U.S. Department of Labor

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

BRB No. 20-0085 BLA

ANDERSON D. EVANS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 03/26/2021
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Program Director, Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-06326) rendered on a claim filed on September 18, 2017 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with between fifteen and three-quarters and sixteen and one-half years of underground coal mine employment, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he 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) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on erroneous findings that Claimant has at least fifteen years of underground coal mine employment and is totally disabled. Employer further argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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).

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal

[1] 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.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.4; Director's Exhibit 3; Hearing Transcript at 32-33.

mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered Claimant's Employment History Form, Social Security Earnings Records (SSER), hearing testimony,[3] and an Employment Verification Letter from Consol Energy, Incorporated, dated October 9, 2017. Decision and Order at 4-7. She determined the SSER and Employment Verification Letter contain the "most specific information." Decision and Order at 6. She first evaluated Claimant's employment history using only the employment and earnings information contained in the SSER, and then performed an alternative calculation using the letter from Consol Energy in conjunction with the information from the SSER. *Id.* at 5-7.

For her first calculation, using only the SSER, the administrative law judge compared Claimant's annual earnings from all coal mine employers listed on his SSER with the average yearly earnings of employees in coal mining found in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* for all years from 1974 through 2016. Using this method, she determined Claimant established sixteen years and 4.7 months of coal mine employment.[4] Decision and Order at 5-6; Director's Exhibits 6, 7.

[3] In his testimony, Claimant agreed he had at least 15.14 years of coal mine employment. Hearing Transcript at 17-18.

[4] The administrative law judge determined the SSER showed: two years and five months of coal mine employment with Peggs Run Coal Company from 1974 to 1978; 1.9 months with Peggs Run and Beth Energy Mines in 1977; seven years and five months with Beth Energy Mines from 1978 to 1986; 1.5 months with P&O Coal Company in 1991; five years and 7.5 months with Eighty Four Mining Company from 1995 to 2001, including five months in 2000 and three months in 2001; and 4.9 months with Consol, Incorporated, from 2000 to 2001, with three months in 2000 and 1.9 months in 2001. Decision and Order at 5-6; Director's Exhibits 6, 7. We note this amounts to only sixteen years and 1.8 months, whereas the administrative law judge found the sum of sixteen years and 4.7 months. Decision and Order at 6. However, this calculation error is harmless as both figures support the administrative law judge's finding Claimant established more than fifteen years of underground coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 7.

For her alternative calculation, the administrative law judge considered the Employment Verification Letter from Consol Energy alongside the SSER. Decision and Order at 6. She found the letter itself established twelve years and 9.8 months of coal mine employment with two of Consol Energy's subsidiaries, Beth Energy Mines, Incorporated, and Eighty-Four Mining Company, between November 1976 and January 2001. Decision and Order at 6; Director's Exhibit 5. Because the letter did not include Claimant's coal mine employment, as established by the SSER, with Peggs Run Coal Company from 1974 to 1976, P&O Coal Company in 1991, or Consol Energy in 2000 and 2001,[5] the administrative law judge added the two years and 11.4 months shown on the SSER with these three companies to the twelve years and 9.8 months established by the letter. Decision and Order at 6; Director's Exhibits 6, 7. Using this method, the administrative law judge calculated Claimant's length of coal mine employment as fifteen years and 9.2 months. Decision and Order at 6.

Thus, having found Claimant established fifteen years and 9.2 months of employment when considering the Employment Verification Letter from Consol Energy alongside the SSER and sixteen years and 4.7 months when considering the SSER alone, the administrative law judge concluded Claimant established between fifteen and three-quarters years and sixteen and one-half years in underground coal mine employment. Decision and Order at 6-7.

Employer asserts Claimant established only 13.75 years of coal mine employment: twenty-four months with Peggs Run, eighty-eight months with Beth Energy, and fifty-three months with Eighty-Four Mining. Employer's Brief at 4. However, Employer does not explain how it arrived at these numbers, nor does it identify any specific error in the administrative law judge's calculations or explain why those calculations are unreasonable or not supported by substantial evidence. *See Muncy*, 25 BLR at 1-27. The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus, we affirm the administrative law judge's finding that Claimant established more than fifteen years of coal mine employment.[6] *See Sarf*, 10 BLR at 1-120-21; Decision and Order at 6-7. We also affirm,

[5] As previously discussed, *supra* n.4, the administrative law judge found the SSER established: two years and five months of coal mine employment with Peggs Run from 1974 to 1976; 1.5 months with P&O in 1991; and 4.9 months with Consol from 2000 to 2001. Decision and Order at 5-6.

[6] Because we affirm the administrative law judge's finding of more than fifteen years of coal mine employment sufficient to invoke the Section 411(c)(4) presumption, we

as unchallenged, her determination that all of Claimant's coal mine employment was underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

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.[7] 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 the relevant evidence supporting total disability against the 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). Notwithstanding the non-qualifying pulmonary function and blood gas studies,[8] the administrative law judge found Claimant established total disability based on the medical opinions and her weighing of the evidence as a whole.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19-21.

The administrative law judge considered the opinions of Drs. Sood, Go, Celko, Rosenberg, and Basheda. Decision and Order at 12-21. Drs. Sood, Go, and Celko opined that Claimant has a totally disabling respiratory impairment, while Drs. Rosenberg and

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need not address Claimant's argument that the administrative law judge erred in not crediting him with a full year of coal mine employment in 1977. Claimant's Brief at 2-3.

[7] The administrative law judge's finding Claimant's usual coal mine employment as a roof bolter required heavy labor is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[8] 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. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The administrative law judge found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii) because none of the pulmonary function or blood gas studies produced qualifying results. Decision and Order at 10-12. She further found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 9 n.9.

Basheda opined he does not. *Id.* at 19-20; Director's Exhibit 12; Claimant's Exhibits 8, 8a-c, 10, 10a-b; Employer's Exhibits 4-5, 7-8. The administrative law judge found the opinions of Drs. Sood, Go, Celko, and Rosenberg adequately reasoned and documented but found Dr. Basheda's opinion less well documented.[10] Decision and Order at 19-20. Based on "the majority of the best reasoned and documented" medical opinions, the administrative law judge found the medical opinion evidence supports total disability. 20 C.F.R. §718.202(b)(2)(iv); Decision and Order at 20. Weighing the evidence together, she found Claimant established total disability by a preponderance of the evidence. 20 C.F.R. §718.202(b)(2)(i)-(iv); Decision and Order at 21.

Employer argues the administrative law judge erred in crediting the opinions of Drs. Celko, Go, and Sood as adequately reasoned and documented because they are contradicted by the non-qualifying objective studies. Employer's Brief at 6-13. Contrary to Employer's contention, the fact that Claimant did not demonstrate total disability by the pulmonary function studies or blood gas studies does not preclude a finding of total disability based on a reasoned medical opinion that he cannot perform his usual coal mine employment. Indeed, the regulations specifically contemplate that total disability may be established based on a physician's reasoned opinion even when the pulmonary function and arterial blood gas studies are not qualifying. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); 20 C.F.R. §718.204(b)(2)(iv).

As the administrative law judge noted, Drs. Celko and Go opined Claimant could not perform his usual coal mine work as a roof bolter based on testing demonstrating moderate reduction in diffusing capacity, hypoxemia with exercise, and a moderate obstructive ventilatory impairment. Decision and Order at 13, 15-16; Director's Exhibit 12 at 1; Claimant's Exhibits 8 at 6; 8a at 5. Dr. Sood likewise based his opinion on the March 7, 2019 testing demonstrating reduced diffusing capacity, which he opined would prevent Claimant from performing his work as a roof bolter. Claimant's Exhibits 10 at 12-13. Because we reject Employer's argument, we affirm the administrative law judge's finding the opinions of Drs. Sood, Go, and Celko are adequately reasoned and documented. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 19-20.

We reject Employer's assertion that the administrative law judge erred in according less weight to Dr. Basheda's opinion when he relied on "the same information" as Dr. Rosenberg, whose opinion was found reasoned and documented. Employer's Brief at 9-

[10] The administrative law judge gave "average weight" to Drs. Sood, Go, Celko, and Rosenberg, and "slightly reduced weight" to Dr. Basheda. Decision and Order at 20.

10. As the administrative law judge explained, unlike Dr. Rosenberg, Dr. Basheda did not review the results of the March 7, 2019 pulmonary function testing. Decision and Order at 20; *see* Employer's Exhibits 4-8. An administrative law judge may give less weight to the opinion of a physician who reviews less objective data. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005). Moreover, contrary to Employer's suggestion, the fact that the March 7, 2019 pulmonary function study is non-qualifying does not require the administrative law judge to ignore Dr. Basheda's failure to consider it.[11] As discussed above, the administrative law judge determined that Claimant's job as a roof bolter required heavy labor, and she credited the opinions of Drs. Celko, Go, and Sood that Claimant is totally disabled despite his non-qualifying tests. *See Cornett*, 227 F.3d at 578 (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Employer's Brief at 9; Director's Exhibit 12 at 1; Claimant's Exhibits 8 at 6; 8a at 5. We therefore reject Employer's allegations of error in the administrative law judge's analysis of Dr. Basheda's opinion. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 20.

Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's determination that Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. We further affirm the administrative law judge's overall determination that Claimant is totally disabled and 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 Claimant has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total

[11] Employer acknowledges that Claimant's pulmonary function on the March 7, 2019 study was reduced from what Dr. Basheda measured on December 17, 2018. Employer's Brief at 9; *see* Decision and Order at 10; Claimant's Exhibit 6; Employer's Exhibit 4.

[12] "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

disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found Employer failed to establish rebuttal 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); *see Minich*, 25 BLR at 159.

Employer relies on the opinions of Drs. Rosenberg and Basheda. Dr. Rosenberg diagnosed Claimant with chronic obstructive pulmonary disease (COPD)/emphysema due to smoking[13] and unrelated to coal mine dust exposure. Employer's Exhibits 5 at 7-9; 8 at 19-20. Dr. Basheda diagnosed Claimant with COPD due to smoking and asthma unrelated to coal mine dust exposure. Employer's Exhibit 4 at 13-14. The administrative law judge discredited the opinions of Drs. Rosenberg and Basheda because neither physician considered and adequately addressed the possible additive effects of smoking and coal mine dust exposure. Decision and Order at 27-28.

Employer argues the administrative law judge erred in giving less weight to the opinions of Drs. Rosenberg and Basheda.[14] Employer's Brief at 18-19. However, Employer raises no specific challenge to the administrative law judge's credibility

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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).

[13] The administrative law judge found Claimant has a twenty-four pack-year smoking history. Decision and Order at 7-8.

[14] We need not address Employer's challenge to the weight the administrative law judge assigned the opinions of Drs. Sood, Go, and Celko because they do not assist Employer in proving that Claimant does not have legal pneumoconiosis. Employer's Brief at 17-21.

determinations summarized above.[15] We therefore affirm them. *See Skrack*, 6 BLR at 1-711.

Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Basheda, we affirm her determination that Employer failed to establish Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established "no part of [Claimant'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). She permissibly discredited the disability causation opinions of Drs. Rosenberg and Basheda because they did not diagnose legal pneumoconiosis, contrary to her finding Employer failed to disprove Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015);

[15] Employer asserts the administrative law judge erred in discrediting Dr. Basheda's reliance on the "reversibility" of Claimant's impairment on pulmonary function testing, and characterizes this rationale as the sole reason she discredited his opinion. Employer's Brief at 18. As noted above, however, Employer does not address her "further" finding that "as . . . explained by Dr. Go, Dr. Basheda's opinion does not address the possibility of both smoking and coal mine dust being potential causes, nor does he address the additive effects of both factors, as discussed by Dr. Sood." Decision and Order at 27. Employer also alleges the administrative law judge errantly discredited Dr. Rosenberg for failing to acknowledge that emphysema can be caused by coal dust and cigarette smoking. Employer's Brief at 19. This mischaracterizes and fails to address the administrative law judge's findings. As noted above, she found Dr. Rosenberg did not address the additive effects of smoking and coal dust exposure on COPD and emphysema. Decision and Order at 27. She further discredited Dr. Rosenberg's reliance on "the diffuse pattern of emphysema seen in claimant" to exclude coal dust as a contributor, and instead credited Dr. Go's and Dr. Sood's assessment that all forms of emphysema can be caused by coal dust exposure as well as Dr. Go's opinion that the medical literature does not support Dr. Rosenberg's reliance on the form of emphysema to determine its cause. *Id*.

[16] Consequently, we need not address Employer's challenge to the administrative law judge's finding that it also failed to establish Claimant does not have clinical pneumoconiosis. Employer's Brief at 13-17.

Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 30-31. Therefore, we affirm the administrative law judge's conclusion that Employer failed to disprove disability causation. 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

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge