U.S. Department of Labor

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

BRB No. 17-0146 BLA

JAMES E. HYLTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAMBLIN COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/21/2017
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (14-BLA-05704) of Administrative Law Judge John P. Sellers, III, awarding benefits 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 subsequent claim filed on September 9, 2013.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.[4]

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[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 2, 3. His more recent prior claim, filed on October 17, 2008, was denied by the district director on May 25, 2010, because the evidence did not establish total disability. Director's Exhibit 3 at 5, 21.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 14. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment is unchallenged. Therefore, it is affirmed.

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. 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 finding that the pulmonary function study evidence and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv).[5] For the reasons set forth below, we disagree with employer.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five new pulmonary function studies dated May 18, 2009, February 24, 2011, September 20, 2013, July 16, 2014, and March 8, 2016. The May 18, 2009 pulmonary function study yielded non-qualifying[6] values, while all four of the later studies yielded qualifying

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See Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[5] Although employer currently challenges the administrative law judge's finding that claimant established total disability, employer conceded total disability in its post-hearing brief before the administrative law judge:

> Each physician that examined the miner or his medical records in this subsequent claim found [that] he now has [a] disabling pulmonary impairment. There is disagreement on causation. *So the miner has established an element he previously could not prove.* The record in this subsequent claim should be considered on the merits.

Employer's Post-Hearing Brief at 12 (emphasis added). The remainder of the brief argued that employer rebutted the Section 411(c)(4) presumption. *Id.* at 13-18. The administrative law judge, however, made no mention of employer's concession of total disability in his Decision and Order. Because the Board is unable to discern that the administrative law judge accepted or relied upon employer's concession of total disability, the Board will address employer's argument on appeal.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718,

values both before and after the administration of a bronchodilator. Director's Exhibit 10 at 7; Claimant's Exhibit 2; Employer's Exhibits 2 at 15; 8 at 166, 168.

The administrative law judge found that because every pulmonary function study after 2009 was qualifying, the more recent pulmonary function study evidence "weigh[s] in favor of establishing that the [c]laimant is totally disabled." Decision and Order at 21. In so finding, he considered that Drs. Vuskovich and Castle opined that the March 8, 2016 pulmonary function study administered by Dr. Green was invalid due to suboptimal effort by claimant.[7] Decision and Order at 20. However, the administrative law judge also considered Dr. Green's opinion that claimant's March 8, 2016 "spirometry . . . demonstrate[s] acceptable reproducibility with less than 5% variance in the three best effort determinations." Decision and Order at 20, *quoting* Claimant's Exhibit 2 at 3; *see also* Claimant's Exhibit 5 at 24.[8] In view of Dr. Green's explanation, and the administering technician's report that claimant put forth good effort on the study, the administrative law judge accorded greater weight to Dr. Green's opinion that the March 8, 2016 pulmonary function study was valid. Decision and Order at 21.

Employer contends that the administrative law judge erred in finding that the March 8, 2016 pulmonary function study was valid, because he improperly credited a technician's opinion over that of a reviewing physician.[9] Employer's Brief at 15-17.

Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] As summarized by the administrative law judge, Dr. Vuskovich opined that claimant "did not put forth the effort required to generate valid spirometry results," Employer's Exhibit 6 at 1, and Dr. Castle opined that the pulmonary function study was not reproducible. Employer's Exhibit 5 at 4. The administrative law judge noted that Dr. Vuskovich "did not explain the basis for his position." Decision and Order at 20.

[8] Claimant's Exhibit 5 is the transcript of Dr. Green's deposition testimony, which the administrative law judge mentioned but did not cite. Decision and Order at 20. When asked if he agreed that his March 8, 2016 pulmonary function study was invalid, Dr. Green responded, "Well, of the three best efforts there was a less than five percent variation in the three best effort measurements, so I would say that they were valid." Claimant's Exhibit 5 at 24.

[9] Employer does not mention the opinions of Drs. Vuskovich and Castle, but instead points to a statement by Dr. Rosenberg that claimant did not provide maximal

Contrary to employer's contention, the administrative law judge relied on Dr. Green's assessment of the March 8, 2016 pulmonary function study, as supported by the administering technician's observation that claimant put forth good effort. Decision and Order at 20-21. The administrative law judge reasonably analyzed the evidence regarding the validity of the March 8, 2016 pulmonary function study, and substantial evidence supports his credibility determination. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We therefore reject employer's allegation of error, and affirm the administrative law judge's determination that the March 8, 2016 pulmonary function study was "reliable and probative of the [c]laimant's level of disability."[10] Decision and Order at 21.

Substantial evidence supports the administrative law judge's finding that claimant's pulmonary function studies are predominantly qualifying. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014). We therefore affirm the administrative law judge's finding that the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) "weigh[s] in favor of establishing that . . . [c]laimant is totally disabled." Decision and Order at 21.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions[11] of Drs. Baker, Green, Rosenberg, and Castle, all of whom opined that claimant is totally disabled, based on the pulmonary function studies. Decision and Order at 20-22; Director's Exhibit 10; Claimant's Exhibits 2, 3, 5; Employer's Exhibits 2-5, 13. The administrative law judge therefore found that the medical opinion evidence

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effort on the March 8, 2016 pulmonary function study. Employer's Brief at 17; Employer's Exhibit 3 at 3.

[10] Moreover, even if employer demonstrated an error by the administrative law judge regarding the March 8, 2016 pulmonary function study, the error would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The remaining qualifying pulmonary function studies, and the physicians' opinions that claimant is totally disabled based on his pulmonary function study values, would still support the administrative law judge's finding of total disability.

[11] Before considering the medical opinion evidence, the administrative law judge found that the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) was non-qualifying for total disability. Decision and Order at 21.

"overwhelming[ly] supports that the [c]laimant is totally disabled." Decision and Order at 21.

Employer argues that the administrative law judge mischaracterized the medical opinion evidence, arguing that Drs. Rosenberg and Castle opined that claimant's total disability is due to obesity and not to a respiratory or pulmonary impairment. Employer's Brief at 18.[12] We disagree. Dr. Rosenberg opined that claimant "is disabled from a pulmonary perspective," Employer's Exhibit 2 at 3, and that claimant "has [a] disabling respiratory impairment." Employer's Exhibit 13 at 2. Similarly, Dr. Castle opined that claimant "does not retain the respiratory capacity to perform his previous coal mining employment duties."[13] Employer's Exhibit 4 at 22. Although both physicians also opined that claimant's total disability is due to obesity, that aspect of their opinions is relevant to disability causation, not to whether claimant has a totally disabling respiratory or pulmonary impairment.[14] We therefore reject employer's allegation of error, and affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv).

Employer next argues that the administrative law judge erred by not considering claimant's medical treatment records in determining whether claimant is totally disabled. Employer's Brief at 18. This argument lacks merit. The administrative law judge considered the treatment records to the extent they contained evidence relevant to total

[12] Notably, in alleging that the administrative law judge "mischaracterized" the medical opinions, employer ignores its own prior explicit judicial admission that "[e]ach physician that examined the miner or his medical records in this subsequent claim found [that] he now has [a] disabling pulmonary impairment." Employer's Post-Hearing Brief at 12. Employer has not acknowledged, let alone attempted to explain, its prior concession and material change of position on this issue in successive briefs in this case.

[13] The administrative law judge found that claimant's usual coal mine employment as a roof bolter required heavy manual labor. Decision and Order at 20. That determination is affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[14] The relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner's respiratory or pulmonary impairment precludes the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of the miner's pulmonary impairment relates to the issue of disability causation, which is addressed either at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

disability.[15] Decision and Order at 18; Employer's Exhibits 8, 9. We therefore reject employer's argument that the administrative law judge ignored relevant evidence.

Finally, employer argues that the administrative law judge applied an improper legal standard by "erect[ing] a presumption that the qualifying pulmonary function studies rebuttably established [claimant's] total disability." Employer's Brief at 17-18. We disagree with employer's characterization of the administrative law judge's decision.

The regulation provides that "[i]n the absence of contrary probative evidence," medical evidence meeting the standards in any of the four subsections of 20 C.F.R. §718.204(b)(2)(i)-(iv) "shall establish" total disability. 20 C.F.R. §718.204(b)(2). Consistent with the regulation, the administrative law judge considered whether contrary probative evidence weighed against the qualifying pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 21. He reasonably found that the non-qualifying blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) was not contrary to the pulmonary function study evidence, because blood gas studies measure a different type of impairment. *Id.*; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993). Additionally, he found that the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) did not constitute contrary probative evidence, because the physicians agreed that claimant has a totally disabling respiratory or pulmonary impairment. *Id.* at 21-22. We therefore reject employer's argument that the administrative law judge applied an improper legal standard.

Substantial evidence supports the administrative law judge's finding that the evidence when weighed together established that claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). We therefore affirm the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in the applicable condition of entitlement at 20 C.F.R. §725.309(c), and that he invoked the Section 411(c)(4) presumption.

[15] From the treatment records of Dr. Mann, the administrative law judge considered the pulmonary function studies conducted on May 18, 2009 and February 24, 2011. Decision and Order at 5, 18, 20-21; Employer's Exhibit 8. He noted that those treatment records otherwise contained x-ray readings. The administrative law judge further noted that the treatment records of Dr. Gibson were mostly "illegible," and contained a chest x-ray. Decision and Order at 18; Employer's Exhibit 9.

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 establishing that claimant has neither legal nor clinical pneumoconiosis,[16] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 22-34.

In addressing whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg and Castle.[17] Both physicians opined that claimant does not have legal pneumoconiosis, but suffers from a respiratory impairment that is due to obesity. Employer's Exhibits 2-5; 13. The administrative law judge found that neither physician provided persuasive reasoning for his conclusion. Decision and Order at 26-20. The administrative law judge therefore found that employer failed to establish that claimant does not have legal pneumoconiosis. *Id*. at 33.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Castle. Employer's Brief at 20-25. We disagree. The administrative law judge noted that Drs. Rosenberg and Castle relied, in part, on the fact that claimant's pulmonary impairment developed after claimant's coal mine employment ended, to exclude coal mine dust exposure as a cause of the impairment. Decision and Order at 28, 30; Employer's Exhibits 2-5; 13 at 2. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's

[16] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[17] The administrative law judge also considered the opinions of Drs. Baker and Green diagnosing claimant with both clinical and legal pneumoconiosis. Director's Exhibit 10; Claimant's Exhibits 2, 3, 5.

recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Keathley*, 773 F.3d at 739, 25 BLR at 2-685-86; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 28, 30.

The administrative law judge also permissibly discredited Dr. Rosenberg's opinion as based on generalities. Specifically, the administrative law judge found that, even assuming that Dr. Rosenberg is correct in stating that latent and progressive pneumoconiosis is rare, he did not explain why claimant could not be one of the rare cases in which legal pneumoconiosis has developed after the cessation of coal mine employment. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312, 25 BLR 2-115, 2-126 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 28; Employer's Exhibits 2, 3, 13.

Further, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Castle because he found that neither physician adequately explained why coal mine dust exposure could not have also contributed to claimant's impairment, along with claimant's obesity. *See* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 30; Employer's Exhibits 2-5, 13.

Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Castle,[18] we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[19] *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the

[18] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Rosenberg and Castle for the reasons set forth above, we need not address employer's additional challenges to the administrative law judge's analysis of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 20-25.

[19] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings that employer also failed to establish that claimant

administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id.*

The administrative law judge next addressed whether employer established rebuttal by proving 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). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Rosenberg and Castle that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. 20 C.F.R. §718.305(d)(1)(ii); *see Kennard*, 790 F.3d at 668, 25 BLR at 2-741-42; *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013); Decision and Order at 33-34. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

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does not have clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 19-20.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge