U.S. Department of Labor

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

BRB No. 18-0109 BLA

JACOB TAPIA Claimant-Respondent v. CHEVRON MINING, INCORPORATED, Self-Insured Through CHEVRON c/o BROADSPIRE/CRAWFORD Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/25/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Timothy S. Hale (Hale & Dixon, P.C.), Albuquerque, New Mexico, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-5531) of Administrative Law Judge John P. Sellers, III, 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 March 24, 2014.[1]

The administrative law judge found that claimant established more than thirty years of employment at underground coal mines and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309,[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section

[1] Claimant filed three prior claims for benefits, each of which was finally denied. Director's Exhibits 1-3. The most recent prior claim was denied by the district director on June 15, 2012 because the evidence did not establish any element of entitlement. Director's Exhibit 3.

[2] When a miner files a claim for benefits 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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.[4]

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption.[5] Claimant responds, urging

[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 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). Based on claimant's testimony, the administrative law judge found that all of his coal mine work was performed either underground or above ground at an underground mine site. Decision and Order at 18-19; Hearing Tr. at 17-19. Thus, the administrative law judge found that all of claimant's coal mine work is qualifying for the purposes of the fifteen-year presumption. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); *Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979); Decision and Order at 3, 18-19.

[4] Prior to awarding benefits, 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 22, 28-29.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established over thirty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

affirmance of the award of benefits.[6] The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[7]

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.[8] 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 he has a respiratory or pulmonary impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, total disability is established by 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). 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).

[6] On November 15, 2018, claimant filed a response brief, acknowledging that it was several months late. Having received no objections to this untimely filing, we accept it. 20 C.F.R. §§802.212, 802.217.

[7] Employer filed a Motion to Dismiss Chevron as the designated responsible operator. The Director, Office of Workers' Compensation Programs, responded, requesting that the motion be denied. By Order dated October 3, 2018, the Board denied employer's motion on the basis that it conceded that it was the responsible operator before the district director and failed to challenge its designation before the administrative law judge or in its Petition for Review and brief before the Board. *Tapia v. Chevron Mining, Inc*., BRB No. 18-0109, slip op. at 2 (unpaginated) (Oct. 3, 2018) (Order).

[8] Because claimant's last coal mine employment was in New Mexico, we will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Tr. at 16-17; Director's Exhibit 7.

Employer argues that the administrative law judge "ignored the uncontradicted contrary probative evidence" in finding that claimant established a totally disabling respiratory or pulmonary impairment. Employer's Brief at 6. We disagree. Turning first to the three new blood gas studies,[9] the administrative law judge gave "paramount weight" to Dr. Sood's August 11, 2015 qualifying[10] exercise blood gas study as being a better predictor of claimant's ability to work in the mines than the studies conducted only at rest. Decision and Order at 20. Noting further that only the December 8, 2014 study, conducted at rest, was non-qualifying, he found that the blood gas studies "as a whole" support a finding of total disability.[11] Decision and Order at 5. The administrative law judge further found that while none of the pulmonary function studies is qualifying, this evidence does not undermine a finding of total disability because it measures a different form of impairment than the blood gas study evidence. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 20.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Sood and Tuteur. Dr. Sood opined that claimant has a totally disabling respiratory impairment as demonstrated by his qualifying blood gas studies, while Dr. Tuteur opined that claimant retains the respiratory capacity to perform his usual coal mine employment. Decision and Order at 20- 22; Director's Exhibit 16; Claimant's Exhibit 3; Employer's Exhibits 1, 9. Specifically, Dr. Tuteur opined that the qualifying blood gas studies, including Dr. Sood's August 11, 2015 study, constituted normal studies

[9] The three new blood gas studies were conducted on June 30, 2014, December 8, 2014, and August 11, 2015. Dr. Tuteur's December 8, 2014 blood gas study produced non-qualifying values at rest; exercise studies were not conducted. Employer's Exhibit 1. The June 30, 2014 study conducted by Dr. Sood produced qualifying values at rest; exercise studies were not conducted. Director's Exhibit 16. Dr. Sood's August 11, 2015 study produced qualifying values both at rest and during exercise. Claimant's Exhibit 3.

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those table values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] As employer has not specifically challenged the administrative law judge's finding that the weight of the new blood gas study evidence is qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21.

upon calculation of the A-a O_2 gradient.[12] Employer's Exhibits 1; 4 at 38-43, 60-62; 9. Finding Dr. Tuteur's opinion to be unpersuasive, the administrative law judge concluded 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 21-22. Weighing the evidence together, he found that the blood gas study evidence, as supported by the opinion of Dr. Sood, establishes total disability. 20 C.F.R. §718.204(b)(2); *see Shedlock*, 9 BLR at 1-198; Decision and Order at 22.

Contrary to employer's argument, in finding that the weight of the evidence establishes total disability, the administrative law judge fully considered Dr. Tuteur's report and deposition testimony, including his explanation of why his calculation of the A-a O_2 gradient showed that claimant's qualifying blood gas studies do not reflect disability. Decision and Order at 13-18, 23-25; Employer's Brief at 5-6. Noting that the Department of Labor, in promulgating the regulations, chose to measure total disability based on the PO_2 and PCO_2 values, together with the altitude of the test, the administrative law judge permissibly declined to credit Dr. Tuteur's reliance on the A-a O_2 gradient to interpret the blood gas studies. Decision and Order at 21-22; *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). Moreover, employer has not specifically challenged the administrative law judge's basis for discrediting Dr. Tuteur's opinion or his finding that the blood gas study evidence is qualifying for total disability. Thus, we affirm his determinations that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv), and as a whole at 20 C.F.R. §718.204(b)(2). Consequently, we further affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.

[12] Dr. Tuteur opined that the tables in the Department of Labor (DOL) regulations are "general guidelines" which are reasonably used when the barometric pressure is not known. Decision and Order at 21; Employer's Exhibit 4 at 41-42. He stated that with the knowledge of the precise barometric pressure on the date of testing he was able to determine, without the use of the DOL table, that the qualifying values were not reflective of a totally disabling respiratory impairment. Decision and Order at 21; Employer's Exhibit 4 at 41-43. In contrast, Dr. Sood opined that the PO_2 and PCO_2 values on the June 30, 2014 and August 11, 2015 blood gas studies are a reliable basis upon which to conclude that the miner is totally disabled. Decision and Order at 21-22; Director's Exhibit 16; Claimant's Exhibits 1, 3.

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 claimant has neither legal nor clinical pneumoconiosis,[13] 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); *see Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 821-22 (10th Cir. 2017).

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 opinion of Dr. Tuteur that claimant does not have legal pneumoconiosis, but has chronic bronchitis and a minimal obstructive impairment that are "most likely" attributable to claimant's years of cigarette smoking and his childhood exposure to fossil fuel combustion fumes.[14] Employer's Exhibits 1; 4 at 28-30. The administrative law judge discredited Dr. Tuteur's opinion as inadequately explained. Decision and Order at 22-23.

Specifically, the administrative law judge correctly noted that Dr. Tuteur acknowledged the possibility that claimant's coal dust exposure contributed to his chronic bronchitis and minimal obstructive impairment. Decision and Order at 27. He permissibly found, however, that Dr. Tuteur did not persuasively explain why he concluded, in this case, that claimant's more than thirty years of coal mine dust exposure did not significantly contribute, along with his other exposures, to his respiratory impairment. Decision and Order at 27-30, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (recognizing that the effects of smoking and coal mine dust are additive); *see Blue Mountain Energy v. Director,*

[13] 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). "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).

[14] The administrative law judge also considered the opinion of Dr. Sood that claimant has legal pneumoconiosis, and correctly noted that it does not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 28.

OWCP [*Gunderson*], 805 F.3d 1254, 1260-61 (10th Cir. 2015); *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Employer's Exhibits 1, 4, 7, 9.

It is for the administrative law judge to assess the credibility of the evidence and determine the weight to assign it. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370. Moreover, employer has not specifically challenged the reasons the administrative law judge provided for discrediting Dr. Tuteur's opinion on the presence of legal pneumoconiosis. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

As the administrative law judge permissibly discredited the only opinion supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 29.

The administrative law judge next addressed whether employer rebutted the presumption by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-30. The administrative law judge permissibly discounted Dr. Tuteur's disability causation opinion because he did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29-30; Employer's Exhibits 1, 4, 7, 9. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. 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. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge