U.S. Department of Labor

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

BRB No. 19-0481 BLA

HERALD G. BATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY, LLC c/o ANR INCORPORATED	)	
	)	
and	)	
	)	
AIG ASURANCE COMPANY, FKA AIG PROPERTY CASUALTY COMPANY	)	DATE ISSUED: 09/30/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-5478) 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 claim filed on November 29, 2016.

The administrative law judge credited Claimant with 32.25 years of coal mine employment,[1] including at least fifteen years of surface coal mine employment that took place in conditions substantially similar to those in an underground mine. The administrative law judge also found Claimant 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.[2] 30 U.S.C. §921(c)(4) (2018). 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 is totally disabled and therefore erred in finding he invoked the Section 411(c)(4) presumption. Employer also argues he 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.[3]

The Benefits Review Board's scope of review is defined by statute. We must affirm

---

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

[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 of at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 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 consider all relevant evidence and weigh the evidence supporting 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).

The administrative law judge considered three pulmonary function studies conducted on April 3, 2017, June 26, 2017 and August 1, 2018. Each study produced qualifying values[4] before the administration of bronchodilators and non-qualifying values thereafter. Director's Exhibits 16, 23; Employer's Exhibit 2. The administrative law judge gave determinative weight to the pre-bronchodilator values over the post-bronchodilator values and found the pulmonary function studies established total disability. Decision and Order at 15-16.

Employer argues the administrative law judge erred in not addressing Dr. Sargent's invalidation of all three pulmonary function studies. Employer's Brief at 5-9. We disagree.

Contrary to employer's characterization of the evidence, the administrative law judge accurately found that while Dr. Sargent invalidated the August 1, 2018 pulmonary function study, no physician invalidated the other two studies. Decision and Order at 16. The administrative law judge accurately noted that Dr. Gaziano validated the April 3, 2017 pulmonary function study. *Id.*; Director's Exhibit 15. The administrative law judge also accurately noted that Dr. Sargent testified that Claimant provided "a pretty good effort" during the April 3, 2017 and June 26, 2017 pulmonary function studies. Decision and Order at 16 n.52; Employer's Exhibit 3 at 22.

[4] 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).

Although the administrative law judge questioned Dr. Sargent's reasons for invalidating the August 1, 2018 pulmonary function study,[5] he accepted his determination that the study was invalid. Decision and Order at 16. The administrative law judge, however, found the remaining two pulmonary function studies conducted on April 3, 2017 and June 26, 2017 valid. *Id.* The administrative law judge rationally explained he accorded greater weight to the pre-bronchodilator studies based on the Department of Labor's (DOL's) recognition that use of a bronchodilator may aid in determining the presence or absence of pneumoconiosis but "does not provide an adequate assessment of [a] miner's disability. . . ." *Id.*, *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 Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

The administrative law judge also considered the medical opinions of Drs. Forehand, Fino and Sargent.[6] 20 C.F.R. §718.204(b)(2)(iv). Dr. Forehand opined that Claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 16. Dr. Fino opined that Claimant's obesity adversely affected his lungs, rendering him unable to perform his last coal mine employment.[7] *Id.* Dr. Sargent, however, opined that Claimant does not have a totally disabling respiratory impairment. Employer's Exhibit 3 at 28.

The administrative law judge found that Dr. Forehand's opinion was supported by

[5] Dr. Sargent indicated that for pulmonary function study results to be reproducible, the variation in efforts must be within 3 percent. Employer's Exhibit 3 at 21. The administrative law judge noted this statement is contrary to the standard set forth in the regulations that the variation between the two largest FEV1s of the three acceptable tracings should not exceed 5 percent. 20 C.F.R. Appendix B to Part 718(2)(ii)(G); Decision and Order at 16.

[6] The administrative law judge found the arterial blood gas studies did not establish total disability. He further found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 15.

[7] In addressing Dr. Fino's opinion, the administrative law judge noted that Claimant's respiratory condition, even if contributed to by obesity, is determinative of whether he is totally disabled. Decision and Order at 17; *see* 20 C.F.R. §718.204(a).

the valid, qualifying pre-bronchodilator pulmonary function studies. Decision and Order at 17-18. He therefore found that Dr. Forehand's opinion was well-reasoned. *Id.* He also noted that Dr. Fino suggested that Claimant was totally disabled from a respiratory standpoint due to obesity. *Id.* at 18. The administrative law judge accorded less weight to Dr. Sargent's opinion because he failed to account for the qualifying pre-bronchodilator values from the valid pulmonary function studies. *Id.* He therefore found the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in crediting Dr. Forehand's opinion in light of the doctor's reliance on invalid pulmonary function studies. Contrary to employer's contention, the administrative law judge found that Dr. Forehand relied upon the valid qualifying pre-bronchodilator results from the April 3, 2017 pulmonary function study. He also found Dr. Forehand's opinion consistent with the valid pre-qualifying results from the June 26, 2017 pulmonary function study conducted by Dr. Fino. Because it is supported by substantial evidence,[8] we affirm the administrative law judge's crediting of Dr. Forehand's opinion as well-reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18.

We also reject Employer's argument the administrative law judge erred in his consideration of Dr. Sargent's opinion. The administrative law judge permissibly accorded less weight to Dr. Sargent's opinion because he failed to account for the valid pre-bronchodilator qualifying pulmonary function studies found by the administrative law judge to be supportive of total disability. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 18. Because Employer does not allege any additional error,[9] we affirm his finding the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv). We also affirm the administrative law judge's determination that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *see Shedlock*, 9 BLR at 1-198; Decision and Order at 18.

[8] Employer asserts Dr. Forehand's opinion is undermined by the non-qualifying blood gas studies. Employer's Brief at 12. Non-qualifying blood gas studies, however, do not call into question valid and qualifying pulmonary function studies as the tests measure different types of impairment. *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, 1-798 (1984).

[9] Employer does not allege any error in regard to the administrative law judge's consideration of Dr. Fino's opinion.

Because Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that Claimant invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish he has neither legal nor clinical 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 failed to establish rebuttal by either method.

Employer contends the administrative law judge erred in finding it failed to disprove clinical pneumoconiosis. The administrative law judge considered seven interpretations of three x-rays dated April 3, 2017, June 26, 2017, and August 1, 2018.

Dr. Seaman, a B reader and Board-certified radiologist, interpreted the April 3, 2017 x-ray as negative for pneumoconiosis, while Dr. DePonte, also a dually qualified physician, and Dr. Forehand, a B reader, interpreted the x-ray as positive. Director's Exhibits 16, 21; Claimant's Exhibit 1. The administrative law judge, therefore, found this x-ray "slightly positive." Decision and Order at 20.

Dr. Tarver, a dually qualified physician, interpreted the June 26, 2017 x-ray as negative for pneumoconiosis, while Dr. DePonte interpreted it as positive. Director's Exhibit 23; Claimant's Exhibit 2. Dr. Seaman interpreted the August 1, 2008 x-ray as negative for pneumoconiosis, while Dr. DePonte interpreted it as positive. Employer's Exhibits 2, 3. Because the June 26, 2017 and August 1, 2018 x-rays were interpreted as both positive and negative for pneumoconiosis by equally qualified physicians, the administrative law judge found them "inconclusive." Decision and Order at 20. The administrative law judge found the x-ray evidence overall was "slightly positive" and therefore insufficient to establish that Claimant does not have clinical pneumoconiosis.

[10] "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). "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).

Employer argues the administrative law judge erred in not according greater weight to Dr. Seaman's negative x-ray interpretations based on her "superior qualifications," noting that Dr. Seaman, unlike Drs. DePonte and Forehand, "teaches radiology."[11] Employer's Brief at 15. We disagree. The administrative law judge was not required to accord greater weight to Dr. Seaman's x-ray interpretations based upon her status as a professor; he permissibly accorded equal weight to the other dually-qualified reader, Dr. DePonte, and found her positive reading supported by that of a B reader, Dr. Forehand. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), aff'd on recon., 24 BLR 1-13 (2007) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Worach v. Director, OWCP*, 17 BLR 1-105 (1993).

Employer also contends the administrative law judge erred in finding the April 3, 2017 x-ray "slightly positive" for pneumoconiosis by engaging in an improper head count. Employer's Brief at 14. Contrary to Employer's argument, the administrative law judge performed a qualitative and quantitative review of the x-ray interpretations to conclude that Drs. DePonte's and Forehand's positive readings, compared to Dr. Seaman's negative reading, rendered the x-ray "slightly positive." *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Even if the administrative law judge had rejected Dr. Forehand's positive reading based on his status as only a B reader, the x-ray would be inconclusive given the equal weight she accorded to the dually qualified physicians, Drs. Seaman and DePonte. Consequently, this x-ray does not assist Employer in establishing that Claimant does not have clinical pneumoconiosis. Because Employer does not raise any additional error, we affirm the administrative law judge's finding that the x-ray evidence did not support a finding that Claimant does not have clinical pneumoconiosis.

Employer also argues the administrative law judge erred in his consideration of Dr. Ahdoot's interpretation of an August 25, 2017 CT scan. Employer's Brief at 16-17. We disagree. The CT scan report indicates it was taken because of Claimant's history of asbestosis exposure, cigarette smoking, and chronic cough. Employer's Exhibit 1. Dr. Ahdoot opined the CT scan revealed findings of old granulomatous disease. *Id.* He specifically noted multiple calcified nodules bilaterally, but no focal infiltrates. *Id.*

The administrative law judge found this CT scan was not obtained for the purpose of determining whether Claimant had pneumoconiosis. Decision and Order at 21. He also noted that Dr. Ahdoot did not indicate whether the CT scan was positive or negative for

[11] At the time of her reading, Dr. Seaman was an Assistant Professor of Thoracic and Cardiovascular Imaging at Duke University. Director's Exhibit 21.

pneumoconiosis. *Id.* He therefore permissibly concluded the CT scan interpretation was not probative as to the presence or absence of pneumoconiosis.[12] *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge may find an x-ray that is silent on the existence of pneumoconiosis inconclusive on the presence or absence of the disease).

Because Employer does not raise any additional error, we affirm the administrative law judge's determination that Employer did not disprove clinical pneumoconiosis. We therefore affirm his finding that Employer did not rebut the presumption by establishing claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established 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). She rationally discounted Drs. Fino and Sargent because they did not diagnose clinical pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 25. Therefore, we affirm the administrative law judge's determination that Employer failed to rebut clinical pneumoconiosis as a cause of Claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

[12] The administrative law judge noted Dr. Sargent reviewed Dr. Ahdoot's CT scan report and indicated it was not read as positive for pneumoconiosis. Decision and Order at 21; Director's Exhibit 3 at 4, 5, 16. The administrative law judge, however, did not find this significant in light of the fact that the CT scan was not obtained for determining the presence of pneumoconiosis. Decision and Order at 21. The administrative law judge also noted that Dr. Sargent is neither a radiologist nor a B reader. Decision and Order at 21 n.70.

[13] Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer did not disprove legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 18-27.

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

MELISSA LIN JONES
Administrative Appeals Judge