and the administrative law judge that Peabody was not correctly identified as the responsible insurer and that Patriot should instead have been named. Director's Exhibits 20, 23; Employer's Prehearing Report at 1; Employer's Closing Argument at 11-32. It further submitted documents to the district director that it alleged supported its theory that Patriot is liable. Director's Exhibit 20. At the hearing, the administrative law judge acknowledged Employer's contentions and further admitted into evidence the deposition testimony of former Department of Labor employees, Steven Breeskin and David Benedict, over the Director's motion to exclude their testimony. Hearing Transcript at 6. Both Employer and the Director addressed the liability issue in their closing briefs. Employer's Closing Argument at 11-32; Director's Post-Hearing Brief Regarding Responsible Operator Designation.

As the Director and Employer note, however, the administrative law judge did not address any of Employer's specific arguments that liability should shift to Patriot as the responsible insurer. Employer's Brief at 15-16; Director's Motion to Remand at 3. Rather, he found only that Claimant's last coal mine employment for at least one year was with Eastern Associated Coal, LLC.[17] Director's Brief at 3; Decision and Order at 4-5.

The administrative law judge must provide "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge made no findings in response to Employer's arguments regarding

---

[17] Employer has not challenged the finding that Eastern Associated Coal, LLC is the responsible operator. We therefore affirm it. *See Skrack*, 6 BLR at 1-711.

the responsible insurer, we must remand this claim for him to make such findings.[18] *See v. Wash. Metro. Area Trans. Auth.*, 36 F.3d 375, 383-84 (4th Cir. 1994) (the administrative law judge is the factfinder; thus, the Board should not rule on an issue before the administrative law judge has considered it).

---

[18] At the hearing, when allowing the deposition transcripts of Steven Breeskin and David Benedict into the record, the administrative law judge indicated "[they] don't really factor into my determination of the [responsible operator] as they go over issues or above issues that I'm able to determine." Hearing Transcript at 6-7. It is unclear whether he was concluding he lacks authority to determine the responsible operator issue, or simply determining that the deposition transcripts do not provide relevant information on that issue. If the former, resolving the responsible operator and insurer issues are within the scope of the administrative law judge's authority. *See, e.g.*, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018) (explaining an administrative law judge must make a de novo determination of an operator's liability). If the latter, the administrative law judge must explain his determination in accordance with the APA.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and the case is remanded to the administrative law judge for consideration of the responsible insurer issue.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge