U.S. Department of Labor

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

BRB No. 17-0014 BLA

KATHY WALKER (o/b/o Estate of JOHN WALKER) Claimant-Petitioner v. HERITAGE COAL COMPANY and PEABODY INVESTMENTS COMPANY, c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/15/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2011-BLA-5510) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 1, 2010.[2]

Applying Section 411(c)(4),[3] the administrative law judge credited the miner with at least fifteen years of underground coal mine employment, but found that the new evidence submitted in this claim was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant could not invoke the Section 411(c)(4) presumption and failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] Accordingly, the administrative law judge denied benefits.

[1] Claimant is the widow of the miner, who died on June 8, 2014. Claimant is pursuing the miner's claim on behalf of his estate. Decision and Order at 1; Director's Exhibit 33 at 3, 41.

[2] This is the miner's fourth claim for benefits. The miner's 1991 and 2003 claims were finally denied by the district director for failure to establish any element of entitlement. Director's Exhibits 1, 2. In the miner's third claim, filed in 2007, the district director denied benefits because he determined that while the miner had pneumoconiosis, he did not have a totally disabling respiratory or pulmonary impairment. The miner filed a request for modification that was denied by the district director on June 10, 2008. Because the miner did not pursue the claim any further, the denial became final. Director's Exhibit 3.

[3] 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 at least fifteen years of underground coal mine employment, or coal mine 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); *see* 20 C.F.R. §718.305.

[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

On appeal, claimant argues that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[5]

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.[6] 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 – Total Disability

Claimant challenges the administrative law judge's weighing of the medical opinion evidence and his finding that the evidence overall failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

Because there are no qualifying pulmonary function studies or qualifying arterial blood gas studies,[7] the administrative law judge properly found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 9-10, 17; Director's Exhibits 14, 33-277, 33-288, 33-416. Furthermore, as there is no evidence in the record indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that total

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conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

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

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1-36; Decision and Order at 3.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

disability was not established at 20 C.F.R. §718.204(b)(2)(iii).[8] Decision and Order at 17.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the miner worked as a heavy equipment operator. Decision and Order at 4, 18. Noting that the miner testified that he was required to climb on and off a bulldozer or track hoe, use levers and foot pedals, and exert upper body strength while working, the administrative law judge found that the miner's usual coal mine work was moderately strenuous. *Id*. at 4, 18-19.

The administrative law judge also considered the new medical opinions of Drs. Rosenberg, Repsher, Baker, and Chavda. Decision and Order at 10-15, 17-19; Director's Exhibits 14, 33-415, 33-83; Employer's Exhibits 2, 4, 5. The administrative law judge noted that Drs. Rosenberg and Repsher determined that the miner was not disabled from performing his usual coal mine work, while Drs. Baker and Chavda determined that the miner was totally disabled notwithstanding his non-qualifying pulmonary function study results.

The administrative law judge credited the opinions of Drs. Rosenberg[9] and Repsher[10] that the miner did not have a totally disabling respiratory or pulmonary impairment because they were consistent with the non-qualifying pulmonary function study evidence as a whole. Decision and Order at 18. The administrative law judge accorded reduced weight to Dr. Baker's opinion on the grounds that it was based on FEV_1 values from the June 18, 2010 pulmonary function study that was invalidated by Dr. Rosenberg, and that Dr. Baker's opinion "[did] not account for" the improved FEV_1

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), (iii). *See Skrack*, 6 BLR at 1-711.

[9] Dr. Rosenberg performed a records review dated February 18, 2013. He opined that the miner did not have a restrictive impairment and that there was no objective basis to conclude that the miner had a disabling airflow obstruction. Dr. Rosenberg determined that from a pulmonary perspective, the miner was not disabled from performing his previous coal mining job or other similarly arduous types of labor. Employer's Exhibit 5.

[10] Dr. Repsher examined the miner on March 16, 2011. He opined that the miner had no objective evidence of any clinically significant pulmonary impairment, and that from a respiratory point of view he was fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry. Employer's Exhibit 2.

values from Dr. Chavda's 2011 pulmonary function study.[11] Decision and Order at 18. The administrative law judge found that Dr. Chavda's opinion that the miner's reduced FEV_1 values and his symptoms prevented him from performing his usual coal mine employment from a pulmonary standpoint was "not completely convincing" because Dr. Chavda portrayed the miner's pulmonary function study results as "worse than they appear."[12] *Id*. Therefore, the administrative law judge concluded that claimant did not establish total disability by the new medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that Dr. Chavda's opinion is sufficient to support a finding of total disability, and maintains that Drs. Chavda and Baker were entitled to base their diagnoses of disability on non-qualifying pulmonary function studies.[13] Claimant also argues that the administrative law judge substituted his own opinion for that of the

[11] Dr. Baker performed the Department of Labor examination on June 18, 2010 and testified by deposition on February 18, 2013. Noting that the FEV_1 value is the best indicator of the ability to do work, Dr. Baker diagnosed the miner with a moderate obstructive defect. He opined that the miner was not able to do the work of a heavy equipment operator due to the fact that both the pre-bronchodilator and post-bronchodilator FEV_1 values from his study met the federal criteria for disability. Director's Exhibit 14; Employer's Exhibit 4.

[12] Dr. Chavda prepared a medical report dated February 21, 2011, testified by deposition on May 17, 2013, and was the miner's treating physician since 2008. He diagnosed a moderate obstructive and restrictive impairment. Dr. Chavda opined that while the miner's FEV_1 of 1.94 liters and FVC of 2.77 liters did not meet federal disability criteria, it was his opinion that the miner did not have the pulmonary function to do the job of a bulldozer operator. Director's Exhibits 33-89, 33-103; 33-415; Claimant's Exhibits 3, 5.

[13] Contrary to claimant's argument, the administrative law judge did not discount Dr. Baker's opinion because it was based on non-qualifying pulmonary function values. Rather, the administrative law judge accorded the opinion less weight because Dr. Baker based his opinion on the June 18, 2010 pulmonary function study that was invalidated by Dr. Rosenberg due to the miner's less-than-maximal efforts. Decision and Order at 18; Director's Exhibit 14; Employer's Exhibit 5; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Additionally, Dr. Baker testified that the FEV_1 values from Dr. Chavda's 2011 pulmonary function study indicated that the miner had the ability to perform his work as a bulldozer operator. Employer's Exhibit 4 at 16. As claimant raises no other issues with respect to Dr. Baker's opinion, we affirm the administrative law judge's discrediting of Dr. Baker's opinion.

medical experts in finding that the miner was not totally disabled, and failed to accord Dr. Chavda's opinion appropriate weight based on his status as a treating physician.[14] Claimant's Brief at 8-11. Some of claimant's arguments have merit.

In considering Dr. Chavda's opinion, the administrative law judge noted that Dr. Chavda based his determination of total respiratory disability on the miner's February 15, 2011 pulmonary function study, which yielded an FEV_1 value of 1.94 and an FVC value of 2.77. Decision and Order at 12. The administrative law judge further noted that Dr. Chavda acknowledged that these results did not meet federal disability criteria, but testified that: an FEV_1 of less than two liters relates to "significant symptoms" even without much exertion; the miner's FEV_1 of 1.94 was "borderline reduced;" and operating a bulldozer could involve high or low temperatures or dust. *Id.*; Director's Exhibit 33-103, 33-105. Despite acknowledging that the miner became short of breath simply from answering questions at the hearing, the administrative law judge stated:

> While I accept the premise of Dr. Chavda's opinion that operating a bulldozer could be strenuous work and a person with a reduced FEV_1 may not be able to perform that work, I note that his pulmonary function study results were not actually *that* borderline: an FEV_1 of 1.94 and an FVC of 2.77, compared to the disability results of 1.81 liters and 2.31 liters, respectively.

Decision and Order at 18 (emphasis in original).

In finding that the evidence did not indicate that the miner was totally disabled prior to his death, the administrative law judge further stated:

> First, [the miner's job], while no doubt strenuous, appears to have been less physically demanding than other jobs in the coal mine, even accounting for the temperatures and the climbing involved. To this end, it is telling that he ran heavy machinery for the road department as recently as 2006 when he retired. Second, [the miner's] only clearly validated pulmonary function study also happens to be the one with the best values, the February 15, 2011 study by Dr. Chavda. This study showed an FEV_1 of 1.94 and an FVC of 2.77, which are considerably above the disability standards, which are 1.81

[14] We affirm, as unchallenged on appeal, the administrative law judge's crediting of the opinions of Drs. Rosenberg and Repsher. Decision and Order at 18; *see Skrack*, 6 BLR at 1-711.

> liters and 2.31 liters, respectively.[15] While these numbers certainly are reduced, the pulmonary function study values are not as marginal as Dr. Chavda suggests. While I concede in principle that [the miner's] FEV_1 values may be the best indicator of his ability, in this case his pulmonary function was more than a tenth of a liter above disability standards while his coal mine employment was of only moderate strenuousness.

Id. at 19.

Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts. *Marcum v. Director,* OWCP, 11 BLR 1-23, 1-24 (1987). Thus, to the extent that the administrative law judge accorded less weight to Dr. Chavda's opinion because he found that the underlying pulmonary function study values were not "*that* borderline" or as "marginal" as Dr. Chavda determined, the administrative law judge erroneously substituted his opinion for that of the physician. *See Marcum*, 11 BLR at 1-24. Accordingly, we vacate the administrative law judge's discrediting of Dr. Chavda's opinion, and remand this case for further findings.

We also agree with claimant that the administrative law judge erred in discounting Dr. Chavda's opinion on the ground that the miner was capable of operating heavy machinery for the road department in 2006. Claimant's Brief at 10-11. The miner's capacity to operate heavy machinery in 2006 is not relevant to the issue of the extent of his respiratory disability at the time of Dr. Chavda's examination in 2011 or the hearing in 2013.[16] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405 (1982). The relevant inquiry is the miner's condition at the time of the hearing and whether he had the respiratory capacity to perform his coal mine work as a bulldozer or track hoe operator. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and

[15] The applicable qualifying FEV_1 value listed in Appendix B of 20 C.F.R. Part 718 for the miner's height and age at the February 15, 2011 study is 1.79, not 1.81.

[16] The record reflects that the miner retired from all employment in 2006. Decision and Order at 4; Director's Exhibit 33-166.

his determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), or a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

On remand, the administrative law judge must reconsider Dr. Chavda's opinion to determine whether it is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), giving consideration to the credentials of the physician, and the sophistication of, and basis for, his diagnosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The administrative law judge must also address Dr. Chavda's status as a treating physician in light of the factors at 20 C.F.R. §718.104(d).[17] *See also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003) ("the opinions of treating physicians get the deference they deserve based on their power to persuade.").

If the administrative law judge finds that the medical opinion evidence is sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), he must determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). If total disability is established, claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and satisfies her burden under 20 C.F.R. §725.309. The administrative law judge must then consider all of the evidence of record to determine whether employer has rebutted the Section 411(c)(4) presumption by disproving the existence of both legal and clinical pneumoconiosis, or by establishing 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

[17] The regulation at 20 C.F.R. §718.104(d) requires the adjudication officer to take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship; (2) duration of relationship; (3) frequency of treatment; and (4) extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge