U.S. Department of Labor

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

BRB No. 17-0174 BLA

JAMES C. WHITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 02/08/2018
	)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05081) of Administrative Law Judge John P. Sellers, III, 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). This case involves a miner's subsequent claim filed on December 4, 2013.[1]

The administrative law judge credited claimant with twenty-two years of underground coal mine employment and found that the new evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and invoked 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) (2012).[3] The administrative law judge further found that employer failed to rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled at 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption and his determination of the commencement date for benefits.

[1] This is claimant's second claim. His initial claim, filed on October 4, 1989, was denied by the district director on June 9, 1994 because he failed to establish any element of entitlement. Director's Exhibit 1.

[2] Where 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(c); *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(c)(3). To obtain review on the merits of his current claim, claimant had to submit new evidence establishing an element of entitlement. *See* 20 C.F.R. §725.309(c); Director's Exhibit 1.

[3] 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 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); *see* 20 C.F.R. §718.305.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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.[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

Because claimant established at least fifteen years of underground coal mine employment, he is entitled to the Section 411(c)(4) presumption if he also establishes that he suffers from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1). 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). A claimant may establish total disability based on pulmonary function testing, 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 of the relevant evidence and weigh the evidence supporting a finding of 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). 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 found that claimant did not establish respiratory disability at 20 C.F.R. §718.204(b)(2)(i) because none of the new pulmonary function studies produced qualifying values.[6] The administrative law judge further found,

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

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

[6] A "qualifying" pulmonary function or arterial 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

however, that the weight of the new blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[7] Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that there are no probative medical opinions that contradict the blood gas study evidence establishing total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). Finally, considering all of the contrary probative evidence together, the administrative law judge found that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2).[8]

Employer contends that the administrative law judge erred in his analysis of the blood gas studies to find total disability established at 20 C.F.R. §718.204(b)(2)(ii). We disagree. The administrative law judge considered the results of five new blood gas studies performed on December 13, 2013, January 10, 2014, May 15, 2014, December 9, 2015, and March 31, 2016.[9] Decision and Order at 5-6, 15-16; Director's Exhibits 14, 19; Employer's Exhibits 4, 8; Claimant's Exhibit 3. Dr. Colman's December 13, 2013

B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] As the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[8] The administrative law judge found that the non-qualifying pulmonary function studies do not preclude a finding of total disability based on the blood gas studies, because pulmonary function studies and arterial blood gas studies measure different types of impairment. Decision and Order at 16. The administrative law judge also considered the treatment notes contained in the record. *Id*. at 17. While noting that the treatment records reflect diagnoses of chronic obstructive pulmonary disease (COPD), with treatment for exacerbation of COPD, the administrative law judge determined that the treatment records do not contain an assessment of claimant's respiratory or pulmonary capabilities. *Id*. Therefore, the administrative law judge found that the treatment records do not constitute contrary probative evidence relevant to total disability, and thus do not undermine his finding that claimant established total disability based on the arterial blood gas study evidence. *Id*.

[9] The administrative law judge correctly noted that while the record contains a statement from Dr. Vuskovich validating a March 15, 2016 blood gas study conducted by Dr. Green, the blood gas study itself is not part of the record. Decision and Order at 6 n.5.

blood gas study yielded non-qualifying values at rest, while Dr. Marantz's January 10, 2014 blood gas study yielded qualifying values at rest; neither physician conducted an exercise study.[10] Decision and Order at 6; Director's Exhibit 14; Employer's Exhibits 8, 11. Dr. Rosenberg's May 15, 2014 blood gas study yielded non-qualifying values both at rest and with exercise. Decision and Order at 6; Director's Exhibit 19. Dr. Tuteur's December 9, 2015 blood gas study yielded non-qualifying values at rest; exercise studies were not conducted. Decision and Order at 6; Employer's Exhibit 4. Finally, Dr. Habre's March 31, 2016 blood gas study yielded qualifying values both at rest and with exercise. Decision and Order at 6; Director's Exhibits 14, 19; Employer's Exhibit 4. The administrative law judge accorded greatest weight to the March 31, 2016 qualifying blood gas study because it is the most recent study of record and was performed both at rest and with exercise. Decision and Order at 16; Claimant's Exhibit 3. Thus, the administrative law judge found that the blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii).[11] Decision and Order at 16.

Employer asserts that the administrative law judge erred in crediting "the results of the March 14, 2016 [blood gas study] over studies conducted earlier" to find that claimant is totally disabled. Employer's Brief at 12. Employer contends that because the administrative law judge found that Dr. Vuskovich's and Dr. Gaziano's validation statements "cancel each other out," the administrative law judge did not properly determine whether the March 14, 2016 study was technically acceptable. *Id.*, *referencing* Decision and Order at 16 n.8. Contrary to employer's argument, however, the record

[10] The administrative law judge noted that Dr. Gaziano indicated by check-mark that the January 10, 2014 study was "technically acceptable[,]" while Dr. Vuskovich indicated by check-mark that it was not valid. Director's Exhibit 14 at 12; Employer's Exhibit 17. Because neither physician provided a rationale for his conclusion, the administrative law judge found that these reports "essentially cancel each other out." Decision and Order at 16 n.8.

[11] In his summary of the evidence, the administrative law judge listed the correct dates and values for all of the arterial blood gas studies. Decision and Order at 6. In weighing the evidence, however, the administrative law judge did not specifically mention that the resting study conducted on December 13, 2013 was non-qualifying, and mistakenly stated that the resting study conducted on March 31, 2016 was non-qualifying. Decision and Order at 16. No party raises these errors on appeal. Moreover, as neither error affects the administrative law judge's weighing of the evidence, they are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

does not contain a blood gas study dated either March 14 or March 15, 2016.[12] Decision and Order at 6 n.5; *see* Employer's Exhibit 14. Rather, the administrative law judge gave greatest weight to the qualifying exercise blood gas study of March 31, 2016. Decision and Order at 16; Claimant's Exhibit 3.

Even assuming that employer intended to challenge the administrative law judge's reliance on the March 31, 2016 qualifying blood gas study, we initially note that this study was not reviewed by Dr. Vuskovich, or invalidated by any physician of record.[13] Further, the administrative law judge permissibly determined that the qualifying March 31, 2016 study is more probative than the studies conducted only at rest, because exercise testing is a better predictor of a claimant's ability to work in the mines. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Decision and Order at 16. He also permissibly accorded the greatest weight to the March 31, 2016 exercise blood gas study because it is the most recent exercise blood gas study by almost two years and, as such, is a better indicator of claimant's current condition than the non-qualifying exercise study conducted on May 15, 2014. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (the question of claimant's ability to perform his usual coal mine work is to be assessed at the time of the hearing); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 16. We therefore affirm the administrative law judge's finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Having found that the blood gas study evidence established total respiratory disability, the administrative law judge next considered the medical opinions of Drs. Habre, Marantz, Rosenberg, and Tuteur. Based, in part, on the March 31, 2016 qualifying blood gas study results, Dr. Habre opined that claimant is totally disabled. Decision and Order at 13-15; Claimant's Exhibit 3. Dr. Marantz also concluded that

[12] As noted *supra* n.10, the administrative law judge found that the statements of Drs. Vuskovich and Gaziano regarding the validity of the *January 10, 2014* blood gas study "essentially cancel each other out." Decision and Order at 16 n.8; Director's Exhibits 14 at 12, 17. Even assuming that employer intended to challenge this finding, we need not address the alleged error, as the administrative law judge's finding that the blood gas study evidence establishes total disability does not rely upon the January 10, 2014 study. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 16; Employer's Brief at 12.

[13] Dr. Vuskovich instead invalidated the MVV results of the March 31, 2016 *pulmonary function study*. *See* Employer's Exhibit 15.

claimant is totally disabled based, in part, on abnormalities she observed in the January 10 and May 15, 2014 blood gas study results. Decision and Order at 6-7; Director's Exhibits 14, 45. In contrast, Drs. Rosenberg and Tuteur opined that claimant is not totally disabled from a respiratory standpoint. Decision and Order at 16-17; Director's Exhibit 19; Employer's Exhibits 2, 3, 4, 17.

The administrative law judge found that the opinions of Drs. Marantz and Habre that claimant is totally disabled are consistent with, not contrary to, his own finding that the blood gas study evidence establishes total disability.[14] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 16-17, *referencing* 20 C.F.R. §718.204(b)(2); Director's Exhibits 14, 45; Claimant's Exhibit 3. He discredited the contrary opinions of Drs. Rosenberg and Tuteur, however, because neither physician adequately considered the most recent qualifying arterial blood gas study evidence in rendering his opinion that claimant is not totally disabled. Decision and Order at 16-17; *see* Employer's Exhibits 4, 17.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur. We disagree. The administrative law judge noted that Dr. Rosenberg based his opinion, in part, on his determination that claimant has preserved gas exchange. Decision and Order at 16, *referencing* Employer's Exhibit 17 at 3. He permissibly discredited Dr. Rosenberg's opinion because, although Dr. Rosenberg reviewed Dr. Habre's March 31, 2016 medical report and objective test results, he did not address the March 31, 2016 qualifying exercise blood gas study. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 16; Employer's Exhibit 17. Similarly, the administrative law judge permissibly discredited Dr. Tuteur's opinion because he did not review the March 31, 2016 blood gas study and, therefore, did not take the most recent qualifying exercise blood gas study results into account in concluding that claimant is not totally disabled. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 16-17.

[14] As referenced by the administrative law judge, the regulation at 20 C.F.R. §718.204(b)(2)(ii) provides that a blood gas study that meets the PO2 and PCO2 values specified in Appendix C to 20 C.F.R. Part 718 is sufficient to establish the existence of a totally disabling impairment "[i]n the absence of contrary probative evidence" or "rebutting evidence." 20 C.F.R. §718.204(b)(2); 20 C.F.R. Part 718, Appendix C; Decision and Order at 16.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge provided valid reasons for discrediting Drs. Rosenberg and Tuteur, the only physicians to opine that claimant is not totally disabled, we affirm the administrative law judge's determination that their opinions do not constitute "contrary probative evidence to preclude the use of the arterial blood gas studies to establish total disability."[15] Decision and Order at 17.

We also affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) overall. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986); Decision and Order at 17. Therefore, we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309; Decision and Order at 17.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[16] or that "no part

[15] Because we affirm the administrative law judge's finding that the contrary medical opinions of record do not undermine his finding that the blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), we need not address employer's contentions that the administrative law judge erred in weighing the medical opinions of Drs. Marantz and Habre, who both opined that claimant is totally disabled by a respiratory or pulmonary impairment. *See Larioni*, 6 BLR at 1278.

[16] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

of [claimant'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). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 17-27.

Although employer generally challenges the administrative law judge's determination that it did not rebut the Section 411(c)(4) presumption, and provides descriptions of the medical opinion evidence, employer does not set forth any specific allegations of error in the administrative law judge's rebuttal findings. *See* Employer's Brief at 10-14. Because the Board is not empowered to reweigh the evidence, or engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii).

Because claimant invoked 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.

Date for the Commencement of Benefits

Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim such as this, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may

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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).

be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Employer argues that the administrative law judge erred in awarding benefits as of December 2013, the month in which the subsequent claim was filed, given that the finding of total disability was based on the most recent arterial blood gas study dated March 31, 2016. Employer's Brief at 14-15. Contrary to employer's argument, and as noted by the administrative law judge, the first evidence of disability does not establish the date of onset of such disability, but merely indicates that claimant became totally disabled at some point prior to that date. *See* Decision and Order at 27, *citing Owens*, 14 BLR at 1-50. Here, the administrative law judge found that "the record does not establish when the [c]laimant first became disabled" as no physician expressed an opinion regarding this matter, and "the objective studies do not reflect a precipitous decline" from which a specific month of onset could be inferred. Decision and Order at 28. Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that benefits are payable from December 2013, the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge