U.S. Department of Labor

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

BRB No. 19-0051 BLA

JAMES D. HICKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOTIVATION COAL COMPANY	)	DATE ISSUED: 12/10/2019
	)	
and	)	
	)	
PITTSTON COMPANY	)	
	)	
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 Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

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

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-06202) of Administrative Law Judge Colleen A. Geraghty on a claim filed on September 2, 2015 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 26.19 years of underground or substantially similar surface coal mine employment[1] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding total disability and in invoking the Section 411(c)(4) presumption. Employer also argues she erred in finding the presumption unrebutted.[3] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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, 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 – 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987);

[1] The record reflects that claimant's coal mine employment occurred in Virginia. Director's Exhibit 3; Decision and Order at 10. Accordingly, this case arises within the jurisdiction 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of 26.19 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge first considered six pulmonary function studies conducted on August 12, 2015, October 12, 2015, April 15, 2016, September 6, 2016, December 27, 2016, and February 21, 2018. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11-14, n.10; Director's Exhibits 12, 13, 17; Claimant's Exhibits 3, 6; Employer's Exhibit 2. She found all of the studies produced qualifying[4] values for total disability except the December 27, 2016 study. Decision and Order at 11-14, n.10. She found, however, that none of the studies are valid except the September 6, 2016 study and specifically rejected the opinions of Drs. Sargent and Fino that the study is invalid.[5] *Id*. Because the only valid study is qualifying, she found claimant established total disability based on this evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14.

Employer argues the administrative law judge substituted her opinion for that of the medical experts when finding the September 6, 2016 study valid.[6] Employer's Brief at 7-11 (unpaginated). We disagree. The administrative law judge acknowledged that, in his deposition, Dr. Sargent testified he reviewed pulmonary function studies dated August 12, 2015 and September 16, 2016 and opined both are "invalid because [c]laimant did not reach a plateau on the [flow-volume loops] and there was no agreement within [five-percent]." Decision and Order at 14; Employer's Exhibit 4 at 16. The administrative law judge found Dr. Sargent's testimony insufficient to invalidate the September 6, 2016 study for two reasons. *Id*. She first found that he referenced the results of a September 16, 2016 study, which is not contained in the record. *Id*. Although she found Dr. Sargent "likely" meant to refer to the September 6, 2016 study, "the uncertainty as to whether he was referring to the correct [pulmonary function study] diminishes his credibility." *Id*. She

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[5] The administrative law judge acknowledged that Dr. Ajjarapu, who administered the September 6, 2016 study, noted "good patient effort." Decision and Order at 14; Claimant's Exhibit 3.

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the December 27, 2016 non-qualifying study is entitled to diminished weight because it "does not identify [c]laimant's . . . height and lacks tracings and [flow-volume] loops as required by the regulations." Decision and Order at 13 n. 10; *Skrack*, 6 BLR at 1-711.

also found that, to the extent he was referring to the correct study, the doctor's opinion is unpersuasive because he did not adequately identify the specific aspects of this test that rendered it invalid. *Id*.

Employer argues Dr. Sargent's reference to a September 16, 2016 study "was a slight transcription issue or a small misquote" and, thus, the administrative law judge erred in finding this diminishes his credibility. Employer's Brief at 9 (unpaginated). We disagree. As employer acknowledges, Dr. Sargent testified that he reviewed a September 16, 2016 study, when no such study is in the record. Although he completed a deposition correction form subsequent to giving his testimony, he did not make any corrections that clarified he actually reviewed the September 6, 2016 study. Employer's Exhibit 4 at 22. Because the administrative law judge, as the trier of fact, has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal, we affirm the administrative law judge's finding that Dr. Sargent's credibility was diminished because he did not actually identify the September 6, 2016 test in his deposition. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989), *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 14.

We further affirm the administrative law judge's additional credibility finding that, even if Dr. Sargent was referring to the correct test, he did not adequately discuss the specifics of the test in deeming it invalid. In challenging this finding, employer submits, without further explanation, that Dr. Sargent "clearly discussed [his] reasoning" and opined the September 6, 2016 study "does not meet the reproducibility criteria." Employer's Brief at 10-11 (unpaginated). The Board, however, must limit its review to contentions of error that the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify any specific error with regard to the administrative law judge's determination that Dr. Sargent's testimony is unpersuasive, we affirm her discrediting of his opinion.

We also reject employer's argument that the administrative law judge erred in rejecting Dr. Fino's opinion that the September 6, 2016 study is invalid. Employer's Brief at 7-11 (unpaginated). As the administrative law judge noted, employer's counsel asked Dr. Fino at his deposition to "generally" provide an opinion as to the validity of all the pulmonary function studies he reviewed. Employer's Exhibit 3 at 14-15. Dr. Fino stated all four studies he reviewed were "submaximal." *Id*. He explained these studies produced results indicating claimant "either stopped exhaling early into the pulmonary function study, like three to four seconds," or claimant exhaled for "six or seven seconds, [but] there was still air coming out of his lungs, [signifying] not all of the air was exhaled." *Id*. Contrary to employer's argument, the administrative law judge permissibly found this reasoning unpersuasive because although the September 6, 2016 study was among the

studies he reviewed, Dr. Fino "only talked about the [studies] in general and did not discuss any specific details as to the [September 6, 2016 study] to support his finding that the test was invalid." Decision and Order at 14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (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 finding that the September 6, 2016 pulmonary function study is valid and establishes total disability. 20 C.F.R. §718.204(b)(2)(i).

In considering the medical opinion evidence,[7] the administrative law judge noted that Dr. Ajjarapu diagnosed claimant as totally disabled, while Drs. Sargent and Fino opined he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16-20. The administrative law judge found all three opinions unpersuasive and entitled to diminished weight.[8] *Id*. at 20. The administrative law judge permissibly found the opinions of Drs. Sargent and Fino unpersuasive because they based their conclusions, in part, on their belief that the September 6, 2016 pulmonary function study is invalid, contrary to the administrative law judge's own finding that the study is a valid indicator of claimant's pulmonary function. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 20. Thus we affirm her determination that the medical opinion evidence does not undermine the weight of the pulmonary function study evidence supporting a finding of total disability. Decision and Order at 20.

Because there is no evidence undermining the valid and qualifying pulmonary function study, we further affirm the administrative law judge's overall conclusion that the evidence, when weighed together, establishes total disability, 20 C.F.R. §718.204(b)(2), *Rafferty*, 9 BLR at 1-232, and her determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 20.

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,[9] 20 C.F.R.

[7] The administrative law judge found that claimant did not establish total disability based on the arterial blood gas testing or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14-15.

[8] The administrative law judge discredited Dr. Ajjarapu's opinion because it was based on a qualifying, but invalid pulmonary function study Dr. Ajjarapu administered on October 12, 2015. Decision and Order at 20.

[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

§718.305(d)(1)(i), or "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)(ii). The administrative law judge found employer failed to establish rebuttal by either method.[10]

To disprove legal pneumoconiosis, employer must demonstrate claimant 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, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge noted Dr. Sargent opined claimant "may have an obstructive impairment that could be due to cigarette smoking, coal [mine] dust exposure, or a combination of both, but due to a lack of valid [pulmonary function studies], he was unable to make that determination." Decision and Order at 27; *see* Director's Exhibit 17; Employer's Exhibit 4 at 18-19. She noted Dr. Fino similarly opined there are no valid pulmonary function studies to "justify a diagnosis of legal pneumoconiosis." Decision and Order at 27-28; *see* Employer's Exhibits 2, 3. She permissibly found their opinions insufficient to rebut the presumption of legal pneumoconiosis because they assumed there are no valid pulmonary function studies, contrary to her finding that the September 6, 2016 pulmonary function study is valid and establishes claimant has a disabling respiratory impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 27-28. Thus we affirm the administrative law judge's consequent determination that employer did not disprove legal pneumoconiosis and therefore did not rebut the presumption by establishing claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

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). She rationally discounted the opinions of Drs. Sargent and Fino on this issue because their opinions as to causation were premised on the absence of legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-

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).

[10] The administrative law judge found that employer disproved clinical pneumoconiosis. Decision and Order at 27.

05 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 28-29. 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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge