U.S. Department of Labor

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

BRB No. 19-0544 BLA

LUELLIN WAGNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED[1]	)	
	)	
	)	DATE ISSUED: 10/21/2020
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 in a Second Subsequent Claim of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor & Green LLP), Tuscaloosa, Alabama, for Claimant.

John C. Webb V and Aaron D. Ashcraft (Lloyd Gray Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

[1] At the formal hearing in this case, Employer's counsel confirmed that Jim Walter Resources, Incorporated, is bankrupt, and the parties stipulated that Warrior Met Coal, self-insured, is the successor operator and has assumed the responsibilities of Jim Walter Resources. Hearing Tr. at 6-7.

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

PER CURIAM:

Employer appeals Administrative Law Judge Tracy A. Daly's Decision and Order Awarding Benefits in a Second Subsequent Claim (2018-BLA-05830) rendered on a claim filed pursuant the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 16, 2015.[2]

The administrative law judge credited Claimant with at least nineteen years and eight months of coal mine employment, including seventeen years in underground mines, and found he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R §718.204(b)(2)(iv). Therefore, he found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The administrative law judge 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. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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

[2] Claimant filed three claims for benefits. On January 2, 2008, the district director denied Claimant's most recent prior claim, filed on May 23, 2007, because he did not establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the present claim on June 16, 2015. Director's Exhibit 4.

[3] 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 surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established seventeen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Change in Applicable Condition of Entitlement - Total Disability

When a miner files a claim for benefits more than one year after the final denial of a previous claim, he must establish "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). The district director denied Claimant's prior claim because he did not establish any element of entitlement. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, Claimant had to establish an element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

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.[5] 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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,[6] the administrative law judge found Claimant established total

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because Claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 10; Hearing Tr. at 18.

[5] The administrative law judge found Claimant's usual coal mine work as a "Miner Helper" required him to stand for seven hours; lift and carry 50 pounds a distance of fifty feet eight times per day; and lift and carry 100 pounds a distance of ten feet four times per day. Decision and Order at 6-7; Director's Exhibit 7.

[6] 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.

disability based on the new medical opinions and his weighing of the new evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13–14.

The administrative law judge determined Claimant's usual coal mine job as a continuous miner helper required "heavy to very heavy work"[8] and considered the opinions of Drs. Hawkins,[9] Goldstein,[10] and Fino.[11] Decision and Order at 7-8, 22-25. Dr. Hawkins

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Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] 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 13-14. He further found no evidence in the record of cor pulmonale with right-sided congestive heart failure. Decision and Order at 14.

[8] We affirm, as unchallenged, the administrative law judge's finding that Claimant's usual coal mine work as a "Miner Helper" required heavy to very heavy work. *See Skrack*, 6 BLR at 1-711.

[9] Dr. Hawkins evaluated Claimant on October 30, 2015. Director's Exhibit 13. He stated Claimant's pulmonary function studies demonstrated a mild impairment and diagnosed chronic obstructive pulmonary disease/chronic bronchitis, exertional shortness of breath, chronic cough, and chest airflow slowing due to underground coal mining and cigarette smoking. He opined that Claimant is unable to perform manual labor or his last coal mine job. *Id*. at 4-5. In a supplemental report dated October 27, 2016, Dr. Hawkins reiterated that Claimant's "clinical impairment along with the objective findings on physical exam [i.e., exertional shortness of breath, chronic cough, and airflow slowing in the chest/basilar rhonchi] would prevent him from performing his last coal mine job or other manual labor." Director's Exhibit 20 at 1; *see also* Director's Exhibit 13 at 4.

[10] Dr. Goldstein evaluated Claimant on May 10, 2016. Director's Exhibit 17. He diagnosed a mixed restrictive and obstructive defect due to smoking and prior surgeries, and opined that Claimant is capable of performing his last coal mine job. *Id*. at 5-6.

[11] Dr. Fino issued a report on October 23, 2018, based on his review of the October 2015 and May 2016 objective studies, x-rays, and evaluations from Drs. Hawkins and Goldstein. Employer's Exhibit 1. He did not diagnose a pulmonary condition. He acknowledged Claimant's FVC and FEV1 values on pulmonary function studies deteriorated since 2004, when he reviewed studies associated with Claimant's initial claim; however, he attributed this change to Claimant's aging and submaximal test effort. Further,

opined that Claimant is totally disabled from a respiratory impairment while Drs. Goldstein and Fino opined that he is not. Director's Exhibits 13, 17, 20; Employer's Exhibit 1. The administrative law judge found Dr. Goldstein's and Dr. Fino's opinions not well-documented or reasoned. Finding Dr. Hawkins's opinion well-documented and reasoned, he determined Claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the administrative law judge erred in finding Dr. Hawkins's opinion well-reasoned and documented because Dr. Hawkins conceded it is "not supported by any objective indications or studies conducted." Employer's Brief at 5-6. We disagree.

Contrary to Employer's assertion, Dr. Hawkins did not state there is no evidence to support a disabling impairment. Employer's Brief at 6. Rather, he predicated his disability opinion on Claimant's abnormal pulmonary function studies. Director's Exhibit 20 at 1.

Non-qualifying test results alone do not necessarily establish the absence of an impairment. *See* 20 C.F.R. §718.204(b)(2)(iv); *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Black Diamond Coal Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). Rather, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether a miner's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv). Here, the administrative law judge noted Dr. Hawkins summarized his October 30, 2015 pulmonary function study as showing mild airflow obstruction, mild restriction, and moderate ventilatory insufficiency. Decision and Order at 16. Noting Dr. Hawkins opined that Claimant has a mild impairment that prevents him from performing his last coal mine job, he found Dr. Hawkins supported his assessment with diagnostic testing. *Id*. He also noted Dr. Hawkins observed in a supplemental report that while Claimant's spirometry did not meet disability standards, no other clinical findings noted during his exam explains Claimant's exertional dyspnea and chronic cough with dark secretions. *Id*. at 19; Director's Exhibit 20.

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he opined that "there is no evidence of a disability based on either a ventilator abnormality or the blood gas results." *Id*. at 3-4.

Further, the administrative law judge permissibly found Dr. Hawkins understood the exertional requirements of Claimant's work as a miner helper because he reviewed Claimant's CM-913 forms, which indicate this work required heavy to very heavy manual labor. *See Bradberry v. Director, OWCP*, 117 F.3d 1361 (11th Cir. 1997). As Dr. Hawkins considered Claimant's exertional requirements in conjunction with his pulmonary function studies, exertional shortness of breath, chronic cough, and slowing airflow in assessing the extent of his disability, the administrative law judge permissibly found his opinion well-documented and reasoned. Decision and Order at 22; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-672 (4th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Nor is there merit to Employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Goldstein and Fino. The administrative law judge noted Drs. Goldstein and Fino predicated their disability opinions on an absence of qualifying pulmonary function studies "as opposed to whether Claimant has the respiratory or pulmonary capacity to perform his usual coal mine job."[12] Decision and Order at 24. He noted that Dr. Goldstein reviewed records from "Norwood Clinic" but did not mention Dr. Hawkins's report or the CM-913 forms detailing the exertional requirements of Claimant's last coal mine job and that Dr. Fino did not discuss the exertional requirements of Claimant's job. *Id*. at 23, 24. Because the administrative law judge determined Drs. Goldstein and Fino did not demonstrate an awareness that Claimant's usual coal mine work required "heavy and very heavy work," he permissibly found their opinions not well-reasoned or documented. *See* 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv); *see Stallard*, 876 F.3d at 671-672; *Jordan*, 876 F.2d at 1460; *Clark*, 12 BLR at 1-155.

The administrative law judge also noted Dr. Fino's opinion that Claimant's age and alleged submaximal effort resulted in the reduction of his pulmonary function test results conflicted with the opinions of Drs. Hawkins and Goldstein, Board-certified pulmonary specialists, who found the tests reliable in diagnosing a mild pulmonary impairment.[13] Noting the pulmonary function tables account for age, *see* Appendix B of 20 C.F.R. Part

[12] The administrative law judge noted Dr. Goldstein acknowledged Claimant has a pulmonary impairment, which he characterized as "a mixed restrictive and obstructive defect." Decision and Order at 23. He further noted Dr. Goldstein opined that Claimant's obstructive defect is mild. *Id*.

[13] Notably, the technician actually administering the May 2016 pulmonary function study commented that Claimant gave good effort and "met [American Thoracic Society] standards." Director's Exhibit 17 at 14.

718, and Dr. Fino did not explain his basis for stating Claimant's October 2015 and May 2016 pulmonary function studies reflect submaximal effort, the administrative law judge permissibly found his opinion unpersuasive as to the absence of impairment. *See Stallard*, 876 F.3d at 671-672; *Jordan*, 876 F.2d at 1460; *Raines*, 758 F.2d at 1534; *Clark*, 12 BLR at 1-155.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jones*, 386 F.3d at 992; *see also Stallard*, 876 F.3d at 670; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge's bases for crediting Dr. Hawkins's opinion over those of Drs. Goldstein and Fino are rational and supported by substantial evidence, we affirm his finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Decision and Order at 25. We also affirm his finding that all of the relevant evidence, when weighed together, establishes total disability at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 26. Thus, we affirm his finding that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Decision and Order at 36.

Because we have affirmed the administrative law judge's findings that Claimant established seventeen years of underground coal mine employment and a totally disabling respiratory impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 21. We further affirm, as unchallenged, his finding Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26-34. We therefore affirm the award of benefits.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits in a Second Subsequent Claim.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge