U.S. Department of Labor

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

BRB No. 19-0172 BLA

CARLOS L. STURGILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	DATE ISSUED: 03/31/2020
	)	
and	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

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

Michelle S. Gerdano (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, ROLFE and GRESH, Administrative Appeals Judges

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05765) of Administrative Law Judge Lauren C. Boucher 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 August 30, 2016.[1]

The administrative law judge credited claimant with thirty-three years of qualifying coal mine employment, as the parties stipulated, and found claimant has a totally disabling respiratory or pulmonary impairment. She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer summarily objects to the application of the Section 411(c)(4) presumption, contending Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, which revived this provision, "violates Article II of the United

[1] Claimant filed a Motion to Alter, Amend & Vacate before the Board, asserting he provided supporting documentation concerning his dependents when the case was before the district director and it should have been placed in the record and sent to the administrative law judge. Employer objected to the motion. The Board denied claimant's motion because its "scope of review is limited to the record developed at the hearing before the administrative law judge." *Sturgill v. North Fork Coal Corp.*, BRB No. 19-0172 BLA, slip op. at 2 (Apr. 23, 2019) (Order) (unpub.). The Board informed claimant that the documentation could serve as a basis for modification before the district director. *Id.*; *see* 20 C.F.R. §725.310.

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

States Constitution." Employer's Brief at 2. On the merits of entitlement, employer asserts the administrative law judge erred in finding claimant established total respiratory disability. Employer also contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board not to entertain employer's unidentified constitutional objection.[3]

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 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).

We agree with the Director that employer does not provide any specific argument for its constitutional objection to the Section 411(c)(4) presumption. Employer's Brief at 2. It merely states an unsupported conclusion. Thus, we decline to address it. *See* 20 C.F.R. §802.211(b); *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 considered 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. 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 found claimant established total disability through the pulmonary function studies

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant established thirty-three years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Hearing Transcript at 65-66.

[4] We 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 6.

and medical opinions, and based on the evidence as a whole.[5] Decision and Order at 6-13; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

The administrative law judge considered pulmonary function studies dated December 13, 2016, June 5, 2017, and January 15, 2018, which listed claimant's height as 70 inches, 68.5 inches, and 68 inches, respectively.[6] Decision and Order at 6-7; Director's Exhibit 12; Employer's Exhibits 1-2. Relying on an average height of 68.8 inches, the administrative law judge used the closest greater table height of 68.9 inches in determining the applicable height when comparing the study results with the values in the 20 C.F.R. Part 718, Appendix B tables. Decision and Order at 6. She found the pulmonary function studies dated December 13, 2016 and January 15, 2018 produced qualifying values and the study dated June 5, 2017 produced non-qualifying values before and after the administration of bronchodilators.[7] Decision and Order at 7-8; Director's Exhibit 12; Employer's Exhibit 1- 2. Consequently, she concluded the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8.

We reject employer's assertion the administrative law judge erred in using 68.8 inches as claimant's height when finding the December 13, 2016 and January 15, 2018 studies qualifying, rather than the 68 or 68.5 inch heights those studies listed, which would render the December 13, 2016 study non-qualifying. *See* Employer's Brief at 3. Contrary to employer's contention, the administrative law judge permissibly resolved the conflict in the heights listed by averaging the various heights to find claimant's height to be 68.8 inches. Decision and Order at 6; *see Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (administrative law judge must make a factual finding to determine the miner's height when studies conflict); *see also K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-

[5] The administrative law judge found total disability was not established at 20 C.F.R. §718.204(b)(2)(ii) because none of the blood gas studies supported a finding of total disability. Decision and Order at 9; *see* Director's Exhibit 10; Employer's Exhibits 1, 2. She further found the record insufficient to establish cor pulmonale with right-sided congestive heart failure. Decision and Order at 6 n.8. Thus, claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

[6] The administrative law judge also considered an October 13, 2016 pulmonary function study but did not include this study when resolving the discrepancy in heights because she found it invalid. Decision and Order at 6-7; Director's Exhibit 10.

[7] A "qualifying" pulmonary function study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

40, 1-44 (2008) (administrative law judge acted within her discretion in averaging the listed heights on the pulmonary functions studies of record). We therefore affirm her finding the December 13, 2016 and January 15, 2018 pulmonary function studies produced qualifying values. *See* Decision and Order at 7-8. As employer makes no other allegations of error concerning the administrative law judge's weighing of the pulmonary function study evidence, we further affirm her conclusion claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

We also affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv); employer does not challenge the opinions of Drs. Alam, Rosenberg, and Westerfield diagnosing total respiratory disability. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; Decision and Order at 12-13; Director's Exhibit 10; Employer's Exhibits 1, 2. We further affirm the administrative law judge's determination claimant established a totally disabling respiratory impairment on the record as a whole, 20 C.F.R. §718.204(b)(2), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See* Decision and Order at 13.

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 nor clinical pneumoconiosis[8] 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 disproved clinical pneumoconiosis but did not establish claimant's respiratory disability was unrelated to legal pneumoconiosis. Decision and Order at 13-21. Thus, she found employer failed to rebut the presumption.

[8] "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).

Legal Pneumoconiosis

To establish claimant does not suffer from legal pneumoconiosis, employer must demonstrate he 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 found the opinions of Drs. Westerfield and Rosenberg, attributing claimant's impairment to lung cancer and its treatment, not well-reasoned and insufficient to rebut the presumption of legal pneumoconiosis.[9] Decision and Order at 18-19; Employer's Exhibits 1-2. She also considered claimant's treatment records but found they are "insufficient to affirmatively establish that Claimant does not suffer from legal pneumoconiosis" because they do not mention pneumoconiosis or coal dust exposure. Decision and Order at 19; Employer's Exhibit 4. Thus, she found employer failed to rebut the existence of legal pneumoconiosis. Employer makes no specific challenge to any of these findings, which we therefore affirm. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer asserts only that the administrative law judge erred by failing to consider Dr. Westerfield's deposition testimony. Employer's Brief at 5-6. The administrative law judge allowed employer sixty days post-hearing to submit deposition testimony from Drs. Westerfield and Broudy. Decision and Order at 2; Hearing Transcript at 14-15, 66. But employer did not submit the depositions. We therefore reject employer's assertion of error. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). As employer makes no other allegations of error regarding the administrative law judge's determination that employer failed to disprove the existence of legal pneumoconiosis, we affirm her finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19.

[9] The administrative law judge also considered Dr. Alam's opinion, diagnosing legal pneumoconiosis, but accurately found it does not aid employer in meeting its burden on rebuttal Decision and Order at 18; Director's Exhibit 10. Thus, we need not address employer's arguments concerning her weighing of this opinion. *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."); *see* Employer's Brief at 4.

[10] Because employer must rebut both legal and clinical pneumoconiosis, the administrative law judge's finding employer did not disprove legal pneumoconiosis

Disability Causation

The administrative law judge next addressed whether employer established 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). The administrative law judge permissibly discounted the opinions of Drs. Westerfield and Rosenberg that claimant's pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 20-21. Employer does not challenge this finding. We therefore affirm the administrative law judge's determination that employer failed to establish no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

precluded rebuttal under 20 C.F.R. §718.305(d)(1)(i), despite his finding that employer disproved clinical pneumoconiosis. Decision and Order at 19.