U.S. Department of Labor

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

BRB No. 18-0022 BLA

DONALD R. PARRENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/30/2019
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Brent Yonts, (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05313) of Administrative Law Judge Colleen A. Geraghty on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on September 29, 2014.

The administrative law judge credited claimant with twenty-eight years of coal mine employment, including twenty-four years underground, as stipulated by the parties and supported by the record, and found that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). She therefore found that 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).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled based on the medical opinion evidence at 20 C.F.R. §718.204(b)(iv) and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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,

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[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-eight years of coal mine employment, including twenty-four years underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5.

and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 - Total Disability

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 gainful work. *See* 20 C.F.R. §718.204(b)(1). A miner's total disability may be established by: qualifying[4] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 initially found that the weight of the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),[5] but that the blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6-10. She further found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11.

Prior to weighing the medical opinion evidence, the administrative law judge found that claimant's usual coal mine work as a ventilation man involved heavy labor. Decision

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

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

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 1-711; Decision and Order at 10-11, 19 n.14.

and Order at 3-4, 11-12. She next considered the medical opinions of Drs. Chavda, Houser, Tuteur, Baker, and Selby, as well as claimant's treatment records. Decision and Order at 12-17. Drs. Chavda, Houser, and Tuteur opined that claimant has a totally disabling respiratory impairment while Dr. Baker opined that claimant "might" be physically able to return to work.[6] Director's Exhibits, 10, 17; Claimant's Exhibits 6-7. In contrast, only Dr. Selby definitively concluded that claimant retains the respiratory capacity to perform his last coal mine job. Employer's Exhibit 3. The administrative law judge credited the opinions of Drs. Chavda, Houser, Tuteur, and Baker, noting that they each had an accurate understanding of the exertional requirements of claimant's usual coal mine work.[7] Decision and Order at 17. The administrative law judge discredited Dr. Selby's opinion that claimant is able to perform his usual coal mine employment, finding that it is inconsistent with the weight of the pulmonary function tests and the physical requirements of claimant's coal mine job. *Id*. Thus, she concluded that the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Initially, we reject employer's argument that the administrative law judge erred in finding that claimant's job involved heavy labor. The administrative law judge acknowledged the parties' stipulation that claimant's usual coal mine job was as a ventilation worker and that "[o]ne of his tasks involved building seals which required lifting 60 pound blocks, once a year." Employer's Brief at 5, *citing* Decision and Order at 3; *see* Joint Pre-Trial Stipulation at 2. Contrary to employer's contention, however, the administrative law judge permissibly credited claimant's uncontradicted testimony that he performed other tasks, including building brattices. Decision and Order at 4, 11-12, 17. Claimant explained that a brattice is a wall constructed of concrete block, "with each [concrete] block weighing 40 pounds" and that he typically built two to three brattices a day. Hearing Tr. at 18-19; Claimant's Exhibit 10 at 24-26; *see* Decision and Order at 4, 11-12, 17. Further, he was required to be on his feet "for most of a 10 hour shift" and walk

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[6] Dr. Baker also stated that claimant's "breathing tests suggest he could do the work of a miner." Claimant's Exhibit 6. The pulmonary function test Dr. Baker relied upon in formulating that opinion, however, was excluded from the record as being in excess of the evidentiary limitations and the administrative law judge specifically declined to consider this test in evaluating Dr. Baker's opinion. Decision and Order at 7 n.8, 13 n.12. These evidentiary determinations are affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[7] The administrative law judge found that Drs. Chavda, Houser, and Baker "have an accurate understanding of the physical aspects of Claimant's coal mine duties," and "Dr. Tuteur's understanding is essentially accurate." Decision and Order at 17.

approximately one mile, and as much as three to four miles, with the mine inspector to areas underground. Hearing Tr. at 35-36; Claimant's Exhibit 10 at 20-21; *see* Decision and Order at 11-12, 17. Based on this testimony, and taking judicial notice of the *Dictionary of Occupational Titles*,[8] the administrative law judge rationally found that claimant's usual coal mine work involved heavy labor. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 11-12, 17.

We also reject employer's alternative argument that, even assuming claimant's job involved heavy labor, the opinions of Drs. Chavda and Houser cannot be credited because they "failed to consider" that one of claimant's duties, lifting 200-pound timbers, was done with the help of a coworker.[9] Employer's Brief at 6. Consistent with claimant's testimony and the administrative law judge's findings, Dr. Chavda stated that claimant, as a ventilation worker, worked 50 to 60 hours per week, built brattices, and lifted multiple concrete blocks weighing 35-43 pounds each, "stacking them from floor to ceiling." Director's Exhibit 10. Dr. Houser similarly noted that claimant was a ventilation worker, built brattices which required lifting concrete blocks weighing 35 to 43 pounds, and walked with inspectors. Claimant's Exhibit 7. Although Drs. Chavda and Houser also stated that claimant "set timbers" weighing approximately 150 pounds without reference to whether claimant had assistance, neither physician relied on this specific job requirement to find claimant totally disabled. Dr. Chavda determined that claimant is totally disabled because "with low lung function" he would not be able to perform a "laborious job" for 8 hours per day in a coal mine, while Dr. Houser concluded that claimant's impairment "has progressed

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[8] The administrative law judge noted that the *Dictionary of Occupational Titles* describes heavy work 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. Decision and Order at 12 n.10.

[9] Employer has not set forth any argument with respect to its assertion that claimant's job duties were "less strenuous" than the job description relied upon by Dr. Baker. *See* 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 6. Consistent with claimant's testimony and the administrative law judge's findings, Dr. Baker noted that claimant worked 10 hour shifts, timbered, built brattices, lifted 45 pounds, and walked two to three miles. Claimant's Exhibit 6.

to the point" that he cannot walk faster than "a slow pace [of] 1.5 miles per hour or more than 100 yards without stopping due to exertional dyspnea."[10] We thus reject employer's contention that Drs. Chavda and Houser based their findings of total disability on inaccurate job descriptions that "far exceeded" heavy labor. Employer's Brief at 6. We therefore affirm, as supported by substantial evidence, the administrative law judge's rational determination that both physicians had an adequate understanding of the physical requirements of claimant's usual coal mine work. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Tenn. 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).

Because employer does not otherwise challenge the administrative law judge's weighing of the opinions of Drs. Chavda, Houser, and Tuteur, we affirm her determination that these opinions support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as supported by substantial evidence and unchallenged on appeal, the administrative law judge's discrediting of Dr. Selby's opinion that claimant is not totally disabled. *See Skrack*, 6 BLR at 1-711. Consequently, we affirm the administrative law judge's finding that the weight of the medical opinions supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[11]

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[10] The administrative law judge did not base her finding of heavy labor on a specific lifting requirement for claimant's timbering duties, but instead stated that claimant "built timbers to hold the mine roof up." Decision and Order at 11. Her only specific finding with respect to a lifting requirement was that claimant's job "build[ing] brattices and seals" required him to lift "concrete blocks weighing between 40 and 60 pounds." *Id.* As noted above, the job descriptions relied upon by Drs. Chavda and Houser are consistent with this finding.

Further, there is no merit to employer's contention that Drs. Chavda and Houser inaccurately assumed that claimant lifted concrete blocks on a daily basis. Employer's Brief at 6. As previously noted, claimant testified that he typically constructed one to three brattice walls a day by lifting and stacking blocks weighing forty pounds. Claimant's Exhibit 10 at 24-26.

[11] We agree with employer that Dr. Baker's statement that claimant should avoid further coal dust exposure so as not to worsen his condition does not constitute a definitive diagnosis of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (An opinion that a claimant should avoid further

Further, we affirm, as unchallenged, the administrative law judge's finding that the evidence as a whole establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack*, 6 BLR at 1-711; *Shedlock*, 9 BLR at 1-198; Decision and Order at 18.

Because claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[12] or that "no

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exposure to coal dust is not a diagnosis of total disability.); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-842 n.3 (1984); *Pruett v. Pickands Mather & Co.*, 6 BLR 1-824, 1-826 (1984). We disagree, however, that remand is required for reconsideration of Dr. Baker's opinion. While employer argues that Dr. Baker did not diagnose total disability, it does not contend that his assessment that claimant "might" be able to perform his usual coal mine work constitutes a diagnosis that claimant is not disabled. Even if it could be construed as such, Dr. Baker's opinion on the issue of total disability would be of limited probative value, as it was based primarily on a pulmonary function study that was excluded from the record. Decision and Order at 7 n.8, 13 n.12. Of the remaining medical opinions, the administrative law judge permissibly credited those of Drs. Chavda, Houser, and Tuteur that claimant is totally disabled, and permissibly discredited the only opinion to definitively diagnose claimant as not totally disabled, that of Dr. Selby. As the weight of the medical opinion evidence still supports a finding of total disability, any error in the administrative law judge's weighing of Dr. Baker's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions 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).

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer did not rebut the presumption by either method.

To disprove legal pneumoconiosis employer must establish that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Selby and Tuteur.[13] Dr. Selby opined that claimant does not have legal pneumoconiosis, but has a mild to moderate restrictive impairment due to cigarette smoke exposure, obesity, congestive heart failure, and a partially paralyzed right hemidiaphragm. Employer's Exhibit 3. Dr. Tuteur opined that claimant does not have legal pneumoconiosis, but has advanced but variable chronic obstructive pulmonary disease (COPD) due to the development of post-infectious bronchiectasis, unrelated to coal mine dust exposure.[14] Employer's Exhibit 7. The administrative law judge found that both opinions are inadequately explained and, therefore, do not rebut the presumption of legal pneumoconiosis. Decision and Order at 23, 25-26.

Employer asserts that the administrative law judge applied an incorrect legal standard by requiring employer's medical experts to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. Employer's Brief at 9-10. We disagree. The administrative law judge correctly stated that employer has the burden of establishing that claimant does not have legal pneumoconiosis, i.e., a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 18, 25-26; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, the administrative law judge did not reject the opinions of Drs. Selby and Tuteur because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, she found their opinions not credible because they failed to adequately explain why claimant's years of coal mine dust exposure could not have significantly contributed, along with his other conditions, to his respiratory impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir.

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[13] The administrative law judge also considered the opinions of Drs. Chavda, Houser, and Baker that claimant has legal pneumoconiosis. Decision and Order at 22-26; Director's Exhibits 10, 17; Claimant's Exhibits 6, 7.

[14] Dr. Tuteur initially diagnosed a restrictive impairment, but revised his opinion after reviewing additional evidence. Director's Exhibit 24; Employer's Exhibit 7.

2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 25-26. As employer has not specifically challenged the administrative law judge's reason for discrediting the opinions of Drs. Selby and Tuteur, we affirm her finding that their opinions are insufficient to rebut the presumption that claimant has legal pneumoconiosis.[15] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order at 26.

As the administrative law judge permissibly discredited the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 26.

The administrative law judge next considered whether employer rebutted the presumption by establishing that "no part of the miner'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)(ii). She permissibly discounted the opinions of Drs. Selby and Tuteur because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer did not disprove that claimant has the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 26-27. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox*, 791 F.2d at 446, 9 BLR at 2-47-48; *Sarf*, 10 BLR

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[15] We reject employer's additional argument that the administrative law judge erred in combining her findings regarding clinical and legal pneumoconiosis, thereby impermissibly applying a more stringent standard. Employer's Brief at 9-10. In considering whether the opinions of Drs. Selby and Tuteur disproved the existence of legal pneumoconiosis, the administrative law judge properly considered whether they credibly established that claimant's diagnosed restrictive or obstructive impairments did not arise out of coal mine employment. *See* Decision and Order at 18, *citing* 20 C.F.R. §718.201(a)(2).

[16] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 8-9.

at 1-120-21. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer 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

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge