U.S. Department of Labor

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

BRB No. 14-0209 BLA

GAZI BOKKON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/13/2015
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (2009-BLA-5627) of Administrative Law Judge Daniel F. Solomon 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 claimant's request for modification of the denial of a subsequent claim filed on February 28, 2006,[1] and is before the Board for the second time.

Initially, in a Decision and Order dated April 3, 2008, the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and denied benefits.

Claimant timely requested modification. In a Decision and Order dated September 5, 2012, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), thereby establishing a change in an applicable condition of entitlement, as well as a change in conditions. 20 C.F.R. §§725.310, 725.309(c). Considering the claim on the merits, the administrative law judge applied amended Section 411(c)(4).[2] 30 U.S.C. §921(c)(4). The administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment,[3] and that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that he is totally disabled due to

[1] Claimant initially filed a claim for benefits on June 27, 1973. Director's Exhibit 1. The district director denied the claim because claimant did not establish any of the elements of entitlement. *Id.* Claimant filed a second claim on May 17, 2002, which was also denied for failure to establish any of the elements of entitlement. Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in West Virginia. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 647 (6th Cir. 2014); *Kopp v. Director, OWCP*, 877 F.2d 307, 309 n.1 (4th Cir. 1989); Director's Exhibit 1. 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 (1989) (en banc).

pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary for consideration of the Section 411(c)(4) presumption. *Bokkon v. Island Creek Coal Co.*, BRB No. 12-0656 BLA (July 16, 2013) (unpub.). However, the Board vacated the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* The Board, therefore, vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *Id.* The Board also vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *Id.* Consequently, the Board vacated the administrative law judge's award of benefits, and remanded the case for further consideration. *Id.*

On remand, the administrative law judge again found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), 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 employer did not establish rebuttal of the presumption. Employer further argues that the administrative law judge applied an incorrect standard in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge applied the proper rebuttal standard. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, rational, 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 contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(iv) and, therefore, erred in finding that claimant invoked the Section

411(c)(4) presumption. The relevant new medical opinion evidence consists of Dr. Chavda's treatment records, and Dr. Tuteur's medical opinion. In a progress note dated February 24, 2011, Dr. Chavda, claimant's family physician, referenced the pre-bronchodilator FEV_1 value from a pulmonary function study taken on the same day, in opining that claimant does not "have enough lung capacity to work [in the] coal mine[s] at [the] present time." Employer's Exhibit 4. Dr. Chavda also interpreted claimant's February 24, 2011 pulmonary function study as revealing a "mild obstructive airway defect." Employer's Exhibit 5.

In a report dated January 1, 2011, Dr. Tuteur opined that claimant has "a respiratory impairment most contemporaneously objectively determined as a mild obstructive abnormality without impairment of oxygen gas exchange." Employer's Exhibit 1. Dr. Tuteur opined that this "impairment is of insufficient severity to produce clinical symptoms or disability." *Id.* Although Dr. Tuteur opined that claimant "has an exercise tolerance which prohibits him from continuing work in the coal mine industry," Dr. Tuteur explained that claimant's exercise limitation was appropriate for an eighty-four year old man and "does not reflect the presence of any primary pulmonary process." *Id.* Dr. Tuteur opined that claimant's "disability is in no way related to any impairment of pulmonary function." *Id.*

On remand, the administrative law judge initially noted that Drs. Chavda and Tuteur each diagnosed claimant with "a mild obstructive impairment." Decision and Order on Remand at 5. As instructed by the Board, the administrative law judge next addressed claimant's usual coal mine employment, and the exertional requirements of that employment. The administrative law judge identified claimant's usual coal mine work as that of a section foreman, a job which the administrative law judge characterized as requiring claimant, among other duties, to carry approximately twenty-five pounds, hang up curtains when they fell down, and supervise the operation of a continuous miner. *Id.* Comparing the exertional requirements of claimant's last coal mining job to the physical limitations noted by the doctors, the administrative law judge found that Dr. Chavda's opinion "demonstrates that [c]laimant is unable to perform his usual coal mine work." *Id.* at 6. The administrative law judge further found that Dr. Tuteur's opinion was not well-reasoned because the doctor "did not adequately explain how he was able to conclude that [c]laimant's mild pulmonary impairment play[ed] no role in his exercise limitation." *Id.* at 5. The administrative law judge also credited Dr. Chavda's opinion over that of Dr. Tuteur, because he found that Dr. Chavda's opinion was better supported by the objective medical evidence. *Id.* The administrative law judge, therefore, found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that, in finding that the medical opinion evidence established total disability, the administrative law judge erred in crediting Dr. Chavda's opinion over

that of Dr. Tuteur. Employer initially contends that the administrative law judge erred in relying upon Dr. Chavda's opinion, because the doctor based his opinion upon non-qualifying[4] pulmonary function study results. Contrary to employer's contention, test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). In this case, the administrative law judge noted that Dr. Chavda interpreted claimant's non-qualifying February 24, 2011 pulmonary function study as revealing a "mild obstructive airway defect." Employer's Exhibit 5. We therefore reject employer's allegation of error.

We also reject employer's contention that the administrative law judge erred in crediting Dr. Chavda's opinion over that of Dr. Tuteur. The administrative law judge permissibly determined, in light of the exertional requirements of claimant's usual coal mine employment, that Dr. Chavda's assessment of a mild obstructive impairment supported a finding of a totally disabling pulmonary impairment.[5] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge further permissibly accorded greater weight to Dr. Chavda's assessment of claimant's pulmonary limitations because the doctor relied upon more recent pulmonary function study evidence. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also permissibly found that Dr. Tuteur's opinion was not well-reasoned because the doctor failed to adequately explain why claimant's mild pulmonary impairment did not play any role in his exercise limitation. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because it is based upon substantial evidence, we affirm the

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

[5] We reject employer's argument that the administrative law judge erred by failing to address the comparative credentials of Drs. Chavda and Tuteur. Dr. Chavda's qualifications are not found in the record. Although the administrative law judge acknowledged Dr. Tuteur's "impressive credentials in pulmonary medicine," he permissibly assigned Dr. Tuteur's opinion less weight because he found that it was not well-reasoned.

administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[6] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). In support of its argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court's decision in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's Brief at 29-45. Although employer's argument was rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), employer asserts that the United States Court of Appeals for the Fourth Circuit has not resolved this issue. Further, employer argues that the recently promulgated regulation implementing amended Section 411(c)(4), specifically 20 C.F.R. §718.305(d), conflicts with the holding in *Usery* and is invalid. Employer's arguments lack merit. The Fourth Circuit court has not disturbed the Board's holding in *Owens*, *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013), and employer has not provided a compelling reason for the Board to revisit this issue. Additionally, employer has not shown that it was, in fact, restricted in the evidence that it could offer in rebuttal. Lastly, we agree with the Director's position that 20 C.F.R. §718.305(d), as amended, is valid. Consequently, we reject employer's arguments to the contrary.

[6] In light of our affirmance of the administrative law judge's finding that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as well as a change in conditions pursuant to 20 C.F.R. §725.310.

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence. The administrative law judge found that the interpretations of claimant's February 24, 2011 x-ray were entitled to the greatest weight because it is the most recent x-ray of record. Decision and Order on Remand at 7. While Dr. Shipley, a B reader and Board-certified radiologist, interpreted the February 24, 2011 x-ray as negative for pneumoconiosis, Employer's Exhibit 6, Dr. Alexander, an equally qualified physician, found that the x-ray was positive for pneumoconiosis. Claimant's Exhibit 1. Because equally qualified physicians disagreed as to whether the February 24, 2011 x-ray established the existence of pneumoconiosis, the administrative law judge permissibly found the readings were "in equipoise" and, therefore, insufficient to disprove the existence of clinical pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order on Remand at 8.

Employer argues that the administrative law judge erred in not according greater weight to Dr. Shipley's negative x-ray interpretation based upon his superior academic qualifications. We disagree. Although the administrative law judge noted Dr. Shipley's position as a professor of clinical radiology at the University of Cincinnati College of Medicine, he accurately noted that Dr. Alexander worked as an assistant professor of Radiology and Nuclear Medicine at the University of Maryland Medical System. Decision and Order on Remand at 8. While an administrative law judge is permitted to assign greater weight to the x-ray interpretation of one physician over another, based on their academic appointments, he is not required to do so. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). In this case, the administrative law judge acted within his discretion in not according greater weight to Dr. Shipley's x-ray interpretation, based upon his academic appointments. We, therefore, affirm the administrative law judge's determination that the x-ray evidence was "in equipoise" and, therefore, did not assist employer in satisfying its burden to disprove the existence of clinical pneumoconiosis.

Employer next argues that the administrative law judge erred in his consideration of Dr. Amin's interpretation of a February 25, 2010 CT scan. Dr. Amin described various irregularities, including "bilateral atypical mass like lesions perhaps compatible with infiltrates" and "significant infiltrative changes," as well as "patchy infiltrates." Employer's Exhibit 4. The administrative law judge gave little weight to this scan, however, because "the physician who reviewed the CT scan did not render an opinion on the existence or absence of pneumoconiosis at all." Decision and Order on Remand at 8.

Employer argues that the "lack of a diagnosis of pneumoconiosis" supports a finding that the disease is not present. Employer's Brief at 25. We disagree. The significance of CT scans that contain no mention of pneumoconiosis is a question of fact committed to the administrative law judge's discretion. *See generally Marra v.*

Consolidation Coal Co., 7 BLR 1-216, 1-218-19 (1984). In this instance, the administrative law judge permissibly evaluated Dr. Amin's CT scan interpretation, and determined that it did not assist employer in disproving the existence of clinical pneumoconiosis.[7] *Id.*

Finally, employer argues that the administrative law judge erred in his evaluation of Dr. Tuteur's opinion. We disagree. Dr. Tuteur reviewed the interpretations of claimant's x-rays. In regard to the interpretations of claimant's August 3, 2007 x-ray,[8] Dr. Tuteur stated:

> What is observed appears to be upper lung field dominant nodular densities found apically and subjacent emphysematous areas associated with pleural thickening. This is not the typical description of coal workers' pneumoconiosis of either the simple or complicated variety; but, from the description, *it is possible that this radiograph does represent some degree of coal workers' pneumoconiosis.*

Employer's Exhibit 1 (emphasis added).

Although Dr. Tuteur ultimately opined that "there is not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis," he acknowledged that "[f]rom the available data, no meaningful rigorous conclusion can be derived with respect to etiology." *Id.* In evaluating Dr. Tuteur's opinion, the administrative law judge acted within his discretion in concluding that Dr. Tuteur's acknowledgement that one of claimant's x-rays showed "possible" pneumoconiosis rendered his opinion equivocal as to the existence of that disease. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge permissibly found that Dr. Tuteur's opinion did not assist employer in disproving the existence of clinical pneumoconiosis. Consequently, we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

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[7] As the United States Court of Appeals for the Third Circuit has noted, "it is at least problematic to allow the absence of evidence in a record to be sufficient to rebut a presumption. . . . [because] [t]he purpose of a presumption is to shift the burden of affirmative proof to the party seeking to rebut the presumed fact." *Kline v. Director, OWCP*, 877 F.2d 1175, 1180 n.15, 12 BLR 2-346, 2-355 n.15 (3d Cir. 1989).

[8] Dr. Tuteur did not review the interpretations of claimant's most recent x-ray, taken on February 24, 2011.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge rationally discounted Dr. Tuteur's opinion, that the miner's disabling pulmonary impairment did not arise out of his coal mine employment, because Dr. Tuteur did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 262, 269, 22 BLR 2-373, 2-383 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). Moreover, the administrative law judge's permissible reason for discrediting Dr. Tuteur's opinion that claimant was not totally disabled by a respiratory impairment also undermines his opinion that coal mine dust exposure did not contribute to that impairment.[9] *See Scott*, 289 F.3d at 269, 22 BLR at 2-383; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that claimant's totally disabling impairment did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

[9] As previously discussed, the administrative law judge permissibly discredited Dr. Tuteur's conclusion that claimant was not totally disabled because Dr. Tuteur did not explain why claimant's pulmonary impairment played no role in his exercise limitation. Dr. Tuteur also noted that claimant's impairment "is of insufficient severity to produce clinical symptoms of disability." Employer's Exhibit 1 at 7.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

Because I agree with the majority that the administrative law judge's rationale for discrediting Dr. Tuteur's opinion that claimant is not totally disabled renders his opinion with respect to the cause of claimant's disability not credible, any error by the administrative law judge in discrediting Dr. Tuteur's opinion for failing to diagnose pneumoconiosis was harmless. I concur in all other respects with the majority's decision.

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JUDITH S. BOGGS
Administrative Appeals Judge