U.S. Department of Labor

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

BRB Nos. 18-0096 BLA
and 18-0096 BLA-A

LEROY PERRY, JR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BEECH FORK PROCESSING, INCORPORATED	)	DATE ISSUED: 01/25/2019
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, 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, and claimant cross-appeals, the Decision and Order Awarding Benefits (2016-BLA-05321) of Administrative Law Judge Larry W. Price 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 subsequent claim filed on October 21, 2014.[1]

The administrative law judge credited claimant with twenty years of underground coal mine employment, as stipulated by the parties, and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[2] He 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).[3] The

[1] Claimant filed three prior claims; two were finally denied and one was withdrawn. Director's Exhibits 1, 2. His most recent prior claim, filed on November 5, 2010, was denied by the district director on May 24, 2011 because he failed to establish any element of entitlement. Director's Exhibit 2 at 3-4, 187. He took no further action on that claim.

[2] When a miner files a claim 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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Because the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 24.

[3] 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

administrative law judge further found that employer did not rebut the presumption and awarded benefits.[4]

On appeal, employer asserts that the administrative law judge erred in finding that claimant is totally disabled and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Claimant has also filed a cross-appeal asserting that the administrative law judge erred in weighing the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), should the Board vacate the award of benefits and remand this case. Employer responds, urging the Board to reject claimant's argument, and reiterating its contentions on appeal. The Director, Office of Workers' Compensation Programs, did not file a response brief in either appeal.[5]

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.[6] 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). In the absence of contrary probative

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underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[4] The administrative law judge considered the old and new evidence together, and permissibly relied upon the evidence submitted with the current claim, which he found more accurately reflects claimant's current condition. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 24.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

[6] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law 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 Exhibits 2, 3, 5.

evidence, a miner's total disability is established by: qualifying[7] 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 of record. *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).

Employer argues that the administrative law judge erred in his evaluation of the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv), and in finding that claimant established total disability based on his weighing of all the evidence at 20 C.F.R. §718.204(b)(2). Employer's Brief at 6. We disagree.

The administrative law judge initially found that because the pulmonary function studies are all non-qualifying, the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 16. He next considered four blood gas studies conducted on December 16, 2014, May 19, 2015, January 8, 2016, and January 27, 2017. Decision and Order at 5, 16-17. The December 16, 2014 study conducted by Dr. Rasmussen produced qualifying values both at rest and with exercise. Director's Exhibit 11. The May 19, 2015 and January 8, 2016 studies conducted by Drs. Jarboe and Dahhan, respectively, produced non-qualifying values both at rest and with exercise. Director's Exhibit 19; Employer's Exhibit 2. Finally, the January 27, 2017 study conducted by Dr. Shah produced non-qualifying values at rest, but qualifying values with exercise. Claimant's Exhibit 5. After finding that all of the studies are valid, the administrative law judge concluded that because the studies conducted by Drs. Rasmussen and Shah produced qualifying values but the studies conducted by Drs. Jarboe and Dahhan did not, the blood gas study evidence is in equipoise.[8] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at

[7] 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).

[8] We affirm, as unchallenged, the administrative law judge's finding that the December 16, 2014 and January 27, 2017 exercise studies are valid and qualifying. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

17. He thus found that the blood gas studies, standing alone, do not establish total disability.[9] Decision and Order at 17.

Prior to weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant's usual coal mine work involved heavy labor. Decision and Order at 14-15. He then considered the medical opinions of Drs. Rasmussen, Forehand, Cohen, Jarboe, and Westerfield.[10] Decision and Order at 6-13, 17-18. Drs. Rasmussen, Forehand, and Cohen opined that claimant has a totally disabling respiratory impairment, as demonstrated by the December 16, 2014 and January 27, 2017 qualifying exercise blood gas studies. Director's Exhibits 11, 13; Claimant's Exhibits 3, 4. In contrast, Drs. Jarboe and Westerfield opined that claimant is able to perform his last coal mine employment from a respiratory standpoint. Director's Exhibit 19; Employer's Exhibits 3, 5, 7, 9. They determined that the December 16, 2014 and January 27, 2017 exercise blood gas studies, while qualifying, do not reflect the presence of a disabling respiratory impairment.

The administrative law judge found that all of the physicians are "significantly qualified and experienced in pulmonary diseases and pneumoconiosis," all demonstrated an adequate understanding of claimant's exposure histories, and all of their opinions are well-reasoned and documented. Decision and Order at 6 n.5 and n.6, 8 n.7, 9 n.8, 11 n.9, 17. He accorded the greatest weight to the opinion of Dr. Forehand, however, because it is the most persuasive and the best reasoned. Decision and Order at 17-18. He also correctly observed that Dr. Forehand's opinion is supported by the opinions of Drs. Rasmussen and Cohen. *Id.* Thus, he found that the medical opinion evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18. Finally, the administrative law judge found that the medical evidence, as a whole, establishes total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 18.

We reject employer's contention that the administrative law judge erred in finding all of the medical opinions to be well-reasoned and well-documented. Employer's Brief at

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[9] The administrative law judge also found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16-17.

[10] Dr. Rasmussen performed the Department of Labor-(DOL) sponsored complete pulmonary evaluation. Following Dr. Rasmussen's death, the DOL asked Dr. Forehand to review Dr. Rasmussen's report and reconsider his conclusions in light of the other evidence of record. Decision and Order at 8; Director's Exhibit 13.

5-8. Contrary to employer's argument, the administrative law judge was not required to give less weight to Drs. Forehand and Cohen on the basis that they did not examine claimant. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997) (examining physicians not categorically more persuasive than non-examining physicians); *Collins v. J&L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999). The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder to decide. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As employer does not otherwise challenge the administrative law judge's finding that the medical opinions of Drs. Forehand and Cohen are well-reasoned and documented, that finding is affirmed. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 17; Employer's Brief at 6.

We also reject employer's contention that, having found all of the medical opinions to be well-reasoned and documented, the administrative law judge erred in finding Dr. Forehand to be more persuasive than Drs. Jarboe and Westerfield. Employer's Brief at 7, 8. There is no dispute among the physicians that exercise blood gas studies are generally a better predictor of a miner's ability to perform hard physical labor than resting blood gas studies. Claimant's Exhibit 4 at 11; Employer's Exhibits 7 at 17; 8 at 11. Dr. Forehand explained that both the peak heart rate achieved and the amount of work expended are needed to evaluate the significance of exercise blood gas study results. Director's Exhibit 13; Employer's Exhibit 8 at 15-17, 28. After reviewing all of the medical evidence of record, he opined that claimant is totally disabled based on the blood gas studies conducted by Drs. Rasmussen and Shah. Director's Exhibit 13; Employer's Exhibit 8 at 15-17, 28. Further, he refuted Dr. Westerfield's opinion that the qualifying studies are the result of obesity and do not reflect the presence of a respiratory impairment, explaining that if claimant's obesity was the cause of his gas exchange impairment, claimant's PO2 would be expected to rise with exercise, not drop.[11] Employer's Exhibit 8 at 20-21. Dr. Forehand also stated that the non-qualifying exercise blood gas studies performed by Drs. Jarboe and Dahhan are less probative indicators of claimant's functional capacity because Dr. Jarboe did not record claimant's heart rate during peak exercise and Dr. Dahhan indicated that claimant only achieved a peak heart rate of 98.[12] Director's Exhibit 13; Employer's Exhibit

[11] We further note that, to the extent Dr. Westerfield opined that any pulmonary abnormalities demonstrated by the objective testing are due to obesity, such an opinion relates to the cause of claimant's pulmonary impairment, not its existence. *See* 20 C.F.R. §718.204(a).

[12] Dr. Forehand noted that while Dr. Rasmussen's testing indicated that claimant's heart rate rose from 88 to 133 with exercise, and Dr. Shah's testing indicated that claimant's

8 at 15-17. Employer cites nothing in the record that undermines the administrative law judge's decision to credit Dr. Forehand's reliance on the studies conducted by Drs. Rasmussen and Shah, or his criticisms of the blood gas testing conducted by Drs. Jarboe[13] and Westerfield.[14] Moreover, as the administrative law judge found and employer does not contest, Dr. Forehand's conclusions are supported by the opinions of Drs. Rasmussen and Cohen, who agreed that claimant has a disabling gas exchange impairment.[15] Decision and Order at 17-18. Because it is rational and supported by substantial evidence, we affirm

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heart rate increased from 82 to 103 with exercise, Dr. Dahhan's testing reflected a smaller increase from 92 to 98. Employer's Exhibit 8 at 16-17, 19, 37. Dr. Forehand explained that this indicated that claimant did not do as much work in Dr. Dahhan's exercise study, making the study a less reliable indicator of claimant's functional capacity for hard labor. *Id.* at 15-17.

[13] Dr. Jarboe acknowledged that he did not record claimant's heart rate or the amount of work expended during the exercise study he conducted. Employer's Exhibit 7 at 12, 19. He further acknowledged that Dr. Shah exercised claimant for longer than Dr. Dahhan, which he stated could explain why Dr. Shah obtained a qualifying result while Dr. Dahhan did not. *Id.* at 12.

[14] While Dr. Westerfield opined that "some" of claimant's exercise studies misrepresented his peak exercise PaO2 because of the short exercise time, he did not identify which studies he was referring to or explain the significance of this factor. Employer's Exhibit 9 at 7. He also did not discuss the significance of the peak heart rate achieved during exercise as an indicator of functional capacity. Employer's Exhibits 3, 5, 9. Although Dr. Westerfield stated that claimant's normal "recovery" PaO2 values demonstrated that his exercise studies were actually normal, the administrative law judge credited Dr. Forehand's accurate statement that exercise recovery values are not a measure of disability under the regulations. *See* 20 C.F.R. §718.204(b)(2)(ii); Employer's Exhibit 8 at 34-35.

[15] Dr. Rasmussen agreed with Dr. Forehand that claimant has marked loss of lung function as reflected by his marked hypoxemia during light exercise, and does not retain the functional capacity to perform his usual coal mine work. Director's Exhibit 11 at 49. Dr. Cohen similarly opined that the exercise studies obtained by Drs. Rasmussen and Shah reflected insufficient gas exchange capacity to allow claimant to perform his usual coal mine work. Claimant's Exhibit 4 at 28. He also agreed with Dr. Forehand that because Dr. Jarboe did not record claimant's peak heart rate and because Dr. Dahhan only achieved a peak heart rate of 98, their exercise studies are less probative indicators of claimant's ability to do heavy labor. *Id.* at 13-15.

the administrative law judge's permissible finding that Dr. Forehand's opinion is "the most persuasive and best reasoned opinion in the record" and is supported by the opinions of Drs. Rasmussen and Cohen. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002) (a reviewing court "is required to defer to the administrative law judge's assessment of the physicians' credibility"); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012) (the decision to credit one opinion over another "is a matter of credibility, which we cannot revisit"); Decision and Order at 18. In arguing that all of the medical opinions should have been accorded equal weight, employer is asking for a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). We thus affirm the administrative law judge's finding that claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv).

Employer next asserts, unpersuasively, that the administrative law judge failed to consider all of the evidence together pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge considered that all of claimant's pulmonary function studies are non-qualifying, that the blood gas studies are in equipoise, and that the medical opinions are "preponderantly positive for total disability." Decision and Order at 18. Giving greatest weight to Dr. Forehand's opinion that claimant is totally disabled based on the results of his blood gas studies, the administrative law judge concluded that the medical evidence, when weighed together, "indicates that claimant is totally disabled from a pulmonary perspective." *Id.* As the administrative law judge adequately considered all contrary probative evidence, *see Shedlock*, 9 BLR at 1-198, we affirm the administrative law judge's finding that the medical evidence, as a whole, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 18.

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 a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 18.

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

Because claimant invoked the Section 411(c)(4), the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] 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)(i), (ii). As employer raises no challenge to the administrative law judge's determinations that it failed to establish rebuttal by either

method, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant has established his entitlement to benefits.[16]

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

[16] In light of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).