U.S. Department of Labor

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

BRB No. 18-0042 BLA

CLAUD G. BREEDING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C & J COAL COMPANY	)	DATE ISSUED: 12/03/2018
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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-05755) of Administrative Law Judge Morris D. Davis, 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 claim filed on October 18, 2013.

The administrative law judge found that claimant established 19.91 years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). Thus, claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory impairment and in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response in this appeal. In a footnote to her letter to the Board, however, the Director urges the Board to reject employer's argument that the administrative law judge erred in finding that employer failed to rebut the presumed fact of disability causation.[3]

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).

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[1] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 6; Hearing Transcript at 19; Decision and Order at 4 n.3. Accordingly, 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).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of 19.91 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *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 cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the 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).

The administrative law judge found that claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17-18. He further found that the arterial blood gas studies and medical opinions do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[4] *Id.* at 18-20. Weighing the evidence together, the administrative law judge gave greatest weight to the pulmonary function studies and therefore found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 20.

Employer argues that the administrative law judge erred in finding that the pulmonary function studies establish total disability under 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 4-10. Employer also argues that the administrative law judge erred in finding that the medical opinions of Drs. McSharry and Sargent do not outweigh the pulmonary function study evidence. We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies, dated January 9, 2014, May 6, 2014, August 6, 2015, November 3, 2015, December 4, 2015, and May 20, 2016.[5] Decision and Order at 6-7; Director's Exhibits 12, 16; Employer's Exhibits 1, 5; Claimant's Exhibits 1, 2. Before determining whether the studies were qualifying[6] for total disability, he noted a discrepancy

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[4] Because there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

[5] The record also includes an October 29, 2013 pulmonary function study that the administrative law judge found was invalid. Decision and Order at 18; Director's Exhibit 10.

[6] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R.

in the measurements of claimant's height, which ranged from sixty-six to sixty-nine inches.[7] Decision and Order at 17-18. The administrative law judge resolved the evidentiary conflict by averaging the various heights, finding that claimant's correct height is 67.7 inches. *Id.*

Based on claimant's height and age at the time of each study, the administrative law judge found that the January 9, 2014, August 6, 2015, December 4, 2015, and May 20, 2016 studies produced qualifying values for total disability before the administration of a bronchodilator, whereas the May 6, 2014 and November 3, 2015 studies did not produce qualifying values pre-bronchodilator. Decision and Order at 17-18. He further found that none of the studies produced qualifying values after the administration of a bronchodilator. *Id.* The administrative law judge accorded greater weight to the pre-bronchodilator results and assigned controlling weight to the four most recent pre-bronchodilator studies dated August 6, 2015, November 3, 2015, December 4, 2015, and May 20, 2016. *Id.* Because three of the four most recent studies were qualifying for total disability, he found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

We reject employer's argument that the administrative law judge erred in assigning greater weight to the qualifying pre-bronchodilator results than to the post-bronchodilator results. Employer's Brief at 4-10. Based on the recognition by the Department of Labor (DOL) that post-bronchodilator results do not provide an adequate assessment of a miner's disability, the administrative law judge rationally gave greater weight to the pre-bronchodilator results. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 174 (4th Cir 1997); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order at 18. We affirm the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(i) based on the preponderance of the most recent pre-bronchodilator pulmonary function studies because it is supported by substantial evidence.

We also reject employer's argument that the administrative law judge erred in weighing the contrary medical opinions of Drs. McSharry and Sargent when weighing the

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Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] Claimant's height was measured as sixty-six inches for the August 6, 2015 pulmonary function study, sixty-six and one-half inches for the May 20, 2016 study, sixty-seven inches for the January 9, 2014, May 6, 2014, November 3, 2015, and December 4, 2015 studies, and sixty-nine inches for the October 29, 2013 study. Director's Exhibits 10, 12, 16; Employer's Exhibits 1, 5; Claimant's Exhibits 1, 2.

relevant evidence at 20 C.F.R. §718.204(b)(2).[8] Employer's Brief at 4-10. The administrative law judge correctly noted that both physicians opined that claimant is not totally disabled from his usual coal mine work based on the post-bronchodilator pulmonary function testing. Decision and Order at 20; Director's Exhibit 16; Employer's Exhibits 1, 1A, 2, 7, 8. Thus, the administrative law judge found that Drs. McSharry and Sargent assumed that claimant is not totally disabled based on the "assumption that [c]laimant will be able to obtain 'optimal' treatment" with bronchodilators. Decision and Order at 20. The administrative law judge permissibly found that their opinions were unpersuasive because "they did not discuss the significance of [claimant's] qualifying [pulmonary function studies] before the administration of medication, or indicate whether, given those values, [claimant] would be able to perform his previous coal mine work." *Id.*; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Thus we affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 20. Because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory 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.

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

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

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[8] The administrative law judge discredited the opinions of Drs. Al Jaroushi and Raj, that claimant is totally disabled, because he found their reasoning unpersuasive. Decision and Order at 19.

[9] "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). "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).

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinions of Drs. McSharry and Sargent. Decision and Order at 23-25; Director's Exhibit 16; Employer's Exhibits 1, 2, 7, 8. Both doctors diagnosed claimant with asthma, which they opined is a disease of the general population and unrelated to coal mine dust exposure. *Id.* The administrative law judge discredited their opinions because he found that their explanations for excluding a diagnosis of legal pneumoconiosis were unpersuasive. Decision and Order at 25.

We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 17-23. Both doctors excluded a diagnosis of legal pneumoconiosis because claimant's pulmonary function studies evidence partial or complete reversibility of the obstructive impairment after bronchodilators, which they opined is consistent with a diagnosis of asthma. Director's Exhibit 16; Employer's Exhibits 1, 1A, 2, 7, 8. They further opined that coal mine dust exposure does not cause asthma. *Id.* The administrative law judge noted, however, that the DOL in the preamble to the 2001 revised regulations recognized that chronic obstructive pulmonary disease (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order at 25, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Further, the DOL set forth that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. The administrative law judge noted that neither Dr. McSharry nor Dr. Sargent "cited a single study or article supporting the premise that reversibility precludes coal [mine] dust as a contributing factor" for claimant's asthma. Decision and Order at 30.

In light of the medical literature relied upon by the DOL in the preamble, the administrative law judge permissibly found the opinions of Drs. McSharry and Sargent, that coal mine dust does not cause asthma, to be an unpersuasive explanation for why claimant's 19.91 years "of exposure to coal mine dust could not have caused or significantly contributed to the development of asthma." Decision and Order at 25; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; 20 C.F.R. §718.201(b).

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence,

we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[10]

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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). Contrary to employer's argument, the administrative law judge rationally discounted the opinions of Drs. McSharry and Sargent that claimant's disability is not due to pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove that claimant has the disease.[11] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 26. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-17.

[11] We reject employer's argument that the administrative law judge cannot discredit the disability causation opinions of Drs. McSharry and Sargent for failing to diagnose legal pneumoconiosis where the disease is established by the Section 411(c)(4) presumption. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (in such circumstances, the administrative law judge may not credit a physician's disability causation opinion absent "specific and persuasive" reasons, and may give the opinion at most "little weight"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting the employer's argument that the administrative law judge "erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found"); Employer's Brief at 20-21.

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