U.S. Department of Labor

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

BRB No. 18-0110 BLA

EDWARD M. LANNON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	
	)	DATE ISSUED: 01/23/2019
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 and Order Denying Motion for Reconsideration of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2013-BLA-05581) of Administrative Law Judge John P.

Sellers, III, 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 March 5, 2012.[1]

The administrative law judge credited claimant with at least seventeen years of coal mine employment, as stipulated by the parties, and determined that claimant's employment occurred either underground or aboveground at an underground mine site. He further found that claimant established that he has a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore concluded that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He then determined that employer did not rebut the Section 411(c)(4) presumption and awarded benefits. Employer filed a motion requesting reconsideration which the administrative law judge denied.

On appeal, employer challenges the administrative law judge's determinations that claimant established total disability and invoked the Section 411(c)(4) presumption, and that employer did not rebut the 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,

[1] Claimant filed an application for benefits on March 5, 2012. Director's Exhibit 2. The administrative law judge noted that the record also contains the first page of an application dated March 26, 2012. Decision and Order at 2 n.2. He considered the March 5, 2012 application as the sole effective claim because the March 26, 2012 application appears to be a photocopy of the first page of the March 5, 2012 application. *Id*.

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled 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] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked for at least seventeen years in qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 3.

and in accordance with applicable law.[4] 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

To invoke the Section 411(c)(4) presumption, claimant must establish that he is totally disabled. 20 C.F.R. §718.204(b)(2). A miner is 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). A claimant may establish total disability based on qualifying[5] pulmonary function or arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all 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).

The administrative law judge determined that although total disability was not established at 20 C.F.R. §718.204(b)(2)(i), (iii), by the pulmonary function tests or biopsy, the blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).[6] Decision and Order at 16-17. The administrative law judge then

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

[5] 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).

[6] Blood gas studies were performed on four dates. An April 27, 2012 resting blood gas study conducted by Dr. Klepper was qualifying. Subsequent resting blood gas studies conducted by Dr. Sood on September 20, 2012, Dr. Repsher on September 27, 2012, and Dr. Sood on October 18, 2016 were non-qualifying; however, an exercise blood gas study conducted by Dr. Sood on October 18, 2016 was qualifying. The administrative law judge gave greatest weight to the 2016 qualifying exercise blood gas study on the grounds that it was "more indicative of the Claimant's ability to perform his last coal mine employment," and therefore found that the arterial blood gas study evidence weighed in favor of

considered the medical opinions of Drs. Sood, Klepper, and Repsher pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 8-12, 17-18.

All three physicians examined claimant and diagnosed hypoxemia based on his blood gas study results. Director's Exhibits 12, 13; Claimant's Exhibits 1, 3. Dr. Sood opined that claimant's impairment is totally disabling,[7] while Dr. Klepper stated that claimant has a "moderate impairment based on shortness of breath with exertion and evidence of significant hypoxemia at rest." Director's Exhibit 12; Claimant's Exhibits 1, 3. Dr. Repsher concluded that claimant's hypoxemia is "of no clinical significance" in light of his normal chest x-ray and pulmonary function study, and that "from a respiratory point of view, he is fully fit to perform his usual coal miner work…."[8] Director's Exhibit 13.

The administrative law judge initially determined that claimant's usual coal mine work as a utility man required heavy manual labor. Decision and Order at 16. He then found that although Dr. Klepper diagnosed significant hypoxemia, she did not offer an opinion as to whether claimant is totally disabled by it. Decision and Order at 17. The

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establishing total respiratory or pulmonary disability. Decision and Order at 16. Employer does not object to this weighing of the evidence.

[7] In a report dated September 20, 2016, Dr. Sood opined that claimant's pulmonary impairment was totally disabling based on claimant's arterial blood gas study, which demonstrated that claimant "would not be able to exercise at the level that would be required in" his last coal mine employment as a utility man that involved heavy labor. Claimant's Exhibit 3.

[8] Under the disability assessment section in his report dated April 27, 2012, Dr. Repsher diagnosed "moderate impairment based on shortness of breath with exertion" and "evidence of significant hypoxia at rest." Director's Exhibit 12. In a supplemental report dated October 31, 2012, Dr. Repsher stated that the results of claimant's pulmonary function study were "equal to or greater than 60% of the predicted values," and therefore, demonstrate "only moderate pulmonary impairment." Director's Exhibit 13. As such, Dr. Repsher concluded: "A coal miner with such [pulmonary function study] values should be able to do coal miner jobs requiring mild to moderate exertion," as "documented in the [Department of Labor] Tables of Presumed Disability Due to Impaired Lung Function." *Id.* In a deposition taken April 24, 2013, Dr. Repsher opined that the 2012 pulmonary function tests that he and Dr. Klepper conducted were normal and that the blood gas study he conducted is "quite above" the regulatory qualifying level, and "substantially higher" than Dr. Klepper's measurements. Employer's Exhibit 1.

administrative law judge found that Dr. Sood's diagnosis of a totally disabling impairment outweighed the contrary opinion of Dr. Repsher, because Dr. Repsher did not adequately explain his view that the blood gas study administered by Dr. Klepper on April 27, 2012 produced qualifying values because claimant was suffering from pulmonary emboli. *Id*. at 17-18; Director's Exhibit 13. In addition, he determined that Dr. Repsher's opinion was entitled to diminished weight because he did not review the qualifying exercise blood gas study administered by Dr. Sood on October 18, 2016. *Id*. at 18; Director's Exhibit 13; Claimant's Exhibit 3. He therefore concluded that claimant established total disability by the preponderance of the medical opinion evidence, and by the preponderance of the relevant evidence, considered as a whole. Decision and Order at 18. Accordingly, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. *Id*. at 18-19.

Employer asserts that the administrative law judge erred in giving little weight to Dr. Repsher's opinion. Employer's Brief at 6-9. The administrative law judge discredited Dr. Repsher's opinion as speculative because he did not identify the objective evidence supporting his conclusion that the qualifying study results obtained earlier by Dr. Klepper were attributable to the presence of pulmonary emboli. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984); Decision and Order at 18. The administrative law judge also accorded less weight to Dr. Repsher's opinion because he "did not have the benefit of reviewing" the most recent blood gas study of record, performed by Dr. Sood on October 18, 2016, which produced qualifying values with exercise. Decision and Order at 18; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-148 (6th Cir. 1988) (administrative law judge may credit evidence that better reflects the miner's current respiratory or pulmonary status); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health). Employer does not point to any specific error in the administrative law judge's discrediting of Dr. Repsher's opinion and therefore in according it less weight. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986) (Failure to properly invoke Board review by making specific allegations of error precludes Board review and requires affirmance of the decision below.); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the discrediting of Dr. Repsher's opinion as to disability. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).

Because employer does not otherwise challenge the administrative law judge's credibility determinations, we affirm his finding that Dr. Sood's opinion established total disability at 20 C.F.R. §718.204(b)(2)(iv), and his finding that the evidence, when

considered as a whole, established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983).

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 at 20 C.F.R. §718.204(b)(2), we also affirm his finding that claimant invoked the Section 411(c)(4) presumption.

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,[9] or that "no part of [claimant'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)(i), (ii); *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1336-1337 (10th Cir. 2014); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method. Decision and Order at 20-25.

The only allegation of error employer raises with respect to rebuttal is that the administrative law judge did not provide a valid reason for discrediting Dr. Repsher's opinion that claimant does not have legal pneumoconiosis. To disprove the existence of pneumoconiosis, employer is required to establish the absence of both clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B). We affirm, as unchallenged on appeal, the administrative law judge's determination that employer failed to satisfy its burden to affirmatively prove that claimant does not have clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-23. Thus, we further affirm his finding that employer did not establish rebuttal under 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 23, 24.

We also affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to prove that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-25. We therefore affirm the administrative law judge's

[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 is defined as "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).

determination that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Goodin*, 743 F.3d at 1336-1337; Decision and Order at 25.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge