U.S. Department of Labor

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

BRB No. 17-0201 BLA

DANIEL L. WOFFORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	
	)	
and	)	
	)	
c/o HEALTHSMART CASUALTY SOLUTIONS	)	DATE ISSUED: 01/25/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, 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 (2016-BLA-5316) of Administrative Law Judge Thomas M. Burke 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 claim filed on November 19, 2014.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with thirty years of underground coal mine employment, and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. 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.[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

[1] The miner's claim form is signed and dated November 13, 2014, but the district director's records indicate that the claim was received on November 19, 2014. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked for thirty years in qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 3.

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

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 – 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 and comparable and gainful 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 of 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) a physician's reasoned medical judgment that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

After finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered the medical opinions of Drs. Rasmussen, Cohen, Basheda, and Fino, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4-10, 12-15. The administrative law judge noted that all of the physicians agreed that claimant's last coal mine job as a roof bolter required heavy to very heavy labor and that claimant suffered from a moderate airway obstruction.[5] *Id.* at 14. Drs. Rasmussen and Cohen opined that claimant's respiratory impairment prevented him from performing his last coal mine work; Drs. Basheda and Fino opined that it did not. Director's Exhibits 13, 16; Claimant's Exhibit 1; Employer's Exhibits 3-6. Determining that the opinions of Drs. Rasmussen and Cohen outweighed the contrary

[5] To the extent employer argues that the administrative law judge erred in finding that claimant's job as a roof bolter included heavy labor, this argument is rejected. Claimant testified at the hearing that his work required: placement of 18 foot long crossbars, which he and another person would lift onto the roof bolting machine; daily work with 50 pound bags of rock dust; dragging 600 foot long, three or four inch diameter miner cables; and shoveling coal spillage. Hearing Transcript at 12-18, 25-27. Moreover, all of the physicians who examined claimant and obtained a work history agreed that his work required heavy to very heavy manual labor. Decision and Order at 14; Director's Exhibits 13, 15; Claimant's Exhibit 4 at 25, 32-33; Employer's Exhibit 4 at 2. As the administrative law judge's determination that claimant's work included heavy labor is supported by substantial evidence, it is affirmed. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 14.

opinions of Drs. Basheda and Fino, the administrative law judge found that the medical opinion evidence established total respiratory disability. Decision and Order at 14-15.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen to find total disability established. Employer contends that their opinions are contrary to the weight of the medical evidence, including the non-qualifying pulmonary function and arterial blood gas testing, which "establishes conclusively that there is not a respiratory or pulmonary disability in this case." Employer's Brief at 12-13.

Employer's argument lacks merit. The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii) . . . of this section . . . 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].

20 C.F.R. §718.204(b)(2)(iv). Here, Dr. Rasmussen explained that the February 19, 2015 objective testing demonstrated "marked loss of lung function as reflected by [claimant's] ventilatory impairment, his increased dead space ventilation with resultant over-ventilation and his marked impairment in oxygen transfer during exercise." Director's Exhibit 13; *see* Decision and Order at 14. Dr. Rasmussen therefore concluded that claimant "clearly does not retain the pulmonary capacity to perform his regular coal mine job." *Id*. Dr. Cohen reviewed all of the objective medical evidence of record and opined that claimant is totally disabled by obstructive lung disease and a moderate diffusion impairment as well as a gas exchange abnormality on sub-maximal exercise. Claimant's Exhibit 1 at 8; Claimant's Exhibit 4 at 25. Moreover, Dr. Cohen opined that claimant retained the pulmonary capacity for only "sedentary or very mild manual labor." Claimant's Exhibit 4 at 25.

The administrative law judge noted that both Drs. Rasmussen and Cohen opined that claimant has diminished work capacity and a clear ventilatory limitation to exercise with significant gas exchange abnormalities. Decision and Order at 15. The administrative law judge also found that their opinions were consistent with claimant's "testimony that he has breathing problems, particularly . . . with exertion." *Id*. at 15. Finding that Drs. Rasmussen and Cohen convincingly explained how claimant's objective testing showed that he was unable to perform his usual coal mine employment,

the administrative law judge permissibly concluded that their opinions are well-reasoned. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 12-15.

We further reject employer's assertion that the administrative law judge erred in giving greater weight to Dr. Cohen's opinion because of "his expertise in the area of black lung disease." Employer's Brief at 13. Employer asserts that the administrative law judge failed to explain how "perceived superior expertise in the area of black lung disease" aids in "making a determination of whether [c]laimant has a respiratory or pulmonary disability." *Id.* at 13-14. Contrary to employer's assertion, however, the administrative law judge acknowledged that Drs. Basheda and Fino are well-qualified due to their Board-certifications in internal and pulmonary medicine and experience treating pulmonary conditions. Decision and Order at 15. The administrative law judge further explained that, in addition to being Board-certified in internal, pulmonary, and intensive care medicine, Dr. Cohen "gave at least 20 lectures between 1990 and 2006 about pulmonary function testing for occupational lung disease, including directing the NIOSH spirometry course." *Id.*, *referencing* Claimant's Exhibit 1. Because Dr. Cohen "is an expert in the effect of coal mine dust on a pulmonary condition" the administrative law judge thus permissibly accorded greater weight to his opinion than to the opinions of Drs. Basheda and Fino. Decision and Order at 15; Claimant's Exhibit 1; *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 280-81 (7th Cir. 2001) (holding that it is "rational to give great weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research").

As the trier-of-fact, the administrative law judge has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396, 22 BLR at 394-95; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In asserting that Drs. Basheda and Fino "provide very reasonable explanations as to why [c]laimant is not totally disabled," employer is seeking a reweighing of the evidence, which the Board is not empowered to do. Employer's Brief at 12; *see Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23. Thus, we affirm the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and his overall determination that total disability was established at 20 C.F.R. §718.204(b)(2).

See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his finding that claimant invoked the Section 411(c)(4) presumption. We further affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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