BRB No. 93-0876 BLA

LEONARD BLACKBURN )
)
Claimant-Respondent )
)
v. )
)
EASTERN ASSOCIATED COAL )
CORPORATION )
) DATE ISSUED:
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 on Remand of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

William E. Berlin (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-2168) of Administrative Law Judge Donald B. Jarvis awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. Pursuant to 20 C.F.R. Part 718, Administrative Law

Judge John S. Patton determined that claimant[1] established "far in excess of fifteen years" of qualifying coal mine employment, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and invocation of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305.

[1]Claimant is Leonard Blackburn, who filed a claim for benefits on July 1, 1980. Director's Exhibit 1.

The administrative law judge also found that employer failed to rebut the presumption pursuant to Section 718.305(d). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment and the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The Board also noted that none of the pulmonary function study evidence is qualifying pursuant to 20 C.F.R. §718.204(c)(1) and that only one of the nine arterial blood gas studies is qualifying pursuant to Section 718.204(c)(2). The Board then vacated the administrative law judge's findings pursuant to Section 718.305 and remanded the case for further consideration of the medical opinion evidence pursuant to Section 718.204(c)(4). The Board further held that, should the administrative law judge find total respiratory disability established pursuant to Section 718.204(c)(4), the administrative law judge must weigh all relevant evidence, like and unlike, to determine if claimant has established total respiratory disability pursuant to Section 718.204(c). Finally, the Board held that if the administrative law judge finds total respiratory disability established pursuant to Section 718.204(c), he must then consider rebuttal pursuant to Section 718.305(d). *Blackburn v. Eastern Associated Coal Corp.*, BRB No. 89-1044 BLA (Dec. 19, 1991)(unpub.).

On remand, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(3). The administrative law judge then found that claimant established total disability pursuant to Section 718.204(c)(4), that claimant is entitled to the Section 718.305(a) presumption that he is totally disabled due to pneumoconiosis, and that employer failed to rebut the presumption pursuant Section 718.305(d). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory impairment and in finding that the §718.305(a) presumption was not rebutted. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer first contends that, upon considering the evidence pursuant to Section 718.204(c)(4), the administrative law judge mischaracterized the opinions of Drs. Warvariv, Rasmussen, and Cardona, all of whom stated that claimant has a totally disabling respiratory condition, by finding that their opinions were well-reasoned when the physicians actually relied on their non-qualifying pulmonary function study and arterial blood gas study results. Director's Exhibits 9, 10, 21; Claimant's Exhibits 1, 3; Employer's Brief at 16-17. In finding that the opinions of Drs. Warvariv, Rasmussen, and Cardona were more persuasive than the opinion of Dr. Zaldivar, who stated that claimant was not totally disabled, Employer's Exhibit 2, the administrative law judge noted that, although the three physicians did not have qualifying pulmonary function and arterial blood gas studies to support their findings, they had findings that they deemed abnormal, they all examined claimant, and there was no showing that any of the three physicians failed to use medically acceptable clinical and laboratory diagnostic techniques. Decision and Order on Remand at 9.

The administrative law judge's findings regarding the reports of Drs. Rasmussen, Warvariv, and Cardona are supported by the record. *See* Director's Exhibits 9, 10, 21; Claimant's Exhibits 1, 3. The administrative law judge permissibly found that the three physicians all provided well-reasoned opinions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Contrary to employer's contention, the administrative law judge may properly find the existence of a totally disabling respiratory impairment by relying upon medical opinions containing non-qualifying pulmonary function and arterial blood gas study results. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's argument.

Employer contends that the administrative law judge erred in relying on the reports of Drs. Rasmussin, Warvariv, and Cardona because he failed to compare claimant's physical capabilities with the physical demands of claimant's usual coal mine employment. Employer's Brief at 18. This contention is without merit, however, as the administrative law judge is not required to compare claimant's physical capabilities with the demands of claimant's usual coal mine employment when the reports upon which he relies are phrased in terms of total disability, as were the opinions of Drs. Rasmussin, Warvariv, and Cardona. Director's Exhibits 9, 10, 21; Claimant's Exhibits 1, 3; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986); *aff'd on recon.* 9 BLR 1-104 (1986).

Next, employer contends that the administrative law judge erred in automatically crediting Dr. Warvariv simply because he was claimant's treating

physician. Employer's Brief at 18. This contention also lacks merit as the administrative law judge may, within his discretion as fact-finder, assign additional weight to an opinion of the miner's treating physician. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Employer contends that the administrative law judge erred in his weighing of the opinions of Drs. Morgan, Pushkin, Leef, Rectenwald, and Daniel. Employer's Brief at 21-22. The administrative law judge permissibly accorded less weight to the opinions of Drs. Morgan and Pushkin on the issue of total disability, because he found that the tenor of their opinions forecloses the possibility of total respiratory disability being established absent qualifying objective test results and because they did not examine claimant. Decision and Order on Remand at 8; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Marsiglio*, *supra*; *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). The administrative law judge then permissibly accorded less weight to the opinions of Drs. Rectenwald, Leef, and Daniel because they did not provide enough information on the issue of respiratory impairment. Decision and Order on Remand at 8; Director's Exhibits 22, 24; *see Lafferty*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, we reject employer's argument.

Employer next contends that the administrative law judge failed to weigh the contrary probative evidence pursuant to Section 718.204(c). Employer's Brief at 22-23. This contention of error is without merit, however, as the administrative law judge permissibly weighed all of the contrary evidence, including the non-qualifying pulmonary function and arterial blood gas studies, in finding the evidence sufficient to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Decision and Order on Remand at 9; *see Lafferty*, *supra*; *Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987). Thus, we affirm the administrative law judge's findings pursuant to Section 718.204(c).

Next, employer contends that the administrative law judge erred in weighing the medical opinions upon considering rebuttal of the presumption pursuant to Section 718.305. Employer's Brief at 24. Dr. Daniel stated that claimant's chronic obstructive lung disease was related to his smoke inhalation. Director's Exhibit 22. The administrative law judge permissibly found Dr. Daniel's reasoning to be questionable because Dr. Daniel based his opinion on his belief that the x-ray evidence was negative for pneumoconiosis and did not comment on the fact that claimant smoked a pipe instead of cigarettes. Decision and Order on Remand at 9-10; *see Clark*, *supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Next, the administrative law judge permissibly found Dr. Morgan's opinion, which attributed

claimant's respiratory condition to excess weight, to be suspect because he did not discuss the differing weights observed by the various physicians and the effect of those differences. Decision and Order on Remand at 10; Employer's Exhibit 7; *Clark*, *supra*; *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

The administrative law judge then permissibly found the opinions of Drs. Warvariv, Rasmussen, and Cardona to be more persuasive as they fully considered claimant's mining and smoking histories before rendering their opinions. Decision and Order on Remand at 10; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986). Further, the administrative law judge permissibly accorded the greatest weight to Dr. Warvariv's opinion as claimant's treating physician. Decision and Order on Remand at 10; *see Grizzle*, *supra*; *Onderko*, *supra*; *Wetzel*, *supra*. Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal pursuant to Section 718.305(d). *See Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *see also Turner v. Director, OWCP*, 927 F. 2d 778, 15 BLR 2-6 (4th Cir. 1991); *see generally Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge