U.S. Department of Labor

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

BRB No. 18-0106 BLA

FREDDIE FRALEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHELL COAL & TERMINAL COMPANY d/b/a WOLF CREEK COLLIERIES, INCORPORATED	)	DATE ISSUED: 01/24/2019
	)	
Employer-Petitioner	)	
	)	
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 Peter B. Silvain, Jr., 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.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05550) of Administrative Law Judge Peter B. Silvain, Jr., 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 subsequent claim filed on June 27, 2014.[1]

The administrative law judge credited claimant with twenty years of coal mine employment, including nineteen years underground, and found that he has a totally disabling respiratory or pulmonary impairment. He therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement.[2] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in his consideration of the new pulmonary function study evidence in finding total disability established and that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits.[3] The

[1] Claimant filed two prior claims, both of which were finally denied. Claimant's first claim, filed on April 28, 1982, was denied by the district director on June 24, 1993 because claimant did not establish any element of entitlement. Director's Exhibit 1 at 7, 238. Claimant took no further action on that claim. Claimant's second claim, filed on January 12, 1999, was denied by Administrative Law Judge Joseph E. Kane on January 26, 2001 because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 2. Claimant took no further action on that claim.

[2] 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.

[3] By Order dated March 28, 2018, the Board granted claimant's request to withdraw his cross-appeal. *Fraley v. Shell Coal & Terminal Co,* BRB No. 18-0106 BLA-A (Mar. 28, 2018) (unpub. Order).

Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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.[5] 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 (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. *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 pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four new pulmonary function studies performed on May 5, 2014, August 26, 2014, January 19, 2015 and July 22, 2016. Decision and Order at 8-9, 17. The May 5, 2014 study conducted at the Veterans Administration (VA) Medical Center produced qualifying[6] values before the administration of a bronchodilator, but non-qualifying values after the administration of the bronchodilator. Decision and Order at 17; Director's Exhibit 13. The August 26, 2014 and January 19, 2015 studies conducted by Drs. Rasmussen and

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty years of coal mine employment, including of nineteen years of underground employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

[6] A "qualifying" pulmonary function 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).

Rosenberg, respectively, produced non-qualifying results both before and after administration of a bronchodilator. Decision and Order at 17; Director's Exhibits 12, 15. Finally, the July 22, 2016 study, also conducted at the VA Medical Center, produced qualifying values both before and after administration of a bronchodilator. Decision and Order at 17-18; Claimant's Exhibit 1.

After finding that the May 5, 2014 and July 22, 2016 studies are valid, the administrative law judge gave determinative weight to the pre-bronchodilator May 5, 2014 values over the post-bronchodilator values to find that the study is qualifying. Decision and Order at 17. Having thus determined that two studies are qualifying while two are not, the administrative law judge gave greatest weight to the qualifying July 22, 2016 study because it is "the most up to date representation of the Claimant's respiratory condition." *Id.* at 18. He therefore found that claimant established total disability by the pulmonary function study evidence. *Id*.

Employer contends that the administrative law judge erred by not applying the quality standards at 20 C.F.R. §718.103 and Part 718, Appendix B to the May 5, 2014 and July 22, 2016 pulmonary function studies conducted at the VA Medical Center.[7] Employer's Brief at 3-4. Employer argues that not applying the quality standards "is inappropriate when those studies are considered . . . pulmonary function study evidence under 20 C.F.R. §725.414(a)(2)(i)." *Id*. at 3. This argument lacks merit.

The May 5, 2014 and July 22, 2016 pulmonary function studies were submitted as part of the miner's hospitalization and treatment records. Because these studies were not generated in connection with a claim for benefits, they are not subject to the quality standards set forth in 20 C.F.R. Part 718. *See* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79927 (Dec. 20, 2000); 64 Fed. Reg. 54975 (Oct. 8, 1999); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008) (quality standards are inapplicable to hospitalization and treatment records because such records are not developed in connection with a claim for benefits). Despite the inapplicability of the specific quality standards, an administrative law judge must still determine if the qualifying pulmonary function study results are sufficiently reliable to support a finding of total disability. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Here, the administrative law judge fully considered whether the May 5, 2014 and July 22, 2016 studies are sufficiently reliable and accurately observed that Dr. Rosenberg opined that the May 5, 2014 study "appears valid" and that no physician opined

[7] Employer contends that neither the May 5, 2014 nor the July 22, 2016 study bears the signature of the supervising physician and the July 22, 2016 study also lacks the requisite number of tracings specified the regulation. Employer's Brief at 3, *citing* 20 C.F.R. §718.103(b).

that the study is invalid. Decision and Order at 17; Director's Exhibit 14 at 3. The administrative law judge similarly observed that Drs. Rosenberg, Forehand, and Cohen all reviewed the July 22, 2016 study and none opined that it is invalid. Rather, Dr. Cohen specifically acknowledged that it was a "good study." Decision and Order at 17-18; Claimant's Exhibit 2 at 18. As the administrative law judge permissibly relied on the uncontradicted opinions of Drs. Rosenberg and Cohen to credit the May 5, 2014 and July 22, 2016 pulmonary function studies, we affirm his conclusion that these studies support a finding of total disability. 20 C.F.R. §718.101(b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Stowers*, 24 BLR at 1-89, 1-92. Employer raises no further challenge to the administrative law judge's weighing of the new pulmonary function study evidence. We, therefore, we affirm his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

We further affirm as unchallenged the administrative law judge's findings that claimant established total disability based on the new medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19. We also affirm, as unchallenged, the administrative law judge's finding that the new evidence as a whole establishes total disability pursuant to 20 C.F.R. §718.204(b)(2).[8] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Shedlock*, 9 BLR at 1-198; *Skrack*, 6 BLR at 1-711; Decision and Order at 19-20.

In light of our affirmance of the findings that claimant has 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); Decision and Order at 20.

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,[9] or that "no

[8] We also affirm the administrative law judge's finding that claimant established total disability based on the old and new evidence together. Decision and Order at 6, 25.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial

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). The administrative law judge found that employer failed to establish rebuttal by either method.[10]

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinions of Drs. Rasmussen, Forehand, Cohen, and Rosenberg. Drs. Rasmussen, Forehand, and Cohen each diagnosed legal pneumoconiosis,[11] while Dr. Rosenberg opined that claimant does not have legal pneumoconiosis but has a significant restrictive impairment and an exercise associated gas-exchange impairment unrelated to coal mine dust exposure. Decision and Order at 22-23. The administrative law judge discredited Dr. Rosenberg's opinion as inadequately explained. Decision and Order at 23.

Employer contends that Dr. Rosenberg clearly explained why he did not diagnose legal pneumoconiosis. Employer's Brief at 4. We disagree. The administrative law judge permissibly found that in attributing claimant's respiratory impairments to other causes, including obesity and a previous sternotomy, Dr. Rosenberg failed to convincingly explain why claimant's twenty years of coal mine dust exposure was not also a contributing or exacerbating factor.[12] *See Brandywine Explosives & Supply v. Director, OWCP*

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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).

[10] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 22-23.

[11] The administrative law judge found that because the opinions of Drs. Rasmussen, Forehand, and Cohen each diagnosed the existence of legal pneumoconiosis, their opinions do not assist employer in rebutting the presumption. Decision and Order at 23.

[12] Dr. Rosenberg examined claimant on February 20, 2015, noting that claimant worked in underground coal mine employment for twenty-one years, and had a 17-24 pack year history of smoking. Director's Exhibit 15. Based on his examination of claimant and review of the medical evidence of record, he opined that claimant does not have clinical or legal pneumoconiosis, but does have a mild degree of restriction. *Id*. Dr. Rosenberg further opined that claimant's reduction in lung volumes is multifactorial in nature, being related

[*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion is insufficient to rebut the presumption that claimant has legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 23.

As the administrative law judge thus permissibly discounted the only medical opinion that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

The administrative law judge next addressed whether employer could establish the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited Dr. Rosenberg's opinion on disability causation because there were no "specific and persuasive reasons" for concluding it was independent of his opinion on the existence of legal pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); Decision and Order at 24-25. As substantial evidence supports this finding, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

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to his excessive weight and previous sternotomy. *Id*. In supplemental reports, following his review of additional medical evidence, Dr. Rosenberg diagnosed a significant restrictive impairment and an exercise associated gas-exchange impairment. Director's Exhibit 14; Employer's Exhibits 2, 3. He acknowledged that "it is possible that [claimant] has [coal workers' pneumoconiosis] which is disabling" but continued to opine that, based on the available evidence, claimant's impairments could not be attributed to coal mine dust exposure. Employer's Exhibit 3. Dr. Rosenberg stated that further testing was needed to help elucidate the causes of claimant's condition, and stated that the differential diagnoses included parenchymal lung disease, emphysema or even thromboembolic disease. *Id.*

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge