U.S. Department of Labor

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

BRB No. 15-0150 BLA

JAMES BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & P COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/25/2016
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

H. Brett Stonecipher and Tighe A. Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2011-BLA-06024) of Administrative Law Judge Larry S. Merck, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Because the newly submitted evidence was sufficient to establish that claimant is totally disabled, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on the filing date of this subsequent claim,[1] and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment for invocation of the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge applied the wrong rebuttal standard and erred in discrediting the opinions of its physicians in finding that employer did not establish rebuttal of the

[1] Claimant has filed five prior claims for benefits. The first four claims, filed on June 13, 1989, January 26, 1998, June 8, 1999, and November 27, 2001, were each denied by the district director because claimant was unable to establish any element of entitlement. Director's Exhibits 1, 2, 3, 4. Claimant filed his fifth claim on February 2, 2005, which was denied by Administrative Law Judge Kenneth A. Krantz on August 31, 2007. Director's Exhibit 5. Although Judge Krantz found that claimant established the existence of pneumoconiosis arising out of coal mine employment, and a change in an applicable condition of entitlement under 20 C.F.R. §725.309, he determined that the evidence was insufficient to establish that claimant was totally disabled. *Id*. Claimant took no further action with regard to the denial until he filed the current subsequent claim on June 2, 2010. Director's Exhibit 7.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability 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.

presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge applied the correct rebuttal standard in weighing the evidence. Employer has also filed a reply brief, reiterating its arguments.[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.[4] 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).

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four newly submitted pulmonary function tests. The administrative law judge noted that a pulmonary function test performed on November 4, 2010 was qualifying[5] for total disability, before and after the use of a bronchodilator.[6] Decision and Order at 10;

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established "over 15 years of underground coal mine employment." Decision and Order at 8; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 8.

[5] A "qualifying" pulmonary function test or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" pulmonary function test or blood gas study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Employer asserts correctly that, contrary to the administrative law judge's finding, the November 4, 2010 pulmonary function test does not qualify for total disability. Although the FEV1 is below the table values, the FVC recorded for the test exceeds the tables values listed in Appendix B for the miner's height (ranging from 66 to 68 inches) and his age of 60, at the time the test was conducted, and there was no MVV recorded. Employer's Brief at 12; *see* Decision and Order at 10; Director's Exhibit 15. Notwithstanding, we consider the administrative law judge's error in characterizing the test as qualifying to be harmless, as he properly concluded that claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Director's Exhibit 15. He found that two pulmonary function tests dated February 14, 2011 and July 14, 2011 were non-qualifying, before and after the use of a bronchodilator, and that a November 11, 2011 test, performed without the use of a bronchodilator, was also non-qualifying. Decision and Order at 10; Director's Exhibit 18; Claimant's Exhibit 1; Employer's Exhibit 1. Because a "majority" of the pulmonary function tests, including "the most recent" tests, were non-qualifying, the administrative law judge found that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10.

Because each of the four newly submitted arterial blood gas studies, dated November 4, 2010, February 24, 2011, July 14, 2011, and November 5, 2011, was non-qualifying, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11; Director's Exhibits 15, 18; Claimant's Exhibit 1; Employer's Exhibit 1. Furthermore, because there was no evidence in the record to establish that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge concluded that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11 n.6.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinions of Drs. Forehand, Baker, Broudy, and Dahhan. Decision and Order at 11-16. The administrative law judge credited the opinions of Drs. Forehand and Baker, that claimant is totally disabled, over the contrary opinions of Drs. Broudy and Dahhan. *Id*. at 16. Weighing all of the evidence together, the administrative law judge determined that claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment.[7] *Id*.

Employer argues that the administrative law judge erred in relying on the opinions of Drs. Forehand and Baker, because they diagnosed "disability wholly on pulmonary function," contrary to the administrative law judge's finding that the pulmonary function study evidence is non-qualifying for total disability. Employer's argument is rejected as without merit.

[7] The administrative law judge found that the evidence from the prior claims, dating back from 2005, was "less probative of claimant's current condition." Decision and Order at 17.

The fact that claimant is unable to establish total disability based on pulmonary function or arterial blood gas study evidence does not preclude a finding of total disability based on the medical opinion evidence. The regulation at 20 C.F.R. §718.204(b)(2)(iv) specifically states:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). Furthermore, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has specifically held that even a mild respiratory impairment may prevent the performance of a miner's usual coal mine work, when considered in conjunction with the specific physical requirements of the miner's coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

In this case, we see no error in the administrative law judge's findings that Drs. Forehand[8] and Baker[9] provided reasoned and documented opinions that claimant is

[8] Dr. Forehand examined claimant on November 4, 2010, at the request of the Department of Labor (DOL). Director's Exhibit 11. On the DOL Form CM-988, Dr. Forehand identified claimant's coal mine job as a "cutting machine operator" and stated:

> A significant respiratory impairment is present. Insufficient residual ventilatory capacity remains to return to last coal mining job. Unable to work. Totally and permanently disabled.

Id.

[9] Dr. Baker prepared a report on November 7, 2011, based on his examination of claimant. Claimant's Exhibit 1. Dr. Baker noted that claimant worked eighteen years and three months in underground coal mine employment, working primarily as a cutting machine operator, but that he also helped out "on all jobs at one time or another." *Id*. Dr. Baker reported claimant's respiratory symptoms and noted that claimant used supplemental oxygen at night for the "last five or six months." *Id*. Dr. Baker diagnosed a moderate obstructive defect, based on pulmonary function testing, and mild to moderate

totally disabled from performing his usual coal mine work. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). We also reject employer's contention that the administrative law judge erred in giving less weight to the opinions of Drs. Broudy and Dahhan. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002).

Dr. Broudy examined claimant on February 24, 2011, and stated that from a "purely respiratory standpoint, disregarding any non-pulmonary problems . . . [claimant] would retain the ventilatory capacity to do his previous work of continuous miner operator." Director's Exhibit 18. During his deposition conducted on October 10, 2013, Dr. Broudy reviewed the specific physical demands of claimant's job, as described by Dr. Baker in his addendum report. Employer's Exhibit 6 at 24. In response to the question of whether claimant was able to perform his previous coal mine job, Dr. Broudy stated, "[w]ell, I think he probably could if he wanted to." *Id*. at 20. Additionally, when asked on cross-examination whether claimant had the ability to perform "arduous manual labor" from a respiratory standpoint, Dr. Broudy stated:

> Well, as [claimant] said, and I would agree, I would also be short of breath going up two flights of stairs, so I think he may be short of breath with some heavy exertion. And he may have to rest after doing very heavy work, but that's more typical – more of the miners than – it's typical of most of the miners I would say.

Id. at 26.

Taking into consideration Dr. Broudy's varying statements, we affirm the administrative law judge's finding that Dr. Broudy's opinion is "equivocal and

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resting hypoxemia, based on the arterial blood gas study. *Id*. He concluded that claimant was totally disabled. *Id*. In an addendum to his report dated September 20, 2013, Dr. Baker discussed the physical requirements of claimant's usual coal mine jobs, which included cutting machine operator, roof bolter and general laborer. Claimant's Exhibit 2. He described that claimant was required to "crawl maybe 100 feet up to one hour per day, lift 100 pounds up to 5 times a day, carry 25 pounds several times daily and perhaps up to 200 pounds 5 times a day." *Id*. Dr. Baker specifically opined that claimant is totally disabled by a moderate obstructive respiratory impairment from performing the heavy manual labor required by his usual coal mine work. *Id*.

confusing" as to whether claimant is totally disabled. Decision and Order at 14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Thus, we affirm the administrative law judge's finding that Dr. Broudy's opinion is entitled to little weight on the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

With regard to the opinion of Dr. Dahhan, the administrative law judge noted correctly that he examined claimant on July 17, 2011, and indicated that claimant suffers from a mild respiratory impairment that was less severe than when claimant was examined by Dr. Forehand, "particularly the post[-]bronchodilator values." Decision and Order at 15, *quoting* Employer's Exhibit 1. Dr. Dahhan reported that claimant "retains the physiological capacity to return to his previous coal mining work or job of comparable physical demand." Employer's Exhibit 1. During his deposition, when asked how he would categorize claimant's respiratory impairment, Dr. Dahhan stated that it is "*mild based on the post[-]bronchodilator values*. And it's obstructive in nature, again, based on the spirometry values and the rest of the study." Employer's Exhibit 7 at 10-11 (emphasis added).

The administrative law judge gave less weight to Dr. Dahhan's opinion, observing that when deciding if a miner is totally disabled, the relevant inquiry is "whether a miner is able to perform his job, not whether he is able to perform his job after he takes medication." Decision and Order at 16. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Dahhan's opinion is "poorly reasoned," to the extent that Dr. Dahhan focused on claimant's post-bronchodilator pulmonary function results and did not adequately address whether claimant could perform his usual coal mine work based on the pre-bronchodilator results. Decision and Order at 16; s*ee* 20 C.F.R. §718.204(b)(1); 45 Fed. Reg. 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and his overall finding that claimant is totally disabled, in consideration of all the contrary probative evidence. We further affirm the administrative law judge's finding that

claimant invoked the Section 411(c) presumption,[10] and that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[11] Decision and Order at 16-17.

II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively establish either that claimant does not have legal[12] and clinical[13] pneumoconiosis or that

[10] Employer argues that the administrative law judge abdicated his duty as fact-finder by failing to resolve the conflict in the evidence regarding the length of claimant's smoking history and concluding only that claimant "smoked cigarettes for a substantial amount of time." Decision and Order at 8. Although the administrative law judge did not render a specific finding on the length of claimant's smoking history, remand is not required, as the administrative law judge did not discount any of the medical opinions in this record on the ground that the physician relied on an inaccurate smoking history. *See Larioni*, 6 BLR at 1-1278.

[11] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied for failure to establish total disability, claimant had to establish this element of entitlement, based on the newly submitted evidence, in order to obtain a review of his current subsequent claim on the merits. *White*, 23 BLR at 1-3.

[12] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[13] "'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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary

"no part of [claimant's] disabling respiratory or pulmonary impairment was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected Dr. Dahhan's opinion that claimant has no respiratory impairment related to coal dust exposure.[14] Decision and Order at 20. We disagree with employer that the administrative law judge failed to consider the entirety of Dr. Dahhan's opinion, as the administrative law judge fully discussed the explanations given by Dr. Dahhan for why claimant's respiratory disease was due to smoking, and why his impairment was consistent with rheumatoid disease. *Id*. The administrative law judge, however, permissibly concluded that Dr. Dahhan did not adequately address why claimant's "significant length of underground coal mine employment" did not also significantly contribute to, or substantially aggravate, claimant's respiratory impairment. Decision and Order at 20; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i).[15]

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fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[14] The remaining medical opinions do not aid employer in rebutting the presumed facts of clinical and legal pneumoconiosis. Dr. Forehand diagnosed clinical pneumoconiosis and legal pneumoconiosis in the form of obstructive respiratory disease caused by claimant's coal mine employment. Director's Exhibit 15. Dr. Baker also diagnosed clinical pneumoconiosis and opined that claimant has legal pneumoconiosis the form of chronic bronchitis and chronic obstructive pulmonary disease caused by coal dust exposure and smoking. Claimant's Exhibit 1. Dr. Broudy diagnosed clinical pneumoconiosis and "a pulmonary lung disease," which he attributed to smoking and coal mine dust exposure. Director's Exhibit 18. In response to a question posed in the report as to whether claimant suffers from legal pneumoconiosis or a pulmonary impairment arising from, or aggravated by coal dust exposure, Dr. Broudy wrote, "yes, he does." *Id*.

[15] The administrative law judge properly found that it was not necessary to address whether employer disproved the existence of clinical pneumoconiosis, as employer's failure to disprove the existence of legal pneumoconiosis precludes rebuttal under 20

Furthermore, the administrative law judge permissibly rejected Dr. Dahhan's opinion relevant to the issue of disability causation because he did not diagnose legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 268-269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); Decision and Order at 21. Because Dr. Broudy testified that he "could not exclude coal dust exposure as a contributing factor[] to [claimant's disabling] impairment," his opinion does not aid employer in establishing that no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis.[16] *See* Director's Exhibit 18; Employer's Exhibit 6 at 21. We therefore affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, his coal mine employment pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Ogle*, 737 F.3d at 1071, 25 BLR at 2-446-47.

C.F.R. §718.305(d)(1)(i). *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); Decision and Order at 20 n.7.

[16] Employer argues that in order to rebut the presumed fact of disability causation, it must show only that pneumoconiosis was not a "substantially contributing cause" of claimant's disability. The administrative law judge, however, applied the correct rebuttal standard and properly required employer to establish that "pneumoconiosis *played no part* in causing [claimant's] disability." Decision and Order at 21 (emphasis added); 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge