U.S. Department of Labor

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

BRB No. 19-0508 BLA

TIMOTHY E. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROCKSPRING DEVELOPMENT, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/30/2020
Employer-Petitioner	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2018-BLA-05139) 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 miner's claim filed on November 15, 2016.

The administrative law judge credited Claimant with 36.47 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). He therefore 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) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also asserts the administrative law judge erred in concluding 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.[2]

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.[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 (1965).

Invocation of the 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 and comparable and gainful

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled 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] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 36.47 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 26.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 13; Director's Exhibit 3.

work.[4] *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 cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of 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). In this case, the administrative law judge found Claimant established total disability based on the pulmonary function studies and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies conducted on December 4, 1992, September 8, 2016, December 20, 2016, April 20, 2017, and July 11, 2018. The December 4, 1992 pulmonary function study yielded non-qualifying[6] pre-bronchodilator values, and did not include post-bronchodilator results. Claimant's Exhibit 2. The September 8, 2016 pulmonary function study yielded qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 9 at 6. The December 20, 2016 pulmonary function study yielded non-qualifying pre-bronchodilator values and qualifying post-bronchodilator values. Director's Exhibit 13 at 8. Only a pre-bronchodilator pulmonary function study was conducted on April 20, 2017, which was non-qualifying. Director's Exhibit 26 at 12. Finally, the July 11, 2018 pulmonary function study yielded non-qualifying pre-bronchodilator values and qualifying post-bronchodilator values. Employer's Exhibit 4 at 10.

[4] The administrative law judge found Claimant's usual coal mine work required "heavy manual labor." Decision and Order at 28. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1- 711.

[5] The administrative law judge found the blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 27, 30.

[6] 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).

The administrative law judge discounted the December 4, 1992, non-qualifying pulmonary function study because of its age.[7] He noted all the remaining studies were valid and found no reason to discount the qualifying, post-bronchodilator results. Concluding the four qualifying pulmonary function test results outweighed the non-qualifying results, the administrative law judge found the preponderance of the pulmonary function studies supported a finding of total disability. Decision and Order at 29-30.

Employer contends the administrative law judge did not adequately explain his weighing of the pulmonary function studies and should have credited the non-qualifying pre-bronchodilator values over the qualifying post-bronchodilator values. Employer's Brief at 20-21 (unpaginated). We disagree.

The administrative law judge acknowledged that post-bronchodilator pulmonary function study results "are not necessarily dispositive of the issue of total disability" because "the question is whether [Claimant] is able to perform his job, not whether he is able to perform his job after he takes medication." Decision and Order at 29; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). He explained, however, that this reasoning is inapplicable in Claimant's case because it assumes a miner's condition would improve upon receiving the bronchodilator medication, but Claimant's condition instead consistently worsened with bronchodilators.

As there was no challenge to the validity of any of the post-bronchodilator pulmonary function studies, the administrative law judge concluded they are "reliable and probative indicators" of Claimant's pulmonary condition. Decision and Order at 29. Noting pneumoconiosis is a chronic condition that may sometimes allow a person to exert more effort than one's typical condition may allow, he rationally concluded there is no reason to discount the "validly performed and qualifying post-bronchodilator tests in favor of the pre-bronchodilator tests." *Id.* at 29-30; *see Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (holding that non-qualifying results are not automatically more credible than contemporaneous non-qualifying results). He therefore permissibly credited the September 8, 2016 qualifying pre-bronchodilator study along with the qualifying September 8, 2016, December 20, 2016 and July 11, 2018 post-bronchodilator studies over the three non-qualifying pre-bronchodilator studies. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016). We therefore reject Employer's argument that the administrative law judge did not adequately explain his analysis, and we affirm his finding that the pulmonary function studies established total disability. 20 C.F.R.

[7] Employer does not challenge the administrative law judge's finding regarding the December 4, 1992 pulmonary function study. We therefore affirm it. *See Skrack*, 6 BLR at 1-711.

§718.204(b)(2)(i); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Addison*, 831 F.3d at 256.

Medical Opinions

The administrative law judge reviewed the medical opinions of Drs. Baker, Cohen, Go, Fino, and Zaldivar. Dr. Baker concluded Claimant was totally disabled based on the post-bronchodilator pulmonary function test results as well as his combination of bronchitis and shortness of breath. Director's Exhibits 13 at 6-7; 26 at 1-2; Claimant's Exhibit 4 at 12. He further testified in his deposition that, although the non-qualifying pre-bronchodilator pulmonary function testing did not meet the disability standards by itself, it demonstrated Claimant would still have a "great deal of difficulty" performing his last coal mine job. Claimant's Exhibit 4 at 12-13. Dr. Cohen opined the weight of the pulmonary function test evidence, coupled with Claimant's diffusion impairment, demonstrated Claimant has a totally disabling pulmonary impairment preventing him from performing his last coal mining job. Claimant's Exhibit 5 at 16-18. Dr. Go likewise concluded the pulmonary function testing results demonstrated a level of impairment incompatible with the requirements of his last coal mine job. Claimant's Exhibit 6 at 8.

Dr. Fino opined Claimant is not disabled as the pulmonary function and arterial blood gas studies demonstrated only a mild impairment. Director's Exhibit 26 at 8-9; Employer's Exhibits 5 at 2; 6 at 4. Similarly, Dr. Zaldivar opined Claimant has only a mild restriction of total lung capacity and mild diffusion abnormality, and that he retains the ventilatory and blood gas capacity to perform his usual coal mine work. Employer's Exhibit 4 at 5-7.

The administrative law judge credited Drs. Baker's, Cohen's, and Go's opinions, finding them reasoned and well-documented. Decision and Order at 30-31. In contrast, he determined the contrary opinions of Drs. Fino and Zaldivar were inconsistent with the underlying medical evidence and inadequately explained. Decision and Order at 31-32.

Employer argues the administrative law judge erred in crediting Dr. Baker's opinion because his diagnosis was based on post-bronchodilator pulmonary function studies which, Employer argues, are insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i). We disagree.

As discussed above, the administrative law judge permissibly found no reason to discount the "validly performed and qualifying post-bronchodilator tests in favor of the pre-bronchodilator tests." Decision and Order at 29-30. Moreover, contrary to Employer's contention, the administrative law judge credited Dr. Baker's diagnosis due not only to his reliance on the post-bronchodilator pulmonary function tests but also Claimant's symptom

presentation of bronchitis and shortness of breath, and his conclusion that Claimant's non-qualifying pre-bronchodilator pulmonary function test results further demonstrated he would be unable to perform his usual coal mine employment. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 30; Director's Exhibits 13 at 6-7; 27 at 1-2; Claimant's Exhibit 4 at 12.

Employer further asserts the administrative law judge should have credited the opinions of Drs. Fino and Zaldivar over those of Drs. Cohen and Go. Employer's Brief at 22-24 (unpaginated). We disagree. As the administrative law judge explained, Drs. Cohen and Go, like Dr. Baker, considered not only the qualifying post-bronchodilator pulmonary function tests but also explained that the pre-bronchodilator pulmonary function testing results demonstrated Claimant could not perform the exertional requirements of his usual coal mine employment. Decision and Order at 30-31; Director's Exhibits 13 at 6-7; 26 at 1-2; Claimant's Exhibit 4 at 12-13; 5 at 16-18; 6 at 8.

In contrast, the administrative law judge permissibly declined to credit Dr. Fino's opinion that the reduced FEV1 and FVC values on Claimant's pulmonary function studies "may simply be normal for him" as the doctor did not provide a sufficient rationale for this conclusion, and because the doctor did not acknowledge the results of the post-bronchodilator pulmonary function testing and explain why they were not relevant. Decision and Order at 31-32; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. The administrative law judge similarly permissibly discredited Dr. Zaldivar's opinion because, while the doctor explained the purpose of bronchodilators in pulmonary function testing, he did not explain why the post-bronchodilator results do not represent Claimant's true ventilatory capacity and because his description of Claimant's last coal mine employment suggested he did not appreciate its strenuous nature. Decision and Order at 32-33; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

Employer has not demonstrated any error of law or established that substantial evidence does not support the administrative law judge's credibility findings. Instead, it merely seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

We therefore 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 33. We also affirm his finding that Claimant is totally disabled based on all the relevant evidence and that he invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock,* 9 BLR at 198; 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 33.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that he has neither legal nor clinical pneumoconiosis[8] 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)(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 did 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, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Employer relies on the opinions of Drs. Fino and Zaldivar that Claimant does not have legal pneumoconiosis.[9] The administrative

[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).

[9] The administrative law judge accurately found the opinions of Drs. Baker, Cohen, and Go diagnosing legal pneumoconiosis do not aid Employer in meeting its burden on rebuttal. Decision and Order at 39.

law judge found these opinions not well-reasoned and insufficient to rebut the existence of legal pneumoconiosis. Decision and Order at 38-39.

Employer asserts the administrative law judge failed to consider Dr. Fino's and Zaldivar's opinion that, if Claimant had pneumoconiosis, arterial blood gas testing would demonstrate a drop in his blood oxygenation with exercise. Employer's Brief at 25 (unpaginated). Contrary to Employer's argument, the administrative law judge permissibly discredited these opinions as they fail to recognize arterial blood gas testing and pulmonary function testing measure different types of impairment, and the doctors did not explain why normal results on arterial blood gas testing establish Claimant does not have an impairment demonstrated by pulmonary function testing. Decision and Order at 38-39; *see Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

The administrative law judge also permissibly discredited the opinions of Drs. Fino and Zaldivar because they did not adequately explain why Claimant's coal mine dust exposure did not contribute to his impairment. Decision and Order at 38-39; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000). Because the administrative law judge provided valid reasons for discrediting Drs. Fino's and Zaldivar's opinions, we affirm his 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.[10] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, (4th Cir. 2015).

Disability Causation

The administrative law judge found Employer failed to establish 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); Decision and Order at 40-41. Employer raises no specific challenge to this determination, which we affirm. *See Skrack*, 6 BLR at 1-711. Regardless, the administrative law judge permissibly found Drs. Fino and Zaldivar provided no opinion on disability causation independent of their rejected view Claimant did not suffer from legal pneumoconiosis. *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 opinion as to causation may not be credited unless there are "specific

[10] We therefore need not address Employer's contentions that the administrative law judge erred in finding that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 14-17 (unpaginated).

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 40-41. 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

MELISSA LIN JONES
Administrative Appeals Judge