U.S. Department of Labor

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

BRB No. 19-0527 BLA

JAMES A. MAGGARD Claimant-Respondent v. HUMPHREYS ENTERPRISES, INCORPORATED and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/23/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer/Carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2017-BLA-06061) rendered on a claim filed on May 19, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with at least thirty-seven years of coal mine employment, with at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground coal mine. He also found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus 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) (2012). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption, and alternately contends the administrative law judge improperly invoked the presumption based on an erroneous finding that Claimant is totally disabled.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the Section 411(c)(4) presumption is constitutionally valid.

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

[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) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established at least thirty-seven years of coal mine employment with at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

[3] Because Claimant's last coal mine employment occurred in Virginia, Hearing Transcript at 15, 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).

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 5-6 (unpaginated). Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After Employer submitted its Brief in Support of Petition for Review, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA is unconstitutional, but vacated and remanded the district court's determination that the remainder of the law must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Total Disability

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 gainful 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 pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical

[4] The administrative law judge found Claimant's usual coal mine employment was as a heavy equipment operator. Decision and Order at 14. We affirm this finding as it is unchallenged. *See Skrack*, 6 BLR at 1-711.

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 pulmonary function studies and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Employer's Brief at 7-11 (unpaginated). We reject Employer's arguments.

The administrative law judge considered five pulmonary function studies conducted on May 11, 2015, November 5, 2015, July 23, 2018, November 8, 2018, and December 16, 2018. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9. He found the May 11, 2015, November 5, 2015, July 23, 2018, and December 16, 2018 studies produced qualifying values pre-bronchodilator, whereas the November 8, 2018 study produced non-qualifying values pre-bronchodilator.[6] Decision and Order at 8-9; *see* Director's Exhibit 13; Claimant's Exhibits 1-3; Employer's Exhibit 1. He also found none of the studies produced qualifying values post-bronchodilator.[7] *Id*.

We reject Employer's argument that the administrative law judge erred in failing to give the November 8, 2018 non-qualifying study "particular weight" because it is among the most recent of record and was submitted by Claimant. Employer's Brief at 8 (unpaginated). That Claimant submitted this study into evidence is irrelevant for determining its credibility relative to the other studies, and Employer cites no authority for that proposition. Employer also does not explain why its recency necessarily entitles it to greatest weight given the administrative law judge's unchallenged finding that "all [pulmonary function studies] in evidence [are] sufficiently reliable" for assessing total disability, including the most recent of record, the December 16, 2018 study, which produced qualifying values. Decision and Order at 9.

[5] The administrative law judge found Claimant did not establish total disability based on the arterial blood studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 7, 10.

[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).

[7] The May 11, 2015 study did not include any post-bronchodilator testing. Claimant's Exhibit 2.

We further reject Employer's argument that the administrative law judge was required to assign greatest weight to the non-qualifying studies because they produced "higher values" and thus best represent Claimant's condition. Employer's Brief at 8 (unpaginated). The Fourth Circuit has explicitly held otherwise. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (rejecting argument that higher test results should be credited as more reliable than lower ones).

The administrative law judge permissibly credited the pre-bronchodilator studies over the post-bronchodilator studies as he determined they were a better indicator of whether Claimant could perform his usual coal mine work without the aid of medication. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."); *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); Decision and Order at 8-9. He also permissibly found Claimant established total disability because the preponderance of the pre-bronchodilator studies is qualifying. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 8-9. Because it is supported by substantial evidence, and Employer raises no additional arguments, we affirm the administrative law judge's finding that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9.

With respect to the medical opinions, the administrative law judge found the opinions of Drs. Green and Raj that Claimant is totally disabled are well-reasoned and documented. Decision and Order at 10-14. He found the contrary opinions of Drs. McSharry and Rosenberg are not well-reasoned or documented. *Id*. Thus he found Claimant established total disability based on the medical opinions. *Id*.; *see* 20 C.F.R. §718.204(b)(2)(iv).

Employer does not challenge the administrative law judge's finding that the opinions of Drs. McSharry and Rosenberg are not well-reasoned and documented and thus entitled to diminished weight. Decision and Order at 12-14; Employer's Exhibits 1, 2. Thus we affirm his rejection of their opinions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Further, we reject Employer's general assertion that the opinions of Drs. Green and Raj are unsupported by the objective studies of record.[8] Employer's Brief at 8-11 (unpaginated).

[8] To the extent Employer asserts a physician's opinion cannot be based on non-qualifying objective tests, that argument is rejected. The regulations set forth total disability can be established with reasoned medical opinions even "where total disability

Dr. Green diagnosed Claimant with severe chronic airflow obstruction based on his pulmonary function testing. Director's Exhibit 13 at 5-6. He noted Claimant's usual coal mine employment involved operating a dozer and grader that required him to "lift 40 to 50 pounds." *Id*. at 3. He concluded Claimant is totally disabled because the "severe airflow obstructive impairment" and symptoms of wheezing and shortness of breath would prevent him from "operating heavy equipment and lifting 40-50 pounds at any given time during his workday." *Id*. at 5-6. In supplemental reports, Dr. Green indicated he reviewed additional objective testing, including non-qualifying pulmonary function testing, but reiterated his opinion that Claimant is totally disabled based on the degree of his obstructive impairment. Director's Exhibits 18, 78; Claimant's Exhibit 3. He further opined arterial blood gas testing that evidenced hypoxemia also supported the conclusion Claimant is totally disabled. Claimant's Exhibit 3.

The administrative law judge found Dr. Green based his opinion on "relevant histories, physical examination, and objective testing," and he "demonstrated that he understood the exertional requirements" of Claimant's usual coal mine employment. Decision and Order at 11. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Green's opinion is well-reasoned and documented. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 10-11; Employer's Brief at 8-11 (unpaginated).

Dr. Raj opined Claimant has a moderate obstructive respiratory impairment evidenced by pulmonary function testing. Claimant's Exhibit 1 at 3. Although Claimant's arterial blood gas testing was non-qualifying, he opined the resting blood gas testing evidenced "significant" hypoxemia. *Id*. at 4. He noted Claimant becomes short of breath "after walking [five to six] steps on stairs." *Id*. Based on Claimant's obstructive impairment and hypoxemia, Dr. Raj opined Claimant is totally disabled from his usual coal mine employment as a heavy equipment operator that required him to climb stairs and lift 40 to 50 pounds. *Id*. at 1, 3-4.

The administrative law judge found Dr. Raj relied on "relevant histories, physical examination, objective testing" and identified the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 12. The administrative law judge also found Dr. Raj "sufficiently explained why he determined Claimant [is] incapable of

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cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [or] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see also 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").

performing his usual coal mine work in light of non-qualifying objective testing." *Id*. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Raj's opinion is well-reasoned and documented. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 12; Employer's Brief at 8-11 (unpaginated).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, established total disability and Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 14.

As Employer has not challenged the administrative law judge's determination that it did not rebut the presumption, we affirm his finding and the award of benefits. *See* 20 C.F.R. §718.305(d)(1); *Skrack*, 6 BLR at 1-711; Decision and Order at 14-22.

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