U.S. Department of Labor

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

BRB No. 17-0426 BLA

JAMES E. HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D D & E MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 07/18/2018
COMMERCE & INDUSTRY/CHARTIS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5936) of Administrative Law Judge Lee J. Romero, 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 miner's claim filed on June 5, 2013.

The administrative law judge credited claimant with 20.15 years of coal mine employment, either in underground mines or in conditions substantially similar to those in an underground mine, and found that the evidence establishes that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). He therefore found 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).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that it did not rebut the presumption.[2] Claimant responds, urging affirmance of the award of benefits. The

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in underground mines, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] Approximately nine months after filing its brief in support of the petition for review, and seven months after the briefing schedule closed, employer moved to hold this case in abeyance and argued for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-5. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's]

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, 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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's 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).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] Before addressing the medical opinions, the administrative law judge determined that claimant's usual coal mine work was as a mechanic and a loading machine operator and also involved shoveling coal. Decision and Order at 39. He noted that claimant testified that his job required him to lift heavy equipment on a daily basis, including "jacks, brake calipers, and tars" weighing 150 to 200 pounds. *Id.*; Hearing Tr. at

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case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked for 20.15 years in qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 10.

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

[5] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 10-12.

16-17. Based on claimant's description, the administrative law judge found that claimant's usual coal mine work included "heavy labor."[6] Decision and Order at 39.

The administrative law judge then considered the medical opinions of Drs. Forehand, Sargent, and McSharry. Decision and Order at 17-30, 35-42. He credited the opinion of Dr. Forehand that claimant is totally disabled, finding that Dr. Forehand had a "sufficient understanding" of claimant's exertional requirements and that his opinion is "sufficiently reasoned and documented." Decision and Order at 41. In contrast, the administrative law judge rejected Dr. Sargent's opinion that claimant is not totally disabled based on his "failure to consider the actual requirements of [c]laimant's last coal mine employment." *Id.* The administrative law judge also "subtract[ed] some probative weight" from Dr. McSharry's opinion, finding it "ambiguous" as to whether claimant is totally disabled. *Id.* The administrative law judge concluded:

> Based on the aforementioned, I find and conclude that the medical opinion evidence demonstrates that [c]laimant is totally disabled due to a respiratory or pulmonary condition. Notably, all three doctors opined [c]laimant suffered from an obstructive respiratory impairment, albeit at differing severities. Notwithstanding Dr. McSharry's somewhat ambiguous opinion and Dr. Sargent's failure to fully consider [c]laimant's exertional requirements, Dr. Forehand opined that [c]laimant could not return to his former coal mine employment on the basis of the severity of his obstructive respiratory impairment.

Decision and Order at 41-42. Thus, the administrative law judge concluded that claimant established total respiratory disability. Decision and Order at 42.

Employer's primary argument on appeal is that the administrative law judge selectively analyzed the evidence and did not apply the same level of scrutiny in determining the credibility of employer's physicians in comparison with Dr. Forehand. Employer's Brief at 5-7. Employer contends that the administrative law judge erred in discrediting Dr. Sargent's opinion on the basis that he was not familiar with the actual exertional requirements of claimant's usual coal mine work. *Id.* Further, employer asserts that the administrative law judge's finding that Dr. McSharry's opinion is ambiguous as to whether claimant is disabled is not supported by the record. *Id*. at 6. Finally, employer asserts that the administrative law judge failed to consider that Dr. Forehand's opinion is

[6] Because the administrative law judge's finding that claimant's usual coal mine work included heavy labor is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

based only on the June 24, 2013 pulmonary function study he administered, while Drs. Sargent and McSharry reviewed all of the pulmonary function studies, including those from 2014 and 2016. *Id*. at 6-7. Some of employer's arguments have merit.

As summarized by the administrative law judge, Dr. Forehand examined claimant on June 24, 2013 and noted that he worked underground as a scoop and loading machine operator, mechanic, and equipment operator. In his narrative supplemental report dated August 22, 2013, Dr. Forehand explained that although the pre-bronchodilator results of claimant's June 24, 2013 pulmonary function study resulted in values that "slightly exceed the U.S. Department of Labor disability standards," these are "only guidelines and do not necessarily take into consideration a coal miner's job and physical exertional requirements to meet the demands of the job." Director's Exhibit 18. Considering claimant's "job description and work including the ventilatory requirements for his job," Dr. Forehand concluded that claimant does not retain the pulmonary capacity to perform the duties expected of him in his usual coal mine work. *Id*. Finding that Dr. Forehand had a "sufficient understanding" of the exertional requirements of claimant's usual coal mine work and that his opinion is "sufficiently reasoned and documented," the administrative law judge accorded it "considerable probative weight." Decision and Order at 40.

Conversely, the administrative law judge rejected Dr. Sargent's opinion on the grounds that he "fail[ed] to consider the actual requirements" of claimant's usual coal mine work and based his opinion "solely on the basis of the non-qualifying pulmonary function and arterial blood gas studies." Decision and Order at 41. He noted that Dr. Sargent "assumed [c]laimant had to perform heavy lifting and possibly shovel coal, but he admitted he did not know how much weight [c]laimant had to lift or the distance to which [c]laimant had to carry pieces of equipment." *Id.*

Employer does not challenge the administrative law judge's finding that Dr. Forehand had a sufficient understanding of the exertional requirements of claimant's usual coal mine work. Employer's Brief at 5. Rather, employer contends that the administrative law judge erred in rejecting the opinion of Dr. Sargent who, employer asserts, had a similar understanding of claimant's exertional requirements. *Id.* We agree. As employer correctly states, neither Dr. Forehand nor Dr. Sargent discussed the specific weights claimant had to lift or the distances he had to carry objects.[7] Director's Exhibits 13, 17, 18. Further, Dr.

[7] Dr. Forehand referenced claimant's work history form and the description of claimant's coal mine work contained in his medical records. Director's Exhibits 17, 18. Dr. Forehand also considered Dr. McSharry's medical opinion describing claimant's job as requiring "6-7 hours per day of heavy work involving strenuous labor." Director's Exhibit 17, *referencing* Director's Exhibit 19.

Sargent stated that he assumed that heavy lifting and shoveling were part of claimant's job duties.[8] *Id.* at 18-19. Dr. Sargent further opined that because claimant's resting and exercise blood gas studies were "essentially normal" and his pulmonary function study showed only a "mild" obstructive ventilatory impairment, "he doesn't have a sufficient impairment to keep him from running a loading machine or being a mechanic." Employer's Exhibits 2; 3 at 13. In light of the administrative law judge's determination to credit Dr. Forehand's opinion, the administrative law judge has not adequately explained why he discredited Dr. Sargent's opinion for failing to discuss claimant's "actual" exertional requirements. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-140 (1999) (en banc).

We reject, however, employer's contention that the administrative law judge erred in considering Dr. McSharry's opinion. The totality of employer's argument is that "the [administrative law judge's] decision that Dr. McSharry's opinion was vague is not supported by the record." Employer's Brief at 5. The record reflects, however, that although Dr. McSharry testified that based on his review of Dr. Sargent's 2016 pulmonary function testing, he "wouldn't say claimant is unable to do [his usual coal mine] work" from a pulmonary perspective, he also stated that based on the results of his own testing and that of Dr. Forehand, claimant "may" be disabled. Director's Exhibit 19; Employer's Exhibit 4 at 17, 18, 25. It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess its probative value. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 11, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because employer points to no specific error in the administrative law judge's weighing of Dr. McSharry's opinion, we affirm the administrative law's finding that it is "ambiguous" regarding whether claimant is disabled. Decision and Order at 24.

On remand, the administrative law judge must reconsider the weight accorded to Dr. Sargent's opinion on total disability, including whether Dr. Sargent had a sufficient

[8] Dr. Sargent stated that the job description he reviewed said claimant had to sit or lay on a piece of equipment and operate the controls. Employer's Exhibit 3 at 18. Dr. Sargent added, however, that "most of these miners oftentimes have to do heavy manual labor when they have to fill in or help another miner. So the assumption is that he had to do some heavy lifting. He had to do shoveling of coal and things like that when he was working." *Id.* at 18-19.

understanding of the exertional requirements of claimant's usual coal mine employment. He must then weigh Dr. Sargent's opinion against that of Dr. Forehand to determine whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In rendering his findings, the administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[9] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Should the administrative law judge find that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant evidence together, like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[10] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.[11] 30 U.S.C. §921(c)(4).

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[9] Employer incorrectly asserts that Dr. Forehand's opinion on total disability is based "exclusively on the 2013 [pulmonary function study]." Employer's Brief at 6. In addition to basing his opinion on his own examination and testing of claimant in 2013, Dr. Forehand also reviewed Dr. McSharry's report, including the results of Dr. McSharry's examination and testing in 2014. Director's Exhibit 17 [Dr. Forehand's June 30, 2014 report] at 1-3.

[10] If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[11] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, at this time, the entirety of employer's challenges to the administrative law judge's determination that it failed to rebut the presumption. In the interest of judicial economy, however, and to avoid repetition of error on remand, we note that the administrative law judge did not adequately explain his rationale for discrediting Dr. Sargent's opinion regarding the existence of legal pneumoconiosis. Decision and Order at 49. The administrative law judge acknowledged that Dr. Sargent opined that coal dust did not contribute substantially to claimant's impairment, but nevertheless found that this opinion does not rebut the presumption because Dr. Sargent "opined that [c]laimant's coal dust exposure contributed, albeit

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

minimally, to his respiratory condition[.]" Decision and Order at 49; Employer's Exhibits 2 at 2; 3 at 25. If a physician's underlying rationale is otherwise credible, an opinion that coal dust exposure did not contribute "substantially" to a miner's impairment may be sufficient to rebut the presumption that the miner has legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b) (legal pneumoconiosis includes any chronic pulmonary disease or respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment").