U.S. Department of Labor

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

BRB No. 19-0097 BLA

HARMON L. KILGORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	DATE ISSUED: 03/12/2020
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-06041) of Administrative Law Judge Dana Rosen 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 subsequent claim filed on March 28, 2014.[1] 20 C.F.R. §725.309(c).

The administrative law judge found claimant established thirty-eight and one-half years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. She therefore 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),[2] and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).[3] The administrative law judge further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant totally disabled and, therefore, in invoking the Section 411(c)(4) presumption. Employer further asserts the administrative law judge erred in finding it failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

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[1] On June 9, 1981, the district director denied claimant's prior claim, filed on July 25, 1978, for failure to establish pneumoconiosis and a totally disabling respiratory impairment. Director's Exhibit 1; Decision and Order at 2. Claimant took no further action until filing the present subsequent claim.

[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 coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements to obtain review of his claim. *See* 20 C.F.R. §725.309(c).

substantial evidence, and in accordance with applicable law.[4] 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

To invoke the Section 411(c)(4) presumption, claimant must establish he has a totally disabling respiratory or pulmonary impairment.[5] 20 C.F.R. §718.305(b)(iii). 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). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying pulmonary function studies or arterial blood gas studies,[6] 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). If the administrative law judge finds total disability established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

After finding claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii)[7] the administrative law judge considered the medical opinions of

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 4, 7.

[5] Because employer does not challenge the administrative law judge's findings that the miner had thirty-eight and one-half years of underground coal mine employment and that his usual coal mine work required heavy labor, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 19.

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

[7] The administrative law judge found the pulmonary function studies are invalid and the arterial blood gas studies produced non-qualifying values, thereby precluding a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 6-7, 20-21. Similarly, because there is no evidence of cor pulmonale with right-sided

Drs. Ajjarapu and Sargent at 20 C.F.R. §718.204(b)(2)(iv).[8] Dr. Ajjarapu opined claimant is totally disabled from a respiratory standpoint while Dr. Sargent opined claimant retains the pulmonary capacity to perform his usual coal mine work but is disabled by other factors. In finding the medical opinions established total disability the administrative law judge credited Dr. Ajjarapu's opinion as well reasoned and documented and discredited Dr. Sargent's opinion as inadequately explained.

We reject employer's contention the administrative law judge erred in crediting Dr. Ajjarapu's opinion because it was neither well-reasoned nor documented. *See* Employer's Brief at 6-11. Dr. Ajjarapu examined claimant, considered his employment and exposure histories, and conducted objective testing including pulmonary function and arterial blood gas studies. Decision and Order at 9-10, 21-22; Director's Exhibit 11. As the administrative law judge observed, in her initial May 7, 2014 report, Dr. Ajjarapu noted the pulmonary function testing was flawed as it "shows poor reproducibility and has interruptions in volume flow curves," but concluded that it also demonstrated an obstructive impairment that did not normalize with bronchodilator treatment. Decision and Order at 6-7, 8-10; Employer's Brief at 7; Director's Exhibit 11 at 15-16. She further noted the arterial blood gas study she conducted, while non-qualifying, showed very mild hypoxemia. Decision and Order at 6-7, 8-10; Director's Exhibit 11 at 15-16.

Based on her overall evaluation including the objective test results and claimant's symptoms of shortness of breath, wheezing, and cough, Dr. Ajjarapu concluded he is totally disabled. Director's Exhibit 11 at 15-16. In her supplemental reports, Dr. Ajjarapu acknowledged a Department of Labor consultant determined the pulmonary function testing she conducted was technically invalid, but reiterated her conclusion that based on her examination and evaluation of the record claimant is totally disabled. Decision and Order at 9; Director's Exhibit 11 at 2, 3. Thus, there is no merit to employer's assertion that Dr. Ajjarapu "failed to fully consider the validity issues" with the pulmonary function testing and based her opinion that claimant is disabled "solely" on claimant's reported symptoms and her personal belief. *See* Decision and Order at 23, 24; Employer's Brief at 7-11.

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congestive heart failure, she found claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 6-7, 21.

[8] The administrative law judge determined Drs. Ajjarapu and Sargent have strong credentials in pulmonary medicine and are equally qualified to provide disability assessments. Decision and Order at 8, 11, 21.

Nor is there merit to employer's assertion the administrative law judge failed to adequately explain why she credited Dr. Ajjarapu's opinion as the Administrative Procedure Act (APA) requires.[9] As set forth above, the administrative law judge found Dr. Ajjarapu's conclusions supported by objective testing that she opined reflected obstruction and mild hypoxemia despite being technically invalid or non-qualifying. Decision and Order at 22. Further, she found Dr. Ajjarapu's conclusion that claimant suffers from a respiratory impairment is also supported by claimant's treatment records diagnosing pneumoconiosis and chronic obstructive pulmonary disease (COPD) and documenting his ongoing treatment with inhalers and nebulizers. Decision and Order at 22. Additionally, she found Dr. Ajjarapu's conclusions supported by the credible testimony of claimant's daughter that over the last few years his breathing problems worsened to the point where he could no longer hunt, fish or go on long walks like he did previously. Decision and Order at 22; Hearing Transcript at 19.

The determination of whether a medical opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge permissibly relied on Dr. Ajjarapu's opinion because she found it based on the totality of information from her examination, including relevant work and social histories, claimant's symptoms, physical findings, and the results of objective tests, as well as supported by other evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *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 22, 24. Thus, we affirm the administrative law judge's determination that Dr. Ajjarapu's opinion is well-reasoned, persuasive, merits significant probative weight, and supports a finding of a totally disabling pulmonary impairment. *See Compton*, 211 F.3d at 212.

We further reject employer's contention the administrative law judge erred in discrediting Dr. Sargent's opinion that claimant's total disability is not pulmonary in nature and that he could perform heavy exertional labor from a pulmonary perspective. Decision and Order at 11-16, 21, 23-24; Director's Exhibits 8, 12; Employer's Exhibit 5. Contrary to employer's assertion, the administrative law judge did not discredit Dr. Sargent's opinion for failing to consider claimant's symptoms and relying only on the non-qualifying testing. Employer's Brief at 12. The administrative law judge acknowledged Dr. Sargent's

[9] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issue of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

opinion that claimant's shortness of breath was not indicative of a respiratory or pulmonary impairment and would not, in itself, prevent claimant from performing his usual coal mine work requiring heavy labor. Decision and Order at 23. She permissibly found, however, Dr. Sargent did not adequately explain his conclusion in light of his notation that claimant is short of breath walking from room to room and it takes him a long time to recover when he stops to rest.[10] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 23; Employer's Exhibit 8 at 6. Further, the administrative law judge accurately observed Dr. Sargent considered, incorrectly, that claimant is not taking medication for pulmonary problems, contrary to the claimant's documented treatment with nebulizers and inhalers. Decision and Order at 23; Employer's Exhibit 8 at 8. Based on the foregoing, the administrative law judge permissibly found Dr. Sargent's opinion unpersuasive and entitled to little weight. *Compton*, 211 F.3d at 213; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24.

The administrative law judge is empowered to weigh the medical evidence and draw her own inferences, and the Board may not reweigh the evidence or substitute its own inferences. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999). Because employer has not shown error in the administrative law judge's weighing of the medical opinions, we affirm her finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 24. We further affirm her finding that weighing all the evidence together, claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198; Decision and Order at 24. We therefore affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. Decision and Order at 24-25.

[10] Moreover, in opining claimant's symptom of shortness of breath is not indicative of a pulmonary or respiratory impairment, Dr. Sargent stated that shortness of breath "is very non-specific" and can be due to heart disease, lung disease, or an overall state of deconditioning. Employer's Exhibit 5 at 14-15. To the extent Dr. Sargent opined claimant's shortness of breath cannot be considered a respiratory impairment because it could be due to a condition outside the lungs, we note the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is, or was, present. The etiology of the impairment is addressed under the disability causation element. *See* 20 C.F.R. §718.204(c).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that he had neither legal nor clinical pneumoconiosis,[11] 20 C.F.R. §718.305(d)(2)(i), 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)(2)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis,[12] employer must demonstrate 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 Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Ajjarapu and Sargent. Dr. Ajjarapu opined claimant suffers from legal pneumoconiosis in the form of chronic bronchitis due to both coal dust and cigarette smoking. Director's Exhibit 11. Dr. Sargent opined claimant does not have legal pneumoconiosis. Employer's Exhibit 8 at 16. The administrative law judge accorded greater weight to the opinion of Dr. Ajjarapu to find employer failed to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 27-28.

We reject employer's argument the administrative law judge erred in according significant weight to Dr. Ajjarapu's opinion. Employer's Brief at 20-22. Dr. Ajjarapu diagnosed chronic bronchitis based on the presence of daily cough with sputum production, shortness of breath and wheezing.[13] As the administrative law judge observed, she explained that "both coal dust and tobacco smoking cause airways inflammation leading

[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). "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).

[12] The administrative law judge also found employer failed to establish the miner did not have clinical pneumoconiosis. Decision and Order at 28.

[13] Dr. Sargent agreed a productive cough is indicative of chronic bronchitis. Employer's Exhibit 8 at 14.

to bronchospasm and cause excessive airway secretions and bronchitic symptoms." Director's Exhibit 11 at 15; *see* Decision and Order at 8-9. She also noted claimant's work was performed underground with the majority of time spent at the coal face. Director's Exhibit 11 at 1. "Given the length of employment in the coal mines and the short history of smoking," Dr. Ajjarapu concluded coal dust had "a material adverse effect" on claimant's lungs.[14] *Id.* at 16. The administrative law judge specifically found Dr. Ajjarapu's opinion well-supported by her findings on examination, claimant's symptoms, and claimant's treatment records documenting the diagnosis and treatment of COPD. Decision and Order at 27-28. We therefore affirm the administrative law judge's determination Dr. Ajjarapu's diagnosis of legal pneumoconiosis is "well-reasoned" and entitled to significant weight. *See* 20 C.F.R. §718.201(a)(2), (b); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 28. In asserting Dr. Ajjarapu's opinion is not credible, employer asks for a reweighing of the evidence which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer next asserts the administrative law judge erred in according little weight to Dr. Sargent's opinion that claimant does not have legal pneumoconiosis. Employer's Brief at 17-21. We disagree. The administrative law judge permissibly found the same deficiencies for which she discredited Dr. Sargent's opinion that claimant does not have a disabling respiratory impairment also undercut his opinion that claimant does not have legal pneumoconiosis.[15] *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 27-28. This finding is affirmed, as it is both unchallenged on appeal and supported by substantial evidence. *See Compton*, 211 F.3d at 213; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). In asserting Dr. Sargent's opinion is more credible than Dr. Ajjarapu's opinion, employer again seeks a reweighing of the evidence, which we cannot do. *See Anderson*, 12 BLR at 1-113.

Because the administrative law judge permissibly credited the opinion of Dr. Ajjarapu that claimant has legal pneumoconiosis and rejected the contrary opinion of Dr.

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[14] Dr. Ajjarapu recorded that claimant had over forty years of coal mine employment and smoked approximately one pack of cigarettes per week, quitting in 1994, approximately twenty years prior to her examination. Director's Exhibit 11. Dr. Sargent similarly recorded claimant has a forty-year coal mine employment history and smoked an average of one pack per week, quitting "many years ago." Director's Exhibit 12.

[15] Dr. Sargent stated because he was unable to diagnose a respiratory impairment, he was unable to diagnose legal pneumoconiosis. Director's Exhibit 12.

Sargent, we affirm her finding that employer failed to establish claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(2)(i).

[16] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's argument the administrative law judge erred in also finding it did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 28; Employer's Brief at 13-15.

We also affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to establish that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28-29. We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii).

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

DANIEL T. GRESH
Administrative Appeals Judge