U.S. Department of Labor

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

BRB No. 19-0132 BLA

RANDALL SWEENEY Claimant-Respondent v. SHELL COAL & TERMINAL COMPANY DBA WOLF CREEK COLLIERIES, INCORPORATED and Self-Insured through SHELL COAL & TERMINAL COMPANY c/o ST. PAUL/ TRAVELER BOND & FINANCIAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05201) of Administrative Law Judge Steven D. Bell on a claim filed on December 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

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

On appeal, employer summarily objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, which revived this provision, "violates Article II of the United States Constitution." Employer's Brief at 3. On the merits of entitlement, employer argues the administrative law judge erred in finding claimant totally disabled.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response in this

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 10.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, that claimant worked seventeen years in underground coal mine employment. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14; Hearing Transcript at 10.

appeal. In a footnote to her letter to the Board, however, she urges the Board to decline to entertain employer's unidentified constitutional objection.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

As a threshold matter, we agree with the Director that employer fails to provide any specific argument for its constitutional objection to the Section 411(c)(4) presumption. Employer's Brief at 3. Thus, we decline to address it. *See* 20 C.F.R. §802.211(b).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting 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).

The administrative law judge first considered two pulmonary function studies conducted on March 16, 2015 and May 19, 2016. Decision and Order at 5-6, 15-16; Director's Exhibit 18; Employer's Exhibit 1. He found the March 16, 2015 study produced non-qualifying[5] values for total disability but the May 19, 2016 study produced qualifying values both before and after the administration of a bronchodilator. Decision and Order at 5-6, 15-16. He found the pre-bronchodilator results of the May 19, 2016 study invalid, but the post-bronchodilator results valid. *Id*. at 15-16. Because the qualifying May 19, 2016 post-bronchodilator study was more recent than the non-qualifying study of March 16, 2015, he assigned it greater weight. *Id*. Thus he found claimant established total disability

[4] The administrative law judge found claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 15-16.

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

based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 15-16.

Employer argues the administrative law judge erred in finding the May 19, 2016 post-bronchodilator results valid. Employer's Brief at 3-5. We disagree. Dr. Rosenberg indicated the "flow-volume and volume-time curves revealed incomplete efforts" for this study. Employer's Exhibit 1 at 5. Dr. Cohen agreed with Dr. Rosenberg that the study is invalid. Claimant's Exhibit 2 at 18. In contrast, Dr. Go concluded the post-bronchodilator testing demonstrates total disability because all the "trials were of sufficient duration" and a "sufficient number of trials demonstrated adequate technique to allow for interpretation." Claimant's Exhibit 1 at 7. He stated it was unclear how Dr. Rosenberg reached his conclusion that the testing was invalid.[6] *Id*.

Contrary to employer's argument, the administrative law judge weighed all of the validity opinions together and permissibly found Dr. Go's explanation – that there were sufficient trials of sufficient duration to allow for interpretation – better reasoned than the contrary opinions.[7] Decision and Order at 16; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer's argument that he should have credited the contrary opinions of Drs. Rosenberg and Cohen constitutes a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the administrative law judge's finding that the May 19, 2016 post-bronchodilator study is valid. Further, we affirm his finding as rational that the pulmonary function studies establish total disability because the May 19, 2016 post-bronchodilator study is more recent, valid, and qualifying. *See Woodward v. Director, OWCP*, 991 F.2d

[6] As the administrative law judge noted, Dr. Forehand also opined the post-bronchodilator testing is valid. Claimant's Exhibit 3 at 8; Decision and Order at 16. He explained that, "although individuals can look at the shape of the flow volume loop in surmising effort, the definition of validity is based on the similarity in the values derived from the study not the shape of the flow volume loop." *Id*. He opined the study is valid "based on the similarity and the values of FEV1/FVC" ratio. *Id*.

[7] The technician who conducted the May 19, 2016 study noted "fair/poor" effort for the FVC testing. Employer's Exhibit 1 at 19. Contrary to employer's argument, the administrative law judge rationally found the technician's notations unpersuasive because he did not specify "which efforts were fair and which were poor." Decision and Order at 15-16; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Employer's Brief at 3-4.

314, 319-20 (6th Cir. 1993) (a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis); 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 15-16.

In considering the medical opinions, the administrative law judge noted Drs. Rasmussen, Forehand, Cohen, and Go diagnosed claimant as totally disabled, while Dr. Rosenberg opined he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16-18. The administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he based his conclusion, in part, on his belief that the May 19, 2016 post-bronchodilator study is invalid, contrary to the administrative law judge's finding that it is a valid indicator of claimant's pulmonary function. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 17.

Further, contrary to employer's argument, the administrative law judge rationally found the opinions of Drs. Rasmussen and Forehand well-reasoned and documented because "they are based on [c]laimant's objective testing and his reported symptoms." Decision and Order at 17-18; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185. He also permissibly found Dr. Cohen's opinion "reasoned and documented as it is based on the objective testing and the physical demands of [c]laimant's coal mine employment." *Id*. Finally, he permissibly found Dr. Go's opinion reasoned and documented because it is based on the valid May 19, 2016 post-bronchodilator study. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 17-18. Thus we affirm his finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

We also affirm his findings that all of the relevant evidence weighed together established total disability, 20 C.F.R. §718.204(b)(2), and claimant invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 18. Moreover, we affirm his finding that employer failed to rebut the presumption, as it is unchallenged on appeal.[8] *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-20. We therefore affirm the award of benefits.

[8] Employer asserts the opinions of Drs. Rasmussen, Forehand, Cohen, and Go diagnosing claimant with legal pneumoconiosis are not well-reasoned or documented. Employer's Brief at 5. We need not address this issue. It is employer's burden to rebut the presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). As the administrative law judge noted, the opinions of Drs. Rasmussen, Forehand, Cohen, and Go do not support employer's burden. Decision and Order at 20.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge