U.S. Department of Labor

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

BRB No. 19-0471 BLA

CHARLES LINDY BELCHER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBIN RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/11/2020
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk, PLLC), Beckley, West Virginia and Jennifer Wagner (Mountain State Justice, Inc.), Beckley, West Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2016-BLA-05597) 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 subsequent claim filed on August 11, 2014.[1]

The administrative law judge credited Claimant with 23.67 years of underground coal mine employment based on the parties' stipulation and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the administrative law judge's findings that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.[3]

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.[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).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable

[1] Claimant filed an initial claim on November 16, 1999. Director's Exhibit 1. The district director denied it on April 21, 2000, because Claimant failed to establish any element of entitlement. *Id*.

[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 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established 23.67 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[4] Because Claimant's last coal mine employment occurred in West Virginia, the Board will apply the law 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); Director's Exhibit 6.

gainful work.[5] *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer argues the administrative law judge erred in finding total disability based on the exercise arterial blood gas studies.[6] 20 C.F.R. §718.204(b)(2)(ii); Employer's Brief at 7-10. We reject Employer's arguments.

The administrative law judge considered three newly submitted arterial blood gas studies. Decision and Order at 8-9. A December 4, 2014 study produced qualifying values at rest and after exercise.[7] Director's Exhibit 12. A December 17, 2015 study and a December 12, 2016 study produced non-qualifying values at rest, but neither study included exercise testing. Employer's Exhibits 1, 2. Contrary to Employer's argument, the administrative law judge permissibly assigned the most weight to the exercise blood gas testing because it "better approximates the demands of Claimant's usual coal mine employment." Decision and Order at 8-9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Employer's Brief at 8-10.

Based on the improvement in Claimant's resting blood gas testing from 2014 to 2016, Employer argues the administrative law judge should have inferred the December 17, 2015 and December 12, 2016 studies would have produced non-qualifying exercise results. Employer's Brief at 8-10. This argument has no merit. The administrative law

[5] The administrative law judge found Claimant's usual coal mine employment as a shuttle car operator required "heavy physical exertion." Decision and Order at 6. We affirm this finding as it is not challenged. *See Skrack*, 6 BLR at 1-711.

[6] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 7-9.

[7] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

judge weighs the evidence, while the medical experts interpret medical data. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Employer does not cite any medical evidence to support its speculation. As the only exercise blood gas study of record, taken on December 4, 2014, is qualifying, we affirm as supported by substantial evidence the administrative law judge's finding the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 8-9.

We also reject Employer's argument the administrative law judge erred in finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 10-16.

Drs. Fino and Tuteur opined Claimant is not totally disabled based in part on normal oxygen saturation testing conducted while Claimant exercised. Employer's Exhibits 1 at 5-8, 2 at 3-4. The administrative law judge found Employer did not meet its burden to establish oxygen saturation testing is medically acceptable and relevant to refuting Claimant's entitlement to benefits as neither doctor addressed this issue. 20 C.F.R. §718.107 (party relying on results of "other medical evidence" not addressed in the regulations "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits); Decision and Order at 15 n.15. As both doctors based their opinions on this testing, the administrative law judge permissibly found their opinions inadequately explained. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 14-16.

Both Drs. Fino and Tuteur also opined Claimant has no respiratory or pulmonary impairment because his resting blood gas testing is non-qualifying. Employer's Exhibits 1 at 5-8, 2 at 3-4. They both opined, however, that his pulmonary function testing reflects a diffusion capacity abnormality. Employer's Exhibits 1 at 6, 2 at 3. The administrative law judge permissibly found their opinions not well-reasoned because neither doctor addressed Claimant's qualifying exercise blood gas testing or reduced diffusion capacity. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 14-16.

Dr. Rasmussen opined Claimant has a "marked loss of lung function" based on a minimal restrictive ventilatory impairment, reduced diffusion capacity, and impairment in oxygen transfer during light exercise. Director's Exhibit 12. He opined Claimant is totally disabled from his shuttle car operator job that required heavy labor based on this loss of lung function. *Id*.

We reject Employer's argument that Dr. Rasmussen's opinion cannot establish total disability because he did not address the cause of Claimant's respiratory impairment. Employer's Brief at 7-10. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether

Claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of Claimant's pulmonary condition concerns the issues of disease and total disability causation, which are addressed at 20 C.F.R. §§718.201, 718.204(c), or in regard to the issue of Employer's rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1). The administrative law judge permissibly found Dr. Rasmussen's opinion credible and entitled to "normal weight" because the doctor "possessed an adequate understanding of the exertional requirements of Claimant's usual coal mine job" and relied on qualifying exercise blood gas testing. Decision and Order at 14; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-16. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 16. We also affirm his determinations that Claimant established a change in an applicable condition of

[8] The administrative law judge also found Dr. Cohen's opinion supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16. Employer argues the administrative law judge should have excluded Dr. Cohen's opinion because he reviewed medical treatment records not admitted into the record or exchanged with Employer in discovery. Employer's Brief at 10-16. As discussed above, we have affirmed the administrative law judge's finding that the exercise blood gas study and Dr. Rasmussen's opinion establish total disability. Because Dr. Cohen's opinion does not constitute contrary probative evidence, any error in admitting his opinion is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-16.

Moreover, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish the action represents an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). The administrative law judge considered Employer's arguments but admitted Dr. Cohen's report, reasoning that he could provide diminished weight to Dr. Cohen's opinion, if warranted, for his "minimal" reliance on non-record evidence. November 27, 2018 Order to Show Cause; January 17, 2019 Corrected Order. He also gave Employer an opportunity to submit additional medical evidence in response to Dr. Cohen's report and provide supplemental argument as to why his reliance on non-record evidence undermined his opinion. Hearing Transcript at 12, 17-18; January 17, 2019 Corrected Order; Decision and Order at 12 n.12. Employer has not established the administrative law judge abused his discretion in resolving this issue.

entitlement and invoked the Section 411(c)(4) presumption.[9] 20 C.F.R. §§718.305(b)(1), 725.309. Because Employer has not challenged the administrative law judge's determination that it did not rebut the presumption, we affirm his finding and therefore the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-23.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[9] The administrative law judge found the evidence from Claimant's prior claim "has no probative value in assessing Claimant's current pulmonary function" based on its age. Decision and Order at 16-17. We affirm this finding as unchallenged. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Skrack*, 6 BLR at 1-711.