U.S. Department of Labor

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

BRB No. 19-0152 BLA

RICKY L. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 02/25/2020
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Kathleen H. Kim (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05466) of Administrative Law Judge Steven B. Berlin on a claim filed on January 18, 2013 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found employer is the responsible operator. He credited claimant with twenty-six years of underground coal mine employment[1] 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 argues the administrative law judge erred in finding it is the responsible operator and claimant is totally disabled. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief agreeing the administrative law judge erred in finding employer is the responsible operator.[3]

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,

[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 Exhibits 3, 8.

[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, the finding of twenty-six years of underground coal mine employment. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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).

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 considered five arterial blood gas studies conducted on February 27, 2013, July 12, 2013, July 26, 2013, March 3, 2015, and November 14, 2015. Decision and Order at 9. All the studies produced non-qualifying[5] values at rest. Director's Exhibits 12, 14, 16; Claimant's Exhibits 1-2. The July 12, 2013 and July 26, 2013 studies also produced non-qualifying values with exercise. Director's Exhibits 14, 16. The February 27, 2013, March 3, 2015, and November 14, 2015 studies, however, produced qualifying values with exercise. Director's Exhibit 12; Claimant's Exhibits 1-2. In resolving the conflict in the blood gas studies, the administrative law judge credited the November 14, 2015 qualifying exercise study because it is the most recent. Decision and Order at 17-18. He found the blood gas studies established total disability because the preponderance of the exercise studies are qualifying, including the most recent testing. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 17-18.

Employer contends the administrative law judge erred by allowing claimant to actually submit five distinct blood gas studies that were administered on March 3, 2015, but considering the results as deriving from only one study. Employer's Brief at 9. Employer maintains Dr. Agarwal tested blood drawn at rest and after two, five, ten, and

[4] The administrative law judge found claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 17-18.

[5] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

fifteen minutes of exercise, constituting five separate studies. *Id*. at 8-9. Because the evidentiary limitations entitle claimant to submit two blood gas studies, and he already met his full complement, employer argues Dr. Agarwal's testing should have been excluded. Employer's Brief at 8-9; *see* 20 C.F.R. §725.414(a)(2).

Employer's characterization of the record is incorrect. Dr. Agarwal administered a serial blood draw when conducting his exercise blood gas testing on March 3, 2015, to assess the existence of a respiratory impairment. Claimant's Exhibit 1. Claimant only designated the results of one blood gas study Dr. Agarwal administered as one of his two affirmative studies under the evidentiary limitations. Claimant's Evidence Form; 20 C.F.R. §725.414(a)(2). The administrative law judge correctly found the exercise portion of this single study qualifying. Decision and Order at 9. The administrative law judge did not, as employer alleges, permit claimant to submit five separate, qualifying blood gas studies administered on March 3, 2015 in excess of the evidentiary limitations or weigh five separate studies administered on this date when resolving the conflict in the evidence.

Further, the administrative law judge rationally found the blood gas studies establish total disability because of the preponderance of the qualifying exercise studies and because the November 14, 2015 exercise study was most recent and qualifying. *Woodward v. Director, OWCP*, 991 F.2d 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); Decision and Order at 17-18. Thus we affirm the administrative law judge's finding that the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 17-18.

The administrative law judge next weighed the medical opinions of Dr. Rasmussen, Agarwal, and Raj that claimant is totally disabled and the contrary opinions of Drs. Dahhan, and Broudy that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-20.

In weighing Dr. Dahhan's opinion, the administrative law judge noted the doctor assumed "there [is] no objective [evidence] to indicate any pulmonary impairment or disability, as confirmed by the normal . . . arterial blood gases." Decision and Order at 19 n.11; *see* Director's Exhibit 14; Employer's Exhibit 7. The administrative law judge highlighted, however, that the March 3, 2015 and November 14, 2015 blood gas studies produced qualifying values for total disability during exercise. Director's Exhibit 14; Employer's Exhibit 7. Thus he found Dr. Dahhan's opinion "poorly reasoned and not supported by the objective medical evidence." Decision and Order at 19-20.

With respect to Dr. Broudy, the administrative law judge noted the doctor relied on objective testing Dr. Green conducted that was not admitted into the record. Decision and Order at 20; Director's Exhibit 16; Employer's Exhibit 1. He found "Dr. Broudy's reliance

on this medical evidence adversely affects the credibility of his opinions." Decision and Order at 20. Further, although Dr. Broudy acknowledged the November 14, 2015 blood gas testing produced qualifying results during exercise, he baldly dismissed the results because he maintained the treadmill testing "showed very good exercise capacity in spite of the drop in pO2." *Id*. The administrative law judge permissibly found this rationale inadequately explained. *Id*.

We affirm these findings because employer does not challenge them.[6] *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); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge found the opinions of Drs. Rasmussen, Raj and Agarwal well-reasoned and documented because their "conclusions are based on the results of their objective testing, their clinical findings, and their consideration of the requirements of [c]laimant's previous coal mine job." Decision and Order at 18-20. Employer does not challenge his findings with respect to Drs. Raj and Agarwal.[7] We therefore affirm they establish disability. *See Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv).

We also affirm his finding that claimant established total disability overall, 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986); Decision and Order at 21. Moreover, we

[6] The administrative law judge also discredited the opinions of Drs. Dahhan and Broudy based on their failure to use indwelling arterial catheters when administering their arterial blood gas studies. Decision and Order at 18-20. Employer argues the administrative law judge erred in making this finding. Employer's Brief at 9-10. Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Broudy, we need not address employer's argument. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[7] Because claimant established total disability based on the opinions of Drs. Raj and Agarwal, we need not address employer's argument that the administrative law judge erred in weighing Dr. Rasmussen's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-10.

affirm his finding that employer failed to rebut the presumption as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits.[8]

Responsible Operator

The responsible operator is the "potentially liable operator"[9] that most recently employed claimant for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the Director has designated a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed claimant for at least one year. *See* 20 C.F.R. §725.495(c).

Claimant worked for employer in coal mine employment from November 1981 to March 2003.[10] Decision and Order at 5; Director's Exhibit 3. He subsequently worked for Premier Elkhorn Coal Company (Elkhorn) from March 2003 to November 2012 as an AutoCAD technician. Director's Exhibit 6. The administrative law judge evaluated whether Elkhorn is a potentially liable operator. 20 C.F.R. §725.494; Decision and Order at 5-7. He noted claimant's work for Elkhorn took place primarily in an office where claimant drafted maps. Decision and Order at 5-7. On "infrequent scattered occasions," however, claimant also left "the office on surveying projects and on surface coal mine operations, walk[ed] outcrop for underground operations, and deliver[ed] draft and mine maps to mine sites." *Id*. The administrative law judge determined Elkhorn is not a potentially liable operator because "[c]laimant was [not] exposed to coal [mine] dust on a regular basis for at least a year" while working for this entity. *Id*. at 7.

[8] Employer argues the administrative law judge "erred in concluding that the [c]laimant's step-son was entitled to augment benefits." Employer's Brief at 11. The administrative law judge made no such finding.

[9] To meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, it must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and it must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[10] Employer does not challenge the administrative law judge's finding that it is a potentially liable operator. 20 C.F.R. §725.494; Decision and Order at 7. We thus affirm this finding. *Skrack*, 6 BLR at 1-711.

The Director asserts that the evidence upon which employer relies may not establish that Elkhorn more recently employed claimant for one year, but correctly notes the administrative law judge applied the wrong standard in evaluating this issue. Director's Brief at 2-3. The relevant inquiry is not whether claimant was regularly exposed to coal mine dust for at least one year, but whether Elkhorn employed claimant as a miner for a cumulative period of not less than one year. Director's Brief at 2-3; 20 C.F.R. §725.494(c). Thus, we vacate the administrative law judge's finding that employer is the responsible operator and remand this case for the limited purpose of addressing this issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

The administrative law judge should evaluate whether claimant worked for Elkhorn as a miner for a cumulative period of not less than one year.[11] 20 C.F.R. §725.494(c). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. 20 C.F.R. §725.101(a)(32). The United States Court of Appeals for the Sixth Circuit has set forth the framework for the administrative law judge to apply this regulation when calculating claimant's coal mine employment. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 400-03 (6th Cir. 2019). In making this finding, the administrative law judge should address whether the jobs claimant performed for Elkhorn meet the situs-function test and, therefore, constitute the work of a miner. *See Navistar, Inc. v. Forester,* 767 F.3d 638, 641 (6th Cir. 2014) (to satisfy the situs-function test, a miner must have worked in or around a coal mine or coal preparation facility and done work necessary to the extraction or preparation of coal); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989).

[11] The administrative law judge should evaluate all the relevant evidence on this issue, including claimant's employment history forms, job descriptions and testimony. Director's Exhibits 3, 4, 6-8, 22; Employer's Exhibit 10; Hearing Transcript.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge