U.S. Department of Labor

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

BRB No. 19-0035 BLA

JOHN A. McCULLOUGH Claimant-Respondent v. KEYSTONE COAL MINING CORPORATION and ROCHESTER & PITTSBURGH COAL COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/13/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-06163) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to 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 April 15, 2015.[1]

The administrative law judge credited claimant with sixteen years of coal mine employment at underground mines and found he has a totally disabling respiratory or pulmonary impairment.[2] He therefore determined 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).[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in finding it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational,

[1] This is claimant's second claim for benefits. On July 2, 2003, the district director denied his first claim, filed on April 24, 2002, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on the claim.

[2] The administrative law judge found that all of claimant's coal mine employment occurred underground except for his last position which was on the surface of an underground mine. Decision and Order at 6; Hearing Tr. at 11-14.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant established more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7; Employer's Brief at 10.

supported by substantial evidence, and in accordance with applicable law.[5] 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

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).

The administrative law judge determined the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 17-19. The administrative law judge then considered the new medical opinions of Drs. Basheda, Cohen and Ranavaya.[6] Decision and Order at 20-22; Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 3, 6. Drs. Basheda and Cohen both opined claimant is unable to perform his usual coal mine work due to his exercise hypoxemia. Claimant's Exhibit 1; Employer's Exhibits 3, 6. In contrast, Dr. Ranavaya opined claimant has no respiratory or pulmonary impairment. Director's Exhibit 12. The administrative law judge credited the opinions of Drs. Basheda and Cohen over that of Dr. Ranavaya because he found they better explained their opinions in light of the specific exertional requirements of claimant's usual coal mine work. Decision and Order at 20-22. He therefore found the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[6] Dr. Ranavaya examined claimant at the request of the Department of Labor on December 17, 2015. Director's Exhibit 12. Dr. Cohen examined claimant on November 20, 2017. Claimant's Exhibit 1. Dr. Basheda examined claimant on March 26, 2018, and reviewed the opinions of Drs. Ranavaya, Cohen, and claimant's treating physicians. Employer's Exhibits 3, 6.

We reject employer's assertion the administrative law judge mischaracterized Dr. Basheda's opinion as diagnosing a totally disabling respiratory or pulmonary impairment. Employer's Brief at 12, 15-16. While employer correctly asserts Dr. Basheda stated claimant is not disabled "[f]rom a spirometry standpoint," he specifically concluded claimant "is totally disabled from hypoxemia respiratory failure" and "could not return to his coal mining work."[7] Employer's Exhibits 3 at 19; 6 at 28. As substantial evidence supports the administrative law judge's determination that Dr. Basheda's opinion is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), it is affirmed.[8] *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); Decision and Order at 20-22.

Employer next argues Dr. Cohen's disability opinion is unreasoned and insufficient to support claimant's burden of proof as it is "largely undocumented" in light of the non-qualifying pulmonary function studies and more-recent non-qualifying blood gas studies. Employer alleges Dr. Cohen based his "entire" disability opinion on the "six minute walk test" without explaining his rationale. Employer's Brief at 13-16.

Contrary to employer's contention, the fact claimant did not demonstrate total disability by the pulmonary function study or blood gas study evidence does not preclude a finding of total disability based on the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). Non-qualifying test results alone do not establish the absence of an impairment. *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). Rather, as noted, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether claimant's

[7] Dr. Basheda noted claimant's oxygen saturation was decreased at 88% on room air while at rest, which required 2 liters of supplemental oxygen per minute. After a six-minute walk, claimant's oxygen saturation decreased to 86% while on 2 liters of oxygen. Claimant ultimately required 3 liters of supplemental oxygen per minute to achieve acceptable oxygenation levels. Employer's Exhibit 3 at 6, 19.

[8] Employer also asserts Dr. Basheda's opinion does not support total respiratory disability because he attributed claimant's disabling hypoxemia to his liver disease. Employer's Brief at 12, 15-16. Contrary to employer's argument, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether claimant's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. The etiology of claimant's pulmonary impairment concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

respiratory or pulmonary impairment precluded the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (ii), (b)(2)(iv). Here, Dr. Cohen evaluated claimant's examination results and history, and explained how claimant's drop in oxygen saturation from 98% at rest to 71% after a six-minute walk rendered him totally disabled for his last coal mine job.[9] Claimant's Exhibit 1. As it is the province of the administrative law judge to evaluate the medical opinion evidence and to assess credibility and probative value, we affirm the administrative law judge's determination Dr. Cohen's opinion is credible and reject employer's argument to the contrary. *See Balsavage*, 295 F.3d at 396; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

As employer raises no further arguments relevant to the administrative law judge's finding that claimant established total disability based on the medical opinions, it is affirmed. *See* 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's overall determination that claimant is totally disabled[10] and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

[9] Dr. Cohen provided an extensive history of claimant's symptoms of coughing and mild shortness of breath beginning in 1994 that progressed to the point where claimant can walk approximately a quarter of a city block before he feels short of breath, and has to stop and rest approximately every minute during his daily activities. Claimant's Exhibit 1 at 1. Dr. Cohen explained that due to claimant's inability to perform a formal cardiopulmonary exercise test, claimant performed, as an alternative, a six-minute walk test resulting in interpretable results that "clearly showed disabling exercise hypoxemia" based on an oxygen saturation drop from 98% at rest to 71% at peak exercise. *Id*. at 8. Dr. Cohen concluded "this degree of impairment would be totally disabling for claimant's last coal mine jobs working as a supply man or in the bathhouse where he was required to load heavy supplies such as posts, roof bolts, and bags of rock dust and load trucks." *Id*. He further noted claimant had to drag and carry the hose, which weighed approximately 50 to 60 pounds, to the bathhouse, a distance of one full city block. *Id*.

[10] Because claimant did not establish any element of entitlement in his previous claim, the administrative law judge's finding that claimant established total disability with new evidence constitutes a determination of a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

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 clinical nor legal pneumoconiosis[11] 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 failed to establish rebuttal by either method.[12] We agree with employer the administrative law judge erred in his evaluation of the evidence relevant to rebuttal. Employer's Brief at 17-25.

The administrative law judge began his rebuttal analysis by correctly recognizing that 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); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 14-15. He then considered the opinions of Drs. Ranavaya, Basheda, and Cohen. Decision and Order at 14-15; Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 3, 6. Dr. Ranavaya diagnosed chronic bronchitis/chronic obstructive pulmonary disease (COPD) unrelated to coal dust exposure. Director's Exhibit 12. Dr. Basheda diagnosed hypoxemic respiratory failure unrelated to coal mine dust exposure. Employer's Exhibits 3, 6. Dr. Cohen diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1. Noting that Drs. Ranavaya and Cohen diagnosed chronic bronchitis, and that coal mine dust exposure is "linked in a substantial way" to COPD which includes chronic bronchitis, as set forth in the preamble to the 2001 regulations,[13] the administrative law judge concluded employer failed to disprove legal pneumoconiosis:

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[11] 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). 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).

[12] The administrative law judge found employer successfully disproved clinical pneumoconiosis, but not legal pneumoconisois. Decision and Order at 14.

[13] The administrative law judge noted that, in relevant part, the preamble states:

> As the Act does not require that coal mine dust exposure be the sole cause of a claimant's respiratory impairment, for the reasons given in Section V, *infra*, the undersigned finds that the evidence is insufficient to establish that [c]laimant's respiratory impairment is *entirely unrelated* to coal mine dust exposure.

Decision and Order at 15. Thus, although the administrative law judge accurately stated the rebuttal standard at the outset of his analysis, his conclusion that employer failed to rebut the existence of legal pneumoconiosis does not indicate whether he applied the correct rebuttal standard. Employer's Brief at 12-13. Nor, at this juncture, did the administrative law judge indicate what weight he accorded to Dr. Basheda's opinion that claimant does not have legal pneumoconiosis. Employer's Brief at 21; Employer's Exhibits 3, 6.

Further, it is not clear the administrative law judge properly analyzed the evidence relevant to the existence of legal pneumoconiosis at Section V of his decision, as referenced above. There, he referred to rebuttal of disability causation, stating: "Employer failed to

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> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

Decision and Order at 15, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). As employer correctly argues, however, the administrative law judge appeared to conclude, erroneously, that chronic bronchitis must be attributable to coal mine dust inhalation and therefore constitutes legal pneumoconiosis. Employer's Brief at 17-20. Contrary to the administrative law judge's conclusion, whether a particular miner's chronic bronchitis or COPD is due to coal mine dust exposure must be determined on a case-by-case basis in light of the administrative law judge's consideration of the evidence of record. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012). Here, Dr. Ranavaya explicitly stated claimant's chronic bronchitis/COPD was "[u]nrelated to occupational exposure to dust in coal mining." Director's Exhibit 12 at 4.

rebut the presumed existence of both clinical coal workers' pneumoconiosis[14] and legal coal workers' pneumoconiosis. Thus, [e]mployer now faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to [c]laimant's disability." Decision and Order at 23 (internal citations omitted). He determined employer "must rule out the miner's coal mine employment as a contributing cause of the totally disabling respiratory or pulmonary impairment." *Id.*, *quoting* 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012). But the proper standard is whether employer disproved the existence of legal pneumoconiosis by showing that claimant does not have a respiratory condition that is significantly related to, or substantially aggravated by, coal mine dust exposure. *Minich*, 25 BLR at 154-56; Employer's Brief at 12-13.

We also agree with employer that in finding Dr. Basheda's opinion that claimant's hypoxic respiratory failure is not related to coal dust exposure to be speculative, the administrative law judge did not adequately address the rationale Dr. Basheda provided for his determination. Employer's Brief at 22-24. Dr. Basheda initially noted cardiovascular disease, pulmonary disease, and liver disease "may" result in hypoxemia, and acknowledged claimant had been diagnosed with all three conditions. Employer's Exhibits 3 at 19; 6 at 23. He explained, however, he had excluded cardiovascular disease as a possible cause of claimant's hypoxemia based on his echocardiogram which showed a normal ejection fraction of 60%. Employer's Exhibit 6 at 23, 36. Dr. Basheda also specifically excluded pulmonary disease as a potential cause. *Id.* He noted despite claimant having been diagnosed with COPD, there is no objective evidence to make this diagnosis as claimant's spirometry did not document an FEV1/FVC ratio below 0.7, which is required to diagnose obstruction. Employer's Exhibits 3 at 19; 6 at 27. Nor did he find radiographic evidence of restrictive lung disease. Employer's Exhibits 3 at 19; 6 at 27. Thus, as employer asserts, Dr. Basheda unequivocally concluded "within a reasonable degree of medical certainty" that claimant's hypoxemia is not due to cardiovascular or pulmonary disease but is due to his liver disease.[15] Employer's Exhibit 6 at 34-35. Employer's Brief at 24; Employer's Exhibit 3 at 19.

[14] Contrary to the administrative law judge's statement, he found employer successfully disproved the existence of clinical pneumoconiosis. Decision and Order at 14.

[15] The administrative law judge also discredited Dr. Basheda's opinion because he concluded claimant has no pulmonary disease based on the lack of spirometric or radiographic evidence but "failed to address the blood gas study results." Decision and Order at 12. Contrary to the administrative law judge's finding, Dr. Basheda provided the results of his own blood gas testing, and summarized the blood gas studies conducted by Drs. Ranavaya and Cohen. Employer's Exhibit 3. As no doctor diagnosed a pulmonary

Because it is unclear whether the administrative law judge considered the evidence under the correct rebuttal standard and apparently did not fully consider Dr. Basheda's medical opinion, we vacate his finding that employer failed to establish rebuttal of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). 30 U.S.C. §923(b). Further, as the administrative law judge's evaluation of the evidence relevant to rebuttal of legal pneumoconiosis may affect his evaluation of the evidence relevant to disability causation, we must also vacate that rebuttal finding. 20 C.F.R. §718.305(d)(1)(ii). We therefore vacate the award of benefits and remand this case to the administrative law judge.

On remand, the administrative law judge should first consider whether employer disproved the existence of legal pneumoconiosis by affirmatively establishing 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); *see Minich*, 25 BLR at 1-155 n.8. In doing so, he must fully address Dr. Basheda's opinion.

If, on remand, the administrative law judge finds employer has disproved the existence of legal pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. But if employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Helen Mining Co. v. Elliott*, 859 F.3d 226, 237-38 (3d Cir. 2017); *Minich*, 25 BLR at 1-159.

The administrative law judge should address the explanations the physicians have provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163. He must set forth his findings in detail, including the underlying rationale for his decision, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

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disease or impairment based on claimant's blood gas studies, it is unclear how Dr. Basheda's failure to further address the blood gas study results undermined his opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge