U.S. Department of Labor

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

BRB No. 19-0026 BLA

WHITE MULLINS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DICKENSON RUSSELL COAL COMPANY c/o CHARTIS	)	
	)	DATE ISSUED: 12/12/2019
Employer/Carrier-Respondents	)	
	)	
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 Tracy A. Daly, 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/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05074) of Administrative Law Judge Tracy A. Daly rendered on a claim filed on May 21, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found claimant established 28.09 years of underground coal mine employment and a totally disabling respiratory impairment, thereby invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 718.305. He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant is totally disabled and invoked the Section 411(c)(4) presumption. Employer also argues he erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 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 10.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibits 3, 6.

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

A miner is 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 relevant evidence and weigh the evidence supporting 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). Employer contends the administrative law judge erred in finding claimant established total disability based on the pulmonary function studies and medical opinions.[4] Decision and Order at 13, 25. We disagree.

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 12. Dr. Al-Jaroushi's September 13, 2013 study, Dr. Everhart's March 30, 2016 study, and Dr. Raj's April 4, 2016 study were qualifying for total disability,[5] before and after a bronchodilator was administered. Director's Exhibit 11; Claimant's Exhibits 3, 4. Dr. Fino's February 27, 2014 study and Dr. Basheda's February 18, 2016 study were non-qualifying, before and after a bronchodilator was administered. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge found claimant established total disability by a preponderance of the qualifying pulmonary function studies. Decision and Order at 13.

Employer generally asserts that Dr. Basheda's non-qualifying study establishes claimant is not totally disabled. We disagree. The administrative law judge specifically

[4] The administrative law judge found claimant did not establish total disability through blood gas studies or with evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14.

[5] 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).

observed that Dr. Basheda's February 18, 2016 results were "higher than the others." Decision and Oder at 12. He also noted, however, that the March 30, 2016 and April 4, 2016 studies, obtained only six weeks later, had lower, qualifying values. *Id*. Because no physician challenged the validity of the three qualifying studies, he found they "accurately represent [c]laimant's respiratory condition at the time each study was performed."[6] *Id*. Thus, he found Dr. Basheda's non-qualifying study was outweighed. *Id*.

Employer does not identify any specific error with the administrative law judge's analysis or his determination that a preponderance of the pulmonary function studies are valid and qualifying.[7] *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's finding that a preponderance of the pulmonary function studies overall are qualifying to establish total disability, as it is supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The administrative law judge weighed five medical opinions. He credited the opinions of Drs. Al-Jaroushi, Everhart, and Raj that claimant is totally disabled from performing his usual coal mine employment as a maintenance foreman, over the contrary opinions of Drs. Basheda and Fino. Decision and Order at 29. Employer argues that the administrative law judge erred in rejecting the opinions of Drs. Fino and Basheda, given their qualifications and the documented and reasoned nature of their reports and opinions. Additionally, employer contends the administrative law judge failed to provide adequate

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[6] The administrative law judge further explained his findings with regard to the pulmonary function studies when weighing the medical opinions. Decision and Order at 28-29. He noted that while Dr. Fino's February 27, 2014 pulmonary function study was non-qualifying, he interpreted the results as showing moderately severe obstructive lung disease and opined claimant was totally disabled. *Id*. at 28 n.15, *citing* Director's Exhibit 13. He therefore found that "a substantial portion" or "[eighty] percent" of claimant's pulmonary functions studies were at "disability levels." *Id*. at 29.

[7] Employer asserts that claimant's "response to a bronchodilator shows he has an obstructive impairment unrelated to coal dust exposure." Employer's Brief in Support of Petition for Review at 7. Employer's arguments, however, are relevant to the cause of claimant's respiratory impairment and not whether the impairment is totally disabling. *See* 20 C.F.R. §§718.201(a)(2); 718.204(b)(2).

reasons for rejecting their opinions. Employer's Brief in Support of Petition for Review at 9-10 (unpaginated).

We reject employer's arguments because the administrative law judge gave little probative weight to the physicians' opinions based on grounds which employer does not challenge — their failure to demonstrate an adequate understanding of the exertional requirements of claimant's last coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). He also set forth a lengthy explanation for doing so. Decision and Order at 25-27.

A physician rendering an opinion on total disability must demonstrate an adequate understanding of the exertional requirements of claimant's last coal mine employment. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991). Hence, it is appropriate to discredit the opinion of a physician who does not demonstrate the required understanding. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Ondecko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). Here, the administrative law judge found that claimant's usual coal mine employment as a maintenance foreman required "heavy to very heavy work," including: "walking at least five miles a day, often in a bent position in coal that averaged 52 inches; carrying 40 pounds of equipment, routinely lifting, carrying, spreading and/or dumping 30 to 40 bags of rock dust that weighed 50 pounds each; and lifting weights over 100 pounds when necessary."[8] Decision and Order at 26 *citing* Hearing Transcript at 18-31.

Dr. Basheda opined claimant is not totally disabled. He described that claimant's maintenance foreman job required walking on a regular basis, and lifting and carrying equipment as needed. Employer's Exhibit 1. He opined claimant's mild to moderate respiratory impairment "would not prevent [him] from walking on his job" or "doing *some* lifting." Employer's Exhibit 5 at 16 (emphasis added). As the administrative law judge correctly noted, however, Dr. Basheda testified that claimant did not specify to him how heavy the equipment was he had to carry or how far he had to walk on any given day. Decision and Order at 26; Employer's Exhibit 5 at 18. He also observed that Dr. Basheda did not elicit that information from claimant during the examination. Decision an Order at 26. Thus, the administrative law judge found Dr. Basheda's "reliance on general information [c]laimant provided without further inquiry as to the specific exertional

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's usual coal mine work required heavy to very heavy manual labor. *Skrack*, 6 BLR at 1-711; Decision and Order at 7, 10.

requirements of [his usual coal mine job] detract[ed] from the credibility of his opinion." *Id*. at 27. He also found Dr. Basheda diagnosed a non-disabling Class I/II impairment under the American Medical Association (AMA) guides, but did not elaborate as to the limitations that would result from such an impairment rating under the AMA guides. *Id*. Consequently, the administrative law judge found Dr. Basheda's opinion on total disability not well-reasoned and entitled to minimal probative weight. *Id*.

Dr. Fino diagnosed a mild obstructive impairment and also opined claimant is not totally disabled.[9] Employer's Exhibit 4. He gave a breakdown of claimant's workload as a maintenance repairman as follows: very heavy labor – 25 percent; heavy labor – 25 percent; moderate labor – 25 percent; and light labor – 25 percent. Director's Exhibit 13. Although the administrative law judge found that Dr. Fino understood claimant performed heavy lifting, he found that it was unclear from the workload description if Dr. Fino understood the extent of walking claimant was required to do in his job: walking at least five miles a day, often in a bent position, while constantly carrying 40 pounds of equipment. Decision and Order at 28.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge'sfindings that neither Dr. Basheda nor Dr. Fino had an adequate understanding of the exertional requirements of claimant's usual coal mine employment are unchallenged, and he adequately explained the basis for those findings, we affirm his conclusion that their opinions are not well-reasoned as to whether claimant is totally disabled. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm his determination that the medical opinion evidence supports a finding that claimant is totally disabled.[10] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 29.

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[9] Dr. Fino initially opined based on his February 27, 2014 examination that claimant had a moderate impairment and was totally disabled. Director's Exhibit 13. In a May 2, 2016 deposition, Dr. Fino reviewed Dr. Basheda's February 18, 2016 pulmonary function study and noted the FEV1 was "nearly normal." Employer's Exhibit 4 at 16. He therefore opined claimant is not totally disabled based on Dr. Basheda's test results. *Id*. at 17-18.

[10] Employer states "Dr. Fino's and Dr. Basheda's opinions are the best supported and informed" and that Dr. Everhart and Raj's opinions are "shaded with doubt" because they did not review Dr. Basheda's non-qualifying pulmonary function study. Employer's Brief in Support of Petition for Review at 7 (unpaginated). Employer does not assert,

We further affirm the administrative law judge's overall conclusion that the evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2).[11] *See Shedlock*, 9 BLR at 1-198. We therefore affirm his determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis[12] 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 employer did not rebut the presumption by either method.

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however, that the administrative law judge was unable to credit Drs. Everhart's and Raj's opinions as reasoned based on their respective examinations, which included relevant work and social histories, symptoms, physical findings, and qualifying pulmonary function studies. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[11] We reject employer's assertion the administrative law judge did not adequately consider the contrary evidence. The administrative law judge explained: "the fact that, on one occasion, [c]laimant produced improved [pulmonary function study] values that Dr. Basheda and Dr. Fino believed indicated [he] is not total disabled is outweighed by the totality of the evidence in the record." Decision and Order at 28. He also found claimant could not perform his usual coal mine job, based on pulmonary function studies that "fluctuate to qualifying values." *Id.*

[12] Clinical pneumoconiosis is defined as "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. 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). 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).

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "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). Employer relies on the opinions of Drs. Basheda and Fino, who diagnosed claimant with obstructive lung disease caused solely by smoking, with a possible component of asthma. Employer's Exhibits 4, 5. Employer contends their opinions should have been credited, as they are board-certified pulmonologists and explained why claimant's "variable" obstructive impairment is not legal pneumoconiosis. Because employer does not challenge the administrative law judge's specific findings as to the adequacy of their reasoning for excluding legal pneumoconiosis, we reject employer's allegation of error. *Skrack*, 6 BLR at 1-711.

More specifically, Dr. Basheda opined claimant does not have legal pneumoconiosis because his respiratory impairment partially improved after using a bronchodilator, which Dr. Basheda indicated was not consistent with a "fixed" impairment caused by coal dust exposure. Employer's Exhibit 5 at 11-12. The administrative law judge noted, however, that Dr. Basheda also indicated that claimant's pulmonary function studies, dating from 2013 to 2016, showed "persistent" airway obstruction. Decision and Order at 36, *quoting* Employer's Exhibit 5 at 10. He permissibly found that Dr. Basheda did "not adequately explain why coal mine dust exposure from [c]laimant's lengthy 28.09 years of coal mine employment" did not significantly contribute to "this degree of 'persistent' obstruction that remained." Decision and Order at 36; *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Further, he determined that Dr. Basheda did not adequately explain why the miner's response to bronchodilators necessarily eliminated coal mine dust as a substantially aggravating factor of his impairment. *See Barrett*, 478 F.3d at 356; Decision and Order at 35.

Similarly, the administrative law judge found that Dr. Fino eliminated any contribution by coal dust to claimant's impairment but did not adequately explain why the residual obstructive impairment shown after bronchodilator administration on claimant's 2016 non-qualifying pulmonary function study was not due to his coal dust exposure. Decision and Order at 37; Employer's Exhibit 4; *see Barrett*, 478 F.3d at 356; *Swiger*, 98 F. App'x at 237. Nor did Dr. Fino explain why Claimant's coal dust exposure did not exacerbate any asthma. Decision and Order at 37-38.

The administrative law judge also accurately noted that Dr. Fino opined claimant does not have legal pneumoconiosis based, in part, on his view that claimant's reduced

FEV1/FVC ratio is a pattern of impairment consistent with obstruction caused by cigarette smoking, not coal dust exposure. Decision and Order at 38; Director's Exhibit 13 at 10. In accordance with holdings by the United States Court of Appeals for the Fourth Circuit, he permissibly discounted Dr. Fino's opinion as inconsistent with the Department of Labor's (DOL's) recognition that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting). He also found Dr. Fino's use of statistical averaging to "diminish the likelihood of coal mine dust exposure" playing a role in claimant's obstruction failed to consider the miner's particular case. Decision and Order at 38.

As employer does not allege error with respect to these specific credibility findings by the administrative law judge, and they are supported by substantial evidence, we affirm his determination that the employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i) (A). *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Disability Causation

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). He rationally discounted the opinions of Drs. Basheda and Fino that claimant's disability is not due to pneumoconiosis because their opinions on causation were premised on the absence of legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's

[13] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Basheda and Fino, the only opinions supportive of employer's burden of proof, we need not address employer's argument that the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis by Drs. Al-Jaroushi, Everhart, and Raj. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 40.

opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 45. Therefore, we affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge