U.S. Department of Labor

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

BRB No. 19-0024 BLA

JERRY W. PALMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	DATE ISSUED: 01/14/2020
	)	
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 Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John W. Hargrove (Bradley Arant Boult Cummings LLP), Birmingham, Alabama, for employer.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05497) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on October 13, 2015.[1]

The administrative law judge credited claimant with more than twenty-nine years of coal mine employment at underground mines, as the parties stipulated and supported by the record, and found he has a totally disabling respiratory or pulmonary impairment. He therefore found claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.[3]

On appeal, employer argues the administrative law judge erred in finding claimant established a totally disabling impairment necessary to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its contentions on appeal.[4]

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[1] This is claimant's third claim for benefits. The district director denied his two prior claims, filed May 5, 2010, and December 6, 2012, because he failed to establish total disability. Director's Exhibits 1, 2. Claimant took no further action until filing his current claim. Director's Exhibit 4.

[2] Under Section 411(c)(4) of the Act, claimant is presumed 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] 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 Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *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 19-20.

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

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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 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 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 weigh the relevant evidence supporting 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). Employer contends the administrative law judge erred in finding claimant established total disability based on the medical opinions and treatment records.[6] Decision and Order at 13. We disagree.

The administrative law judge considered the medical opinions of Drs. Goldstein and Barney, together with claimant's treatment records. Dr. Goldstein opined claimant has a restrictive impairment but could perform his usual coal mine work as an electrician. Employer's Exhibit 1 at 29, 38-39. Dr. Barney opined claimant is unable to perform coal mine work due to his respiratory impairment. Director's Exhibits 19, 21. The administrative law judge discredited Dr. Goldstein's opinion and credited Dr. Barney's opinion, as supported by Dr. Hawkins' treatment records, to find claimant established total respiratory disability. Decision and Order at 13.

We reject employer's assertion that "the record evidence does not demonstrate that [claimant] is disabled from any pulmonary disease." Employer's Brief at 13. Only Dr. Goldstein opined claimant is not disabled from his usual coal mine work as an electrician.

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

[6] The administrative law judge found claimant did not establish total disability through pulmonary function studies or blood gas studies or with evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 13.

As the administrative law judge accurately observed, Dr. Goldstein relied on an incorrect assumption that claimant's work did not require heavy labor. Dr. Goldstein testified, "I don't see any reason why [claimant] cannot continue to be an electrician. That's not heavy work." Employer's Exhibit 1 at 29. He also stated, "I think he's disabled, but he's able to go back to work as an electrician as long as he's not doing heavy work." *Id.* at 38. The administrative law judge found, however, claimant's employment as an electrician required "heavy work,"[7] Decision and Order at 13, and thus permissibly declined to credit Dr. Goldstein's opinion. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 984 (11th Cir. 2004); *Jordan v. Benefits Review Board,* 876 F.2d 1455, 1459 (11th Cir. 1989); *Ondecko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). Moreover, employer has not set forth any argument or identified any specific error in the administrative law judge's findings. 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (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). We therefore affirm his decision to discredit Dr. Goldstein's disability opinion. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 13.

We also reject employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Barney and Hawkins in finding claimant totally disabled. Employer's Reply Brief at 3. Contrary to employer's contentions, Drs. Barney and Hawkins did not "rel[y] solely upon [claimant's] self-reporting that included subjective symptoms such as shortness of breath . . . ." Employer's Reply Brief at 3. Dr. Barney examined claimant on behalf of the Department of Labor and conducted objective testing. Director's Exhibit 19. As the administrative law judge observed, Dr. Barney specifically opined claimant's reduced FVC values on pulmonary function testing, together with his shortness of breath with moderate activities of daily living, supported the conclusion that claimant is disabled from performing his coal mine work. Decision and Order at 7, 13; Director's Exhibits 19, 21. The administrative law judge noted Dr. Hawkins similarly relied on pulmonary function testing to support his conclusion that claimant "remains limited with exertional shortness of breath." Decision and Order at 9-10; Claimant's Exhibit 6. In his September 14, 2017 treatment record, Dr. Hawkins opined a recent

[7] The administrative law judge found claimant's usual coal mine employment as an electrician required him to perform "heavy work," including: carrying tools weighing approximately twenty-to twenty-five pounds from job to job; lifting objects weighing about one-hundred pounds; walking between one-quarter mile and one and one-half miles a day, and walking the escape route, between two and five miles, twice a year. *See Jim Walter Res., Inc. v. Allen*, 995 F.2d 1027, 1029 (11th Cir. 1993); Decision and Order at 13; Hearing Tr. at 8-9. As this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 13.

pulmonary function study he conducted demonstrated "mild to moderate airflow obstruction with air-trapping and reduced diffusing capacity" and that "compared with previous [pulmonary function testing] . . . there has been further worsening." Claimant's Exhibit 6. Because employer does not otherwise challenge the administrative law judge's credibility determinations, we affirm his finding that Dr. Barney's opinion, as supported by Dr. Hawkins' treatment records, established total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Jones*, 386 F.3d at 984; *Jordan*, 876 F.2d at 1459; Decision and Order at 13. We further affirm his finding that the evidence considered as a whole established total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 13-14.

Because we have affirmed the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm his determination claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i)-(iii); Decision and Order at 14.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis[8] 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). The administrative law judge found employer failed to rebut the presumption by either method.[9]

To disprove legal pneumoconiosis, employer must establish that claimant does not have a chronic lung disease or impairment "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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered Dr. Goldstein's opinion that claimant's restrictive respiratory impairment and dyspnea do

[8] 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 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).

[9] The administrative law judge determined employer did not rebut the existence of legal or clinical pneumoconiosis. Decision and Order at 16-18; *see* 20 C.F.R. §718.305(d)(1)(i).

not constitute legal pneumoconiosis because they are related to his history of epiglottis cancer and not his coal dust exposure.[10] Decision and Order at 17; Director's Exhibit 22; Employer's Exhibit 1. He permissibly discredited Dr. Goldstein's opinion because it was based on the absence of "significant x-ray findings of pneumoconiosis" and because he did not adequately explain why claimant's almost thirty years of coal mine employment did not contribute to or aggravate his pulmonary impairment, along with the remote history of claimant's treatment for epiglottis cancer.[11] *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Decision and Order at 17-18.

Employer contends its medical evidence proves claimant does not have legal pneumoconiosis. Employer's Brief at 13; Employer's Reply Brief at 2-6. But employer has not identified any specific error of law or fact in the administrative law judge's finding that Dr. Goldstein's opinion is not credible. Rather, employer's contentions amount to a request for a reweighing of the evidence. As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Jordan*, 876 F.2d at 1460; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his discrediting of Dr. Goldstein's opinion regarding legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Jordan*, 876 F.2d at 1460; Decision and Order at 18-19.

As the administrative law judge permissibly discredited the only medical 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

[10] Dr. Goldstein stated claimant's throat cancer surgery reduced the size of his upper airway opening, thus causing his abnormal pulmonary function study results and dyspnea. Director's Exhibit 22; Employer's Exhibit 1 at 20-21, 26-28. He also stated: "[h]is restriction is unrelated to coal workers' pneumoconiosis from my standpoint because his chest x-ray doesn't show coal workers' pneumoconiosis." Employer's Exhibit 1 at 26.

[11] The administrative law judge noted that claimant continued to work as a coal miner for twenty-three years after his surgery for epiglottis cancer. Decision and Order at 17.

claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 18.

The administrative law judge next considered whether employer established 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). He again rationally discredited Dr. Goldstein'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. *See 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); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Director's Exhibit 22; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's determination that employer failed to prove 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 it, we affirm the award of benefits.

[12] 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 v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12-15.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge