U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0401 BLA

WILLIAM M. MILLER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 04/11/2017
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5464) of Administrative Law Judge Natalie A. Appetta (the administrative law judge) rendered

on a subsequent claim[1] filed on November 19, 2013 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] Initially, the administrative law judge found that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge credited claimant with at least forty years of underground coal mine employment, and adjudicated the claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[3] The administrative law judge found that the new evidence submitted in support of this claim established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, consequently, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] The administrative law judge also found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and that employer failed to rebut the presumption.[5] Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed six prior claims on September 30, 1988, January 28, 1992, September 22, 1994, April 21, 1997, November 30, 1998, and April 19, 2001, which were finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibits 1-6.

[2] The parties agreed to cancel the hearing and requested a decision on the record. Decision and Order at 2; Order dated September 30, 2015.

[3] The administrative law judge accepted employer's concessions that it is the properly designated responsible operator, that claimant worked as a miner in the coal industry for forty years, and that claimant has one dependent for purposes of augmentation of benefits. Decision and Order at 3-5; Employer's Brief to the administrative law judge at 1-2.

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "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).

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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

Employer argues that the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence in finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).[8]

A. Pulmonary Function Studies at Section 718.204(b)(2)(i)

The administrative law judge considered the results of the newly-submitted pulmonary function studies dated April 23, 2014 and June 23, 2015. Decision and Order at 9-10; Director's Exhibit 19; Employer's Exhibits 2, 3. The administrative law judge determined that the April 23, 2014 study administered by Dr. Jaworski produced

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the claim was timely filed, that employer is the properly designated responsible operator, and that claimant had at least forty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[8] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 18, 19-20.

qualifying values both pre-bronchodilation and post-bronchodilation,[9] while Dr. Parker conducted only a pre-bronchodilator study on June 23, 2015, which yielded non-qualifying results.[10] Decision and Order at 9-10; Director's Exhibit 19; Employer's Exhibits 2, 3.

The administrative law judge gave probative weight to Dr. Jaworski's April 2014 qualifying study because she found that it conformed to the requirements of Appendix B to 20 C.F.R. Part 718, and because Drs. Jaworski and Vuskovich both concluded that it is a valid study.[11] Decision and Order at 9-10, 18-19; Director's Exhibits 19, 31; Employer's Exhibit 4. After noting that the comments to Dr. Parker's June 2015 study indicated that the "ATS standard for three acceptable maneuvers was not met due to variable effort, cough and glottic closure," the administrative law judge gave diminished weight to the non-qualifying 2015 study because it did not conform to the requirements of Appendix B and 20 C.F.R. §718.103(c).[12] Decision and Order at 18; Employer's Exhibit 2. The administrative law judge concluded that the valid and qualifying April 23, 2014 pulmonary function study supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

[9] 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).

[10] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height for purposes of the studies was 65.5 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 10 n.18.

[11] On September 15, 2014, Dr. Vuskovich prepared a Pulmonary Function Study Validation of Dr. Jaworski's April 23, 2014 study and determined that "[claimant] put forth the effort required to generate valid spirometry results." Director's Exhibit 31.

[12] The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of 20 C.F.R. Part 718. Section 718.103 states, in pertinent part, that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part." 20 C.F.R. §718.103(c). Among other provisions, Appendix B requires a minimum of three flow-volume loops and derived spirometric tracings, and states that effort shall be judged unacceptable when the patient has not used maximal effort during the entire forced expiration or has coughed or closed his glottis. *See* 20 C.F.R. Part 718, Appendix B(2)(ii).

Employer argues that the administrative law judge erred in crediting Dr. Jaworski's 2014 pulmonary function study over Dr. Parker's more recent 2015 study. Employer maintains that, despite the fact that claimant did not perform three acceptable maneuvers, the 2015 study produced non-qualifying results and "Dr. Parker noted [that] the results appear valid."[13] Employer's Brief at 4, 7-8. Employer's argument lacks merit.

When considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in compliance with the quality standards set forth in the regulations. 20 C.F.R. §718.103(c). As the Director correctly points out,

> . . . the regulations are clear on this point: "[t]he administration of pulmonary function tests *shall* conform to the following criteria: . . . a minimum of three flow-volume loops and derived spirometric tracings *shall* be carried out."

Director's Brief at 3, *quoting* 20 C.F.R. Part 718, Appendix B(2)(ii) (emphasis in original). Because the 2015 study lacked the requisite maneuvers, was accompanied by only one flow-volume loop tracing, and revealed "variable effort, cough and glottic closure during maneuver," the administrative law judge rationally found that it was entitled to diminished weight due to non-compliance with the regulations.[14] *See* 20 C.F.R. §718.103(c); 20 C.F.R. Part 718, Appendix B(2)(ii), (v); Employer's Exhibits 2, 3. According more weight to the valid and qualifying test results, the administrative law judge permissibly determined that the April 2014 pulmonary function study administered by Dr. Jaworski supported a finding of total disability pursuant to Section

[13] The 2015 pulmonary function study conducted by Dr. Parker contains typed "post-test comments," indicating:

> The results of this test appear to be valid, although the ATS standard for three acceptable maneuvers was not met due to variable effort, cough and glottic closure during maneuver, therefore no post-bronchodilator spirometry performed.

Employer's Exhibit 2. There is no indication whether the comment was included by Dr. Parker or by the technician administering the study.

[14] Dr. Parker's 2015 pulmonary function study was not accompanied by three tracings nor was there any indication that the results represented the highest values of three attempts, as required by the regulations. *See* 20 C.F.R. Part 718, Appendix B(2)(ii), (v); *Duke v. Director, OWCP*, 6 BLR 1-673, 675-76 (1983); Employer's Exhibits 2, 3.

718.204(b)(2)(i).[15] Decision and Order at 19; *see Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22, 1-27 (2004)(en banc); *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-14 (1993). As substantial evidence supports the administrative law judge's findings, they are affirmed.

B. Medical Opinions at 20 C.F.R. §718.204(b)(2)(iv)

The administrative law judge considered the medical opinions of Drs. Jaworski[16] and Vuskovich. Decision and Order at 12-13; Director's Exhibits 19, 42; Employer's Exhibit 4. Dr. Jaworski opined that claimant has a moderately severe obstructive impairment that could prevent him from performing certain aspects of his coal mine employment such as lifting heavy objects. Director's Exhibits 19, 42. In his 2014 report, Dr. Vuskovich reviewed Dr. Jaworski's pulmonary function study, diagnosed claimant with inadequately treated asthma, and opined that "with effective therapy" claimant would have the ventilatory capacity to perform coal mine work or similar work in a dust-free environment. Director's Exhibit 31. In his 2016 supplemental report, Dr. Vuskovich reviewed several of claimant's prior pulmonary function studies and opined that claimant's spirometry results were normal "when race corrected" and that claimant had the ventilatory capacity to perform coal mine work or similar work in a dust-free environment. Employer's Exhibit 4.

Initially, the administrative law judge determined that claimant's usual coal mine employment as a machine operator required heavy manual labor. Decision and Order at 6, 20. The administrative law judge found that Dr. Jaworski's opinion is reasoned and supported by the results of the objective studies, his findings on examination, and claimant's work history.[17] Decision and Order at 22. The administrative law judge

[15] While employer asserts that "as a general rule more weight is given to the most recent evidence" of record, we note that the rule may not be mechanically applied to require that later evidence be accepted over earlier evidence. Employer's Brief at 4, 7; *see Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992).

[16] Dr. Jaworski's supplemental opinion dated December 14, 2015, which was submitted as late evidence by the Director, Office of Workers' Compensation Programs (the Director), was designated by the administrative law judge as Director's Exhibit 42. Decision and Order at 2, 12.

[17] Dr. Jaworski performed the Department of Labor examination on April 23, 2014, and provided a supplemental report on December 14, 2015. He noted that the hardest part of claimant's job as a machine operator working the long wall was lifting seven hundred pound jacks and the conveyor pan line with other miners. Based on his physical examination and his valid, qualifying pulmonary function study results, Dr.

accorded less weight to Dr. Vuskovich's opinion because it was "not well reasoned" and "equivocal and speculative," Decision and Order at 20-21, and found that the weight of the medical opinion evidence supported a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22.

Employer contends that the opinion of Dr. Vuskovich is reasoned and documented, and that the administrative law judge erred in discrediting his opinion. Employer's Brief at 6-7. We disagree.

The administrative law judge determined that Dr. Vuskovich based his opinion that claimant has the respiratory capacity to perform coal mine work on his conclusion that all of claimant's spirometry results between 1992 and 2015 were normal when they were corrected for race, with the exception of the 2014 study.[18] Dr. Vuskovich therefore opined that "it was likely" that claimant had an acute pulmonary disease at the time of the 2014 study. Decision and Order at 20-21; Employer's Exhibit 4. The administrative law judge correctly noted that the regulations do not mandate adjustment for race and that employer presented no evidence showing that such an adjustment is standard in the medical profession.[19] Decision and Order at 21; *see* 45 Fed. Reg. 13,691, 13,711 (Feb.

Jaworski diagnosed claimant with a moderately severe obstructive airway disease with significant but incomplete broncho-reversibility, and concluded that claimant's impairment could prevent him from performing certain aspects of his job such as lifting heavy objects. Director's Exhibits 19, 42.

[18] On February 25, 2016, Dr. Vuskovich reviewed the pulmonary function studies conducted by Dr. Rasmussen on March 4, 1992, Dr. Bellotte on July 27, 1993, Dr. Renn on June 8, 1999, Dr. Jaworski on April 23, 2014, and Dr. Parker on June 23, 2015. Employer's Exhibit 4; Decision and Order at 21 n.30. Dr. Vuskovich noted that claimant is African-American and opined that an African-American's lung size is approximately 15% less than a Caucasian's lung size. Dr. Vuskovich indicated that, in order to accurately determine percent-of-predicted results, Knudson height-age adjusted reference values for Caucasians must be reduced by 15% to apply to African-Americans. He determined that claimant had normal spirometry results when they were corrected for race, with the exception of Dr. Jaworski's evaluation in 2014. Dr. Vuskovich concluded that it was likely that claimant had an acute pulmonary disease that reduced his ventilatory capacity during the 2014 study, but that by the June 2015 study, claimant had recovered and his spirometry results returned to normal. Employer's Exhibit 4.

[19] The Department of Labor has acknowledged that studies have documented that the FVC and the FEV_1 of African-American males are somewhat lower than those for Caucasian males of the same age and height. The Department declined to promulgate

29, 1980). Furthermore, noting that Dr. Jaworski did not indicate that claimant was suffering from an acute pulmonary condition at the time of his 2014 examination, the administrative law judge acted within her discretion in rejecting Dr. Vuskovich's hypothesis that claimant's qualifying values in 2014 likely resulted from an acute pulmonary disease, as being "equivocal and speculative."[20] Decision and Order at 21; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Thus, the administrative law judge permissibly concluded that Dr. Vuskovich's opinion was inadequately reasoned and documented, and merited little weight. Decision and Order at 20-21; Director's Exhibit 31; Employer's Exhibit 4; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Employer also maintains that Dr. Jaworski's opinion does not constitute sufficient evidence to meet claimant's burden of proof to establish total disability. Employer's Brief at 5. Employer's argument lacks merit.

In determining whether a claimant has established total respiratory disability, an administrative law judge is tasked with weighing conflicting evidence and drawing inferences therefrom. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). The administrative law judge must consider all relevant evidence, including medical opinions that are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations that lead to that conclusion. *Poole*, 897 F.2d at 894, 13 BLR at 2-356, *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985). A description of physical limitations in performing routine tasks may be sufficient to allow the administrative law judge to infer total disability. *See Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-41 (1990)(en banc recon.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-44, 1-50 (1985)(en banc); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275, 1-277 (1982).

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separate qualifying table values for African-Americans, however, "until a separate prediction equation based on a large study of normal blacks is formulated . . . [and]. . . [u]ntil such a study has been conducted, the Department feels that it is appropriate to apply the same table to blacks and whites." 45 Fed. Reg. 13,691, 13,711 (Feb. 29, 1980).

[20] Similarly, Dr. Vuskovich's opinion that claimant could perform his coal mine work if he had undergone "effective therapy" is unavailing. As the Director correctly notes, the test to establish total disability is whether a miner can perform his usual coal mine employment, not whether he can perform his usual employment *if he takes medication*. Director's Brief at 4-5; Director's Exhibit 31; *see* 20 C.F.R. §718.204(b)(1)(i).

The administrative law judge determined that claimant's usual coal mine employment was as a machine operator, which required him to perform heavy manual labor.[21] Decision and Order at 6. Dr. Jaworski noted that claimant had to lift the conveyor pan line and jacks weighing seven hundred pounds, with the help of other miners, and he opined that claimant's moderately severe respiratory impairment "could prevent him from performing certain aspects of his job such as lifting heavy objects." Director's Exhibits 19, 42. Dr. Jaworski further opined that even though significant reversibility was demonstrated on spirometry after administration of a bronchodilator, the reversibility was "incomplete" and the "FEV_1 still remained moderately reduced." *Id.*

Because Dr. Jaworski examined claimant, performed objective testing and reviewed the exertional requirements of claimant's last coal mine employment, the administrative law judge permissibly credited his opinion as well reasoned and consistent with claimant's work history, test results, and examination findings. Decision and Order at 22; Director's Exhibits 19, 31, 42. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, the administrative law judge reasonably concluded that Dr. Jaworski's opinion supported a finding of total respiratory disability. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). As the administrative law judge's conclusion constitutes a permissible inference drawn from uncontradicted evidence that claimant's coal mine work required heavy manual labor, we affirm her finding that the medical opinion evidence is sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv), as supported by substantial evidence.

Finally, the administrative law judge found that when all of the relevant evidence was considered, the pulmonary function study and medical opinion evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 22. Because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study. *See Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984). Consequently, we affirm the administrative law judge's conclusion that the newly-submitted evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and

[21] The administrative law judge noted that as part of his duties as a machine operator, which included work as a continuous miner operator, claimant was required to walk and/or stand eight hours a day, carry items weighing approximately twenty-five pounds for a distance of one hundred sixty feet twice a day, and use machines, tools, or equipment. Claimant also had to lift 700-pound jacks and the conveyor pan line with other miners. Director's Exhibits 10, 11, 19, 33.

Order at 16, 22; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 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. Decision and Order at 22. Because claimant established invocation of the presumption, and employer has not challenged the administrative law judge's finding that it did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge