U.S. Department of Labor

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

BRB No. 19-0205 BLA

JOHNNY L. NEELY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 03/27/2020
	)	
ALPHA NATURAL RESOURCES	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05105) of Administrative Law Judge Theresa C. Timlin on a claim filed on August 4, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found claimant established 21.19 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). 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 is totally disabled and could invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Worker's Compensation Programs, has not filed a response brief.[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, 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, 362 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

[1] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where claimant establishes 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 21.19 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[3] Claimant's coal mine employment occurred in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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). The administrative law judge found that claimant established total disability based on the pulmonary function studies, blood gas studies, and medical opinion evidence.[4] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).

Pulmonary Function Studies

The administrative law judge considered four pulmonary function studies conducted on October 1, 2015, November 2, 2016, August 15, 2017, and August 25, 2017. All of the studies produced qualifying values[5] before the administration of bronchodilators. Director's Exhibit 21; Claimant's Exhibits 3, 4; Employer's Exhibit 1. The October 1, 2015 and August 25, 2017 pulmonary function studies produced non-qualifying values with bronchodilators administered, while the November 2, 2016 and August 15, 2017 studies had qualifying values with bronchodilators. Director's Exhibit 21; Claimant's Exhibits 3, 4; Employer's Exhibit 1.

The administrative law judge noted "neither party questioned the validity of the pulmonary function [studies]." Decision and Order at 14. She credited the four qualifying pre-bronchodilator values as more probative of claimant's respiratory condition. *Id.* She also concluded that claimant established total disability based on a preponderance of the pulmonary function studies considered as a whole. *Id.*

[4] The administrative law judge found no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 16.

[5] A "qualifying" pulmonary function study or arterial 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. 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer contends the administrative law judge did not explain her weighing of the pulmonary function studies in accordance with the Administrative Procedure Act.[6] We disagree. The administrative law judge rationally explained she accorded greater weight to the pre-bronchodilator studies based on the Department of Labor's (DOL's) recognition that, although the use of a bronchodilator may aid in determining the presence or absence of pneumoconiosis, it "'does not provide an adequate assessment of [a] miner's disability. . . .'" Decision and Order at 14, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). We affirm the administrative law judge's finding that claimant established total disability based on the pulmonary function study evidence as rational and supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Blood Gas Studies

The administrative law judge considered four blood gas studies. The October 1, 2015 blood gas study was non-qualifying at rest and with exercise. Director's Exhibit 21. The November 2, 2016 study was non-qualifying at rest and with exercise, although the administrative law judge noted the "post-exercise PO2 value was only one mmHg greater than the qualifying value." Decision and Order at 15; *see* Employer's Exhibit 1. The August 15, 2017 blood gas study was qualifying at rest and non-qualifying with exercise. Claimant's Exhibit 4. The August 25, 2017 study was non-qualifying at rest and qualifying with exercise. Claimant's Exhibit 3.

The administrative law judge found the two most recent studies qualifying and gave them greatest probative weight. Decision and Order at 15-16. We agree with employer that the administrative law judge did not evaluate each study individually and explain how she resolved the conflict between the resting and exercise values. See *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). She also did not explain why the two more recent studies were more credible. *Wojtowicz*, 12 BLR at 1-165. Nevertheless, we consider the administrative law judge's errors harmless, as her finding of total disability is supported by valid, qualifying pulmonary function studies and a preponderance of the medical opinions as discussed below. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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 issues 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Medical Opinions

The administrative law judge considered five medical opinions. Drs. Gaziano, Nader, Habre, and Zaldivar each opined that claimant is totally disabled, while Dr. Spagnolo opined he is not. Director's Exhibit 21; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 2. The administrative law judge found Dr. Spagnolo's opinion unreasoned because it was not supported by the qualifying objective studies. Decision and Order at 25.

Employer argues the administrative law judge's error in weighing the blood gas study evidence requires remand for reconsideration of the medical opinion evidence. Employer's Brief at 9-10, 30-31. We disagree. Non-qualifying blood gas studies do not call into question valid and qualifying pulmonary function studies because the tests measure different types of impairment.[7] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 798 (1984). Drs. Gaziano, Habre and Zaldivar specifically opined claimant is disabled based on the pulmonary function studies showing an obstructive respiratory impairment that would preclude him from performing the heavy manual labor required by his usual coal mine employment.[8] Director's Exhibit 21; Claimant's Exhibit 4; Employer's Exhibits 1, 2; 7 at 21. We see no error in the administrative law judge's findings that their opinions are reasoned and documented and sufficient to support a finding of total disability.[9] *See 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 24. In contrast, the administrative law judge permissibly found Dr. Spagnolo's opinion that claimant "could probably do his prior job" despite his qualifying pulmonary function studies' results

[7] Moreover, even if claimant is unable to establish total disability based on objective tests, the administrative law judge may find total disability established based on a physician's opinion that claimant has a respiratory or pulmonary impairment that precludes the performance of his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv).

[8] The administrative law judge found that claimant last worked as a fire boss which required heavy manual labor. Decision and Order at 12. We affirm this determination as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[9] Dr. Nader did not specifically discuss claimant's disability as it relates solely to the pulmonary function studies but his opinion does not refute the administrative law judge's determination that claimant is totally disabled. Claimant's Exhibit 3.

unpersuasive because it was contrary to weight of the medical opinions. Decision and Order at 25; *see also Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Thus, we affirm the administrative law judge's determination that claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2). Decision and Order at 25. We further affirm, as supported by substantial evidence, the administrative law judge's determinations that claimant is totally disabled based on all the relevant evidence and that he invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis[10] 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 did not rebut the presumption by either method.

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). Drs. Zaldivar and Spagnolo opined claimant does not have legal pneumoconiosis. The administrative law judge found their opinions insufficiently reasoned to satisfy employer's burden of proof. Contrary to employer's arguments, we see no error in the administrative law judge's credibility findings.

In his initial report, Dr. Zaldivar diagnosed "moderate irreversible airway obstruction" and opined claimant's impairment is caused solely by smoking with "bronchoreactivity." Employer's Exhibit 1. In a supplemental report, Dr. Zaldivar reviewed additional pulmonary function studies obtained after his examination and opined

[10] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

they showed variability of the impairment with bronchodilator response and worsening over time. Employer's Exhibit 2. He concluded claimant's impairment is due to smoking and untreated "bronchospasm of asthma." *Id.*; Employer's Exhibit 7 at 21-22.

The administrative law judge observed correctly that Dr. Zaldivar excluded coal dust exposure as a causative factor for claimant's impairment based on medical articles indicating that smoking causes cellular damage to the lungs. Decision and Order at 32; Employer's Exhibit 1. The administrative law judge noted, however, that the preamble to the regulations includes "[c]linical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury [that] link in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease." Decision and Order at 31, *quoting* 65 Fed. Reg. 79,920, 79943 (Dec. 20, 2000). She further noted an abstract of a medical study Dr. Zaldivar cited discussed bronchial responses to tobacco smoke exposure but did not discuss bronchial responses to coal mine dust exposure.[11] Decision and Order at 31; Employer's Exhibit 1. We see no error in the administrative law judge's determination that Dr. Zaldivar did not adequately explain his opinion in view of the medical studies and articles he referenced to support his conclusions. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012). Taking into consideration Dr. Zalidvar's rationales, the administrative law judge permissibly found he did not persuasively explain why claimant's fixed and irreversible respiratory impairment did not constitute legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 32.

With respect to Dr. Spagnolo's opinion, the administrative law judge accurately described that he excluded legal pneumoconiosis based, in part, on his belief claimant has a "strong family history" of asthma sufficient to explain the obstructive respiratory impairment. Decision and Order at 32; Employer's Exhibit 8. She permissibly found Dr. Spagnolo's opinion unpersuasive since there is only one notation in the record of claimant's father having asthma and no treatment records showing claimant was ever diagnosed with,

[11] We reject employer's contention that the administrative law judge improperly acted as a medical expert in reviewing the abstract employer provided in support of Dr. Zaldivar's opinion. Employer's Brief at 17-18; s*ee 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) (administrative law judge should consider whether underlying documentation supports a physician's conclusions). Further, employer concedes that the occupations of the medical study's subjects are not identified in the abstract. Employer's Brief at 18. Thus, we see no error in the administrative law judge's finding Dr. Zaldivar's opinion unpersuasive.

or treated for, asthma. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 32.

Additionally, as the administrative law judge noted, Dr. Spagnolo stated he expected to see a "low DLCO (diffusion capacity impairment)" if claimant had legal pneumoconiosis. Employer's Exhibit 8. The administrative law judge permissibly found Dr. Spagnolo did not adequately explain how claimant's reported DLCO of 53 percent of normal by Dr. Zaldivar, Employer's Exhibit 1, and 73 percent of normal by Dr. Nader, Claimant's Exhibit 3, supported his opinion that claimant had no respiratory impairment related to coal dust exposure. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 32; Employer's Exhibit 8.

Because the administrative law judge provided valid reasons for discrediting Drs. Zaldivar's and Spagnolo's opinions,[12] we affirm her finding that employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

Disability Causation

The administrative law judge next addressed whether employer established "no part" of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Having rejected the opinions of Drs. Zaldivar and Spagnolo regarding the cause of claimant's disabling respiratory impairment in her discussion of legal pneumoconiosis, she rationally found neither physician gave reasoned opinions on disability causation. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (a physician's

[12] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Zaldivar and Spagnolo, we decline to address employer's additional challenges to her weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[13] We therefore need not address employer's contentions regarding clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the physician's view on causation is independent of the physician's mistaken belief that the miner did not have pneumoconiosis); Decision and Order at 34-35. Thus, we affirm the administrative law judge's determination that employer failed to establish no part of claimant's total disability was caused by legal 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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge