U.S. Department of Labor

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

BRB No. 16-0308 BLA

JERRY L. COLEMAN Claimant-Respondent v. SPEED MINING, INCORPORATED and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2017 DECISION and ORDER

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

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5021) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered 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). The administrative law judge credited claimant with 35.47 years of underground coal mine employment, found that employer does not dispute that it is the properly designated responsible operator, and adjudicated this claim, filed on May 27, 2010, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, he awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption by establishing total respiratory disability pursuant to 20 C.F.R. §718.204(b). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal. Employer has filed a reply brief in support of its position.[2]

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.[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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 35.47 years of underground coal mine employment and that employer is the properly designated responsible operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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

The regulations provide that a miner is considered 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). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R. Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, contending that the administrative law judge erred in weighing the medical opinion evidence and finding that it establishes the existence of a totally disabling respiratory or pulmonary impairment.

After finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered whether the medical opinion evidence, consisting of the opinions of Drs. Rasmussen, Cohen, Doyle, Zaldivar, and Rosenberg, established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14-17; Director's Exhibits 12, 13; Employer's Exhibits 2, 4, 5, 6, 8, 9; Claimant's Exhibits 3, 4, 5, 6. Drs. Rasmussen, Cohen, and Doyle opined that claimant does not retain the pulmonary capacity to perform his usual coal mine employment, whereas Drs. Zaldivar and Rosenberg opined that claimant is not disabled from performing his previous job from a pulmonary perspective. *Id.*

Noting that claimant last worked as a "section foreman," the administrative law judge summarized the Form CM-913[4] job description and claimant's testimony[5]

[4] Form CM-913 is entitled "Description of Coal Mine Work and Other Employment." Director's Exhibit 4. Claimant listed his occupation as "section foreman" and indicated that he had to lift up to 100 pounds various times per day and carry up to 100 pounds for various distances at various times per day. *Id.*

[5] Claimant testified at the hearing that he worked with his men and, on a daily basis, that he: ran a continuous miner; pulled cable weighing thirty-five to forty pounds

regarding the nature and frequency of the tasks he was required to perform in that job. Decision and Order at 17-18; Hearing Transcript at 16-21; Director's Exhibit 4. The administrative law judge took judicial notice of the *Dictionary of Occupational Titles* (DOT) and its descriptions of the various degrees of labor set forth in Appendix C therein.[6] Decision and Order at 17; Hearing Transcript at 6-7. Comparing claimant's description of his position to the DOT's definitions of "miner," "section supervisor," "medium work," "heavy work," and "very heavy work," the administrative law judge found that claimant's usual coal mine work met the definition of "heavy work." Decision and Order at 18.

The administrative law judge then considered the coal mine job duties and exertional requirements noted in the reports of Drs. Rasmussen,[7] Cohen,[8] Doyle,[9]

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about 100 feet; performed roof bolting; ran a shuttle car; shut down mining sections in the long wall with two other miners that required lifting 100-pound top rollers every 100 feet and lifting fifty-pound bottom rollers; shoveled coal weighing up to twenty-five pounds along a 4,000-foot belt line; lifted twenty-pound bags of rock dust; lifted forty-pound bags of cement; lifted 300-pound I-beams with other miners; and walked a mile or more each day. Hearing Transcript at 16-21.

[6] The administrative law judge noted that the *Dictionary of Occupational Titles* (DOT), Appendix C, describes "very heavy work" as "exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects." Decision and Order at 17. "Heavy work" is described as "exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." *Id.* The DOT definition of "medium work" requires occasional exertion of no more than fifty pounds of force. *Id.*

[7] Dr. Rasmussen noted that claimant's job as a section foreman required him to perform general inside labor as a roof bolter, continuous miner operator, and shuttle car operator. Noting that claimant also had to set timbers, shovel, and pull miner cable, Dr. Rasmussen determined that claimant's job required him to do heavy and some very heavy manual labor, and that claimant was disabled from performing his job. Director's Exhibit 12; Employer's Exhibit 4 at 24-25; Claimant's Exhibit 3 at 9, 16.

[8] Dr. Cohen performed a medical record review on May 12, 2014 and provided a supplemental opinion on January 30, 2015. He noted that the occupational history recounted by claimant and reported by Dr. Rasmussen indicated that claimant was required to perform heavy and some very heavy manual labor as a section foreman. Dr.

Zaldivar,[10] and Rosenberg.[11] After reviewing the physicians' characterizations of claimant's work, the administrative law judge credited the opinions of Drs. Rasmussen,

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Cohen opined that claimant's respiratory impairment disables him from performing his job as a section foreman. Claimant's Exhibits 4, 5.

[9] Dr. Doyle, claimant's primary care physician, stated that he had examined claimant six times during the past year and had treated claimant for chronic lung disease and other chronic conditions, including essential hypertension, lung cancer in remission, back pain and kidney disease. Dr. Doyle indicated that he had reviewed claimant's medical records, including test results from Drs. Rasmussen and Zaldivar, and the medical report of Dr. Cohen. Dr. Doyle did not specify the exertional requirements of claimant's usual coal mine employment, but opined that claimant is disabled from performing his job based on the test results and his personal observation that claimant is chronically short of breath with only mild exertion. Claimant's Exhibit 6.

[10] Dr. Zaldivar examined claimant on May 25, 2011, provided a deposition on September 4, 2012, and provided a supplemental opinion on October 12, 2015. Director's Exhibit 13; Employer's Exhibits 5, 8. He diagnosed clinical pneumoconiosis and opined that claimant had a mild pulmonary impairment of no clinical significance related to airway obstruction, as well as a moderate diffusion impairment that was interfering with gas exchange during exercise due to the loss of his left lower lobe at lung cancer surgery, and possible left ventricular cardiac dysfunction as evidenced by claimant's early anaerobic threshold on his exercise stress test. Director's Exhibit 13. Dr. Zaldivar indicated that claimant, in his job as a section foreman, worked with his men, covered for any miners that were missing, operated multiple types of equipment, and "had to lift up to 100 pounds various times per day." Director's Exhibit 13. Dr. Zaldivar opined that claimant's ventilatory capacity would allow him to do "medium work on a continuous basis" and that claimant had "plenty of air to do his usual work or even heavy manual labor." Employer's Exhibit 5 at 20.

[11] Dr. Rosenberg reviewed the evidence of record, provided medical reports dated November 21, 2011 and October 15, 2015, and was deposed on September 18, 2012. Employer's Exhibits 2, 6, 9. He indicated that claimant's last job as a section foreman involved general labor and roof bolting, operating a continuous miner and driller, and lifting up to 100 pounds. Employer's Exhibits 2, 6 at 6-7. Based on his understanding of claimant's employment history, Dr. Rosenberg characterized the physical demands of claimant's job as light to moderate on a regular basis with intermittent or sporadic requirements of up to heavy and very heavy labor at times. Employer's Exhibit 6 at 7. Dr. Rosenberg found no restriction or significant obstruction; a non-disabling reduced

Cohen, and Doyle as "more persuasive and better supported" with regard to the level of exertion that claimant was required to perform in his usual coal mine employment than the contrary opinions of Drs. Zaldivar and Rosenberg.[12] Decision and Order at 18. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that the administrative law judge erred in determining that Drs. Zaldivar and Rosenberg did not have a correct understanding of the exertional requirements of claimant's usual coal mine employment. Employer asserts that both doctors found that claimant is capable of performing heavy labor, based on their description of job duties consistent with those described by claimant. Employer's Brief at 5-8.

The determination of whether a medical opinion is reasoned is within the administrative law judge's discretion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2- 323, 2-335 (4th Cir. 1998); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Lane v. Union Carbide Corp*., 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1977). Since the administrative law judge determined that claimant's job constituted heavy manual labor, whereas Dr. Zaldivar opined that claimant could perform "medium work on a continuous basis"[13] and Dr. Rosenberg opined that claimant's job required "light to moderate physical demands on a regular basis," the administrative law judge permissibly found that these opinions were not persuasive because the physicians underestimated the level of exertion that

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diffusing capacity and an associated oxygenation abnormality that could be related to simple pneumoconiosis; and an early anaerobic threshold in relationship to exercise due to cardiac limitations or poor conditioning. Employer's Exhibits 2, 9. Dr. Rosenberg concluded that "from a pulmonary perspective, [claimant] is not disabled from performing his previous coal mining job or other similarly arduous types of labor." Employer's Exhibit 2 at 4-5.

[12] As employer does not challenge the administrative law judge's finding that claimant's usual coal mine work as a section foreman required heavy labor, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[13] Contrary to employer's argument, while Dr. Zaldivar opined that claimant had "plenty of air to do his usual work or even heavy manual labor," he did not indicate that claimant had the respiratory or pulmonary capacity to perform heavy manual labor on a regular basis. Employer's Exhibit 5 at 20.

claimant was routinely required to perform. Decision and Order at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Employer's Exhibits 5 at 20, 6 at 7. Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Rosenberg.

Employer next argues that substantial evidence does not support the administrative law judge's finding that the opinions of Drs. Rasmussen, Cohen, and Doyle were more consistent with the exertional requirements of claimant's last coal mining job. Employer maintains that the administrative law judge selectively analyzed the evidence and violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by failing to explain his rationale for crediting the doctors' opinions over the non-qualifying objective test results. Employer's Brief at 8-14. We disagree.

The administrative law judge determined that Dr. Rasmussen performed the Department of Labor pulmonary evaluation and opined that claimant was disabled from performing the heavy labor required in his usual coal mine employment because his objective testing demonstrated a moderately to markedly reduced lung function with a mildly reduced ventilatory capacity and a moderate gas exchange impairment.[14] Decision and Order at 14-15; Director's Exhibit 12; Claimant's Exhibit 3. Similarly, the administrative law judge determined that Dr. Cohen provided a medical record review of the reports and test results from Drs. Rasmussen, Zaldivar and Rosenberg. Dr. Cohen opined that claimant would not be able to sustain the heavy exertion required for his job as a section foreman, based on claimant's moderate obstructive defect, moderate diffusion impairment, and significant gas exchange abnormality with exercise. Decision and Order at 16; Claimant's Exhibit 4 at 7. Lastly, the administrative law judge noted that Dr. Doyle, claimant's treating physician, reviewed the reports and test results from Drs. Cohen, Rasmussen, and Zaldivar, and opined that claimant is disabled from performing his former coal mine job, based on his direct observations and the test results. Decision and Order at 16-17; Claimant's Exhibit 6.

Taking into consideration claimant's work requirements and the physicians' characterizations thereof, the administrative law judge permissibly credited the disability findings of Drs. Rasmussen, Cohen, and Doyle as "more persuasive and better supported" than those of Drs. Zaldivar and Rosenberg. Decision and Order at 18; *see Hicks*, 138

[14] Dr. Rasmussen explained that claimant achieved an oxygen consumption of 15.9 milliliters per kilogram per minute, but would require an oxygen consumption of 30 milliliters per kilogram per minute on a fairly regular basis in order to perform heavy and very heavy manual labor. Claimant's Exhibit 4 at 9-10, 21.

F.3d at 532-33, 21 BLR at 2-334-35. Contrary to employer's argument, the administrative law judge did not err in crediting the opinions of Drs. Rasmussen, Cohen, and Doyle despite the non-qualifying objective test results, as even a mild impairment may be totally disabling when compared with the exertional requirements of a miner's usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and that claimant is entitled to invocation of the presumption at Section 411(c)(4).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer has not challenged on appeal the administrative law judge's finding that it did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge