U.S. Department of Labor

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

BRB Nos. 16-0120 BLA
and 16-0120-A

PETER P. DOERR	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING	)	DATE ISSUED: 08/30/2016
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Julie A. Webb (Craig & Craig, LLC), Mount Vernon, Illinois, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2013-BLA-05565) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed on March 15, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least fifteen years of underground coal mine employment and found that he suffered from a totally disabling respiratory or pulmonary impairment. Based on these findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further determined that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, benefits were awarded, commencing March 2012, the month in which claimant filed his claim.

On appeal, employer argues that the administrative law judge erred in weighing the pulmonary function study evidence and in finding that claimant established total disability for invocation of the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in not finding that employer rebutted the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits.[2] Claimant also filed a cross-appeal, maintaining that the correct date for the commencement of benefits is July 2008, when claimant's pulmonary function tests first revealed total disability. In its response to claimant's cross-appeal, employer asserts that, if the Board affirms the award of benefits, the administrative law judge's finding that benefits commence as of March 2012 should be affirmed. Claimant replies, reiterating his argument. The Director, Office of Workers' Compensation Programs, has not responded to either appeal.[3]

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] We reject claimant's contention that employer's appeal with the Board was not timely filed. The administrative law judge issued her Decision and Order on September 29, 2015, and employer filed its appeal electronically with the Board on October 29, 2015. *See* 20 C.F.R. §802.205(a).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption - Total Disability

The regulations provide that a miner shall be considered totally disabled if his respiratory or pulmonary impairment, standing alone, prevents the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function tests showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; or 2) arterial blood-gas tests showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge weighed four pulmonary function tests, dated November 20, 2001, July 28, 2008, May 2, 2012, and September 12, 2012. Decision and Order at 7. The November 20, 2001 pulmonary function test by Dr. Kimball was non-qualifying,[5] and no bronchodilator was administered. Employer's Exhibit 1. The July 28, 2008 test by Dr. Reyes was qualifying, before and after the administration of a bronchodilator. Claimant's Exhibit 2. The May 2, 2012 test by Dr. Tabaz was qualifying, and no bronchodilator was administered. Director's Exhibit 10. The September 12, 2012 test by Dr. Selby was also

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 5.

[5] A "qualifying" pulmonary function test yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

qualifying, before and after the administration of a bronchodilator. Director's Exhibit 18. In weighing the evidence, the administrative law judge gave less weight to the non-qualifying pulmonary function test as it "was performed in 2001, over ten years prior to the other studies." Decision and Order at 7. Thus, the administrative law judge concluded that claimant established total disability by a preponderance of the pulmonary function tests under 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer contends that the July 28, 2008 and September 12, 2012 pulmonary function tests are invalid and that the administrative law judge erred in relying on those test to find that claimant is totally disabled. With respect to the July 28, 2008 test, employer asserts, "[a]lthough it appears from the data submitted that three trials were performed as part of [c]laimant's pulmonary function testing on July 28, 2008, there is no evidence that the reported FEV1 and FVC values constitute the best efforts of the three trials." Employer's Petition for Review at 9. With respect to the September 12, 2012 test, employer asserts, "[t]he spirometry was inconsistent due to poor understanding and poor tolerance."[6] *Id*., *citing* Director's Exhibit 18 at 5. Employer maintains that if those two tests are eliminated from consideration, a preponderance of the testing does not support the administrative law judge's finding of total disability. Employer's Petition for Review at 9. Employer's arguments are rejected as without merit.

The regulatory requirement that there be three tracings to accompany a pulmonary function test is included in the quality standards set forth in 20 C.F.R. §718.103. Contrary to employer's contention, those standards are not applicable to the July 28, 2008 pulmonary function test, as it was obtained in the course of claimant's treatment with Dr. Reyes, and the quality standards apply only to evidence developed in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *accord J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008) (holding that quality standards are not applicable to hospitalization and treatment records). Additionally, the administrative law judge specifically addressed employer's assertion that the September 12, 2012 study was

[6] Employer cites to Dr. Selby's September 12, 2012 report, in which Dr. Selby states:

> Review of the results show spirometry is invalid due to the best trial going less than 6 seconds. If that one is eliminated the next best trial shows a curve of less than maximal effort so it must be eliminated. Now the best and next best trials have FVC of 1.50 and 1.30 which violates the 150 ml or 5% rule thus making the entire spirometry invalid.

Director's Exhibit 18 at 5-6.

invalid and rationally found that "[e]ven if . . . , as [e]mployer argues, the September 12, 2012 study was to be disqualified based on invalid spirometry, a preponderance of the [pulmonary function test] evidence would be qualifying for disability." Decision and Order at 7. Because the administrative law judge permissibly gave less weight to the earliest test in the record, which is non-qualifying, and he rationally credited the two qualifying pulmonary function tests dated July 28, 2008 and May 2, 2012, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Gillespie v. Badger Coal Co*., 7 BLR 1-839 (1985); Decision and Order at 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge correctly found that both of the two arterial blood gas studies, dated June 11, 2012 and September 12, 2012, were non-qualifying and, thus, we affirm her finding that claimant is unable to establish total disability under that subsection.[7] Decision and Order at 8; Director's Exhibits 10, 18. Since there is no evidence in the record that claimant has cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant established total disability based on the medical opinion evidence. Decision and Order at 8, 11-19. We affirm the administrative law judge's findings under 20 C.F.R. §718.204(b)(2) (iv), as they are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8. Furthermore, as it is supported by substantial evidence, we affirm the administrative law judge's overall determination, taking into consideration the contrary probative evidence, that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), and thereby invoked the presumption at Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

establishing that the miner had neither legal[8] nor clinical[9] pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726-27, 25 BLR 2-405, 2-413 (7th Cir. 2013); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Reyes,[10] Tazbaz,[11] and

[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[10] Dr. Reyes, claimant's treating physician, diagnosed moderate obstructive lung disease caused by claimant's coal mine employment. Claimant's Exhibit 2 at 2.

[11] Dr. Tazbaz diagnosed mild respiratory disability from coal workers' pneumoconiosis. Director's Exhibit 10 at 4.

Selby.[12] Decision and Order at 11-19. The administrative law judge noted correctly that Dr. Selby was the only doctor who did not diagnose legal pneumoconiosis. The administrative law judge found that Dr. Selby "does not adequately explain how he has completely ruled out coal mine dust as a contributing factor to [c]laimant's totally disabling respiratory impairment." Decision and Order at 19. The administrative law judge observed that, while Dr. Selby indicated that claimant had a significant response to bronchodilators on pulmonary function testing, "reversibility post-bronchodilator does not necessarily rule out the presence of disabling [pneumoconiosis] where, as here, Claimant [c]ontinued to evidence a fully disabling residual impairment." *Id*., *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Because the administrative law judge found that Dr. Selby's opinion is not well-reasoned, she concluded that employer was unable to disprove the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i), or establish that claimant's disability was not due to legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 20.

Employer's contends that the administrative law judge erred in giving little weight to Dr. Selby's opinion, and states:

> The [administrative law judge] was critical of Dr. Selby because he failed to explain how he completely ruled out coal mine dust as a contributing factor to [c]laimant's totally disabling respiratory impairment. Although Dr. Selby *may have not directly addressed how coal mine dust exposure was not a contributing factor*, his opinions as to the cause of [c]laimant's pulmonary condition [are] well reasoned and well supported by the treatment records which Dr. Selby reviewed and summarized. . . . [H]is opinion should have been given greater weight by the [administrative law judge].

Employer's Petition for Review at 11 (emphasis added). Contrary to employer's assertion, because employer bears the burden of proof on rebuttal to affirmatively establish that claimant does not have legal pneumoconiosis, the administrative law judge

[12] Dr. Selby opined that claimant "does not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation." Director's Exhibit 18 at 6. Dr. Selby further opined that claimant's "history is most consistent with garden variety asthma" and "shows a restrictive defect with reversibility to a bronchodilators [sic] to a significant degree." Employer's Exhibit 5 at 17. Dr. Selby stated that "only asthma would show this type of reversibility even in the face of a restrictive defect." *Id*. Dr. Selby also diagnosed "debilitating cardiac disease" and "severe obesity," both of which he thought contribute to claimant's shortness of breath. *Id*.

properly required Dr. Selby to specifically address why claimant's respiratory or pulmonary impairment was not significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment. *See* 20 C.F.R. §718.201(b); *Burris*, 732 F.3d at 726-27, 25 BLR at 2-413; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich*, 25 BLR at 1-150.

Furthermore, although employer generally asserts that Dr. Selby's opinion is sufficient to rebut the Section 411(c)(4) presumption, employer does not identify specific error committed by the administrative law judge in rendering her credibility findings as they pertain to Dr. Selby's opinion. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983) (Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision.). Thus, we affirm the administrative law judge's finding that Dr. Selby's opinion is not reasoned and that it is insufficient to establish rebuttal of Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i) or (ii). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. We therefore affirm the award of benefits.

III. Claimant's Cross-Appeal - Commencement of Benefits

Once entitlement to benefits is established, the date for the commencement of benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 118, 119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In considering the date from which benefits should commence, the administrative law judge summarily stated:

> I find that the evidence in this claim is not sufficient to establish the onset of total disability due to pneumoconiosis. Entitlement to benefits is therefore established as of March 2012, the month in which [c]laimant filed his claim for benefits.

Decision and Order at 20. Claimant, however, asserts correctly that the July 28, 2008 qualifying pulmonary function test establishes that he was totally disabled prior to the filing date of his claim. Claimant's Response Brief and Cross-Petition for Review at 7. Claimant also notes correctly that in his March 4, 2013 report, Dr. Reyes opined that claimant was totally disabled, based on the July 28, 2008 pulmonary function test, and he attributed claimant's respiratory disability to pneumoconiosis.[13] *Id*. Because there is evidence pre-dating claimant's application for benefits indicating that claimant was totally disabled due to pneumoconiosis on July 28, 2008, we vacate the administrative law judge's determination that benefits commence as of March 2012, and hold that claimant is entitled to benefits commencing July 2008, as a matter of law. *See Greene*, 790 F.2d at 119 n.4, 9 BLR at 2-36 n.4; *Owens*, 14 BLR at 1-47, 1-50.

[13] When asked on a form, "Is the miner's pulmonary impairment (if any) related to his/her occupational lung disease . . . or another etiology . . . ," Dr. Reyes wrote "Yes patient has no other reason to have obstructive lung defect on PFT [pulmonary function test]." Claimant's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, but is modified to reflect July 2008 as the date for commencement of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge