U.S. Department of Labor

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

BRB No. 18-0329 BLA

JAMES W. CLUTTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING/ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 07/29/2019
	)	
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 on Remand Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham & Halbert PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2015-BLA-05761) of Administrative Law Judge Natalie A. Appetta, rendered 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 September 8, 2014, and is before the Board for the second time.[1]

In the administrative law judge's initial Decision and Order, she credited claimant with at least thirty-two years of underground coal mine employment, and found the new evidence established a totally disabling respiratory or pulmonary impairment. She therefore found claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4)[3] of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established at least thirty-two years of underground coal mine employment. *Clutter v. Island Creek Ky. Mining/Island Creek Coal Co.*, BRB No. 17-0063 BLA, slip op. at 3 n.4 (Nov. 2, 2017) (unpub.). The Board vacated, however, her

[1] Claimant filed five previous claims. His most recent prior claim, filed on June 2, 2011, was denied by the district director on December 8, 2011, because the evidence did not establish total disability or total disability due to pneumoconiosis. Director's Exhibit 5. Claimant took no further action until filing the present claim. Director's Exhibit 7.

[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 "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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because claimant's prior claim was denied for failure to establish total disability, claimant is required to establish this element in order for claimant's subsequent claim to be considered on the merits.

[3] Under 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.

finding that claimant established total disability, and remanded the case for consideration of the admissibility of a blood gas study dated July 5, 2016, and for reconsideration of the blood gas studies and the medical opinion evidence.[4] *Clutter*, BRB No. 17-0063 BLA, slip op. at 5. In the interest of judicial economy, the Board also addressed employer's allegations of error relevant to rebuttal of the Section 411(c)(4) presumption, affirmed the administrative law judge's finding employer failed to establish rebuttal, and instructed her she could reinstate her finding on remand if she found claimant invoked the presumption.

On remand, the administrative law judge found claimant established total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. She therefore reinstated her finding employer did not rebut the presumption and awarded benefits.

In the present appeal, employer argues the administrative law judge erred in finding claimant established total disability. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

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). Total disability can be established based on qualifying[6] pulmonary

[4] The administrative law judge had determined that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i) or (iii): none of the pulmonary function studies are qualifying; and there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure. 2016 Decision and Order at 21. These findings were unchallenged.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 3, 9.

[6] A "qualifying" pulmonary function study or 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.

function or 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). The administrative law judge must weigh all relevant evidence supporting disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

The administrative law judge initially followed the Board's instruction to consider the admissibility of the July 5, 2016 blood gas study.[7] Decision and Order on Remand at 4. She noted the study was submitted post-hearing by employer, no party objected to its admission, and both employer and claimant proceeded with the assumption that it was admitted. *Id*. The administrative law judge further noted that her failure to address the study was an "inadvertent mistake." *Id*. Finding that all the parties understood the study to be admitted, she determined that "no separate order" is necessary to admit it.[8] *Id*. Summarizing the blood gas studies of record, the administrative law judge noted that the November 17, 2014 study produced qualifying values at rest and non-qualifying values after four minutes of exercise, while the April 23, 2016 and July 5, 2016 studies, conducted at rest only, produced non-qualifying values.[9] *Id*. at 5, 7; Director's Exhibit 16; Employer's Exhibits 9, 11. She did not, however, render a finding as to whether the blood gas studies established total disability.

The administrative law judge next considered the medical opinions of Drs. Rasmussen, Green, and Zaldivar.[10] Decision and Order on Remand at 6-7. Dr. Rasmussen

---

Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Employer submitted Dr. Habre's July 5, 2016 blood gas study as affirmative evidence under 20 C.F.R. §725.414(a)(3)(i), and cited it in its closing brief before the administrative law judge. Employer's Evidence Summary Form dated August 15, 2016; Employer's Brief filed October 17, 2016 at 7-8; Report of Blood Gas Study dated July 5, 2016.

[8] We affirm the administrative law judge's admission of the July 5, 2016 blood gas study, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4.

[9] Dr. Rasmussen performed the November 17, 2014 blood gas study. Director's Exhibit 16. The April 23, 2016 and July 5, 2016 studies were conducted by Drs. Green and Habre, respectively. Employer's Exhibits 9, 11.

[10] The administrative law judge found the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and 20 C.F.R.

opined claimant is unable to perform his usual coal mine work, requiring heavy and very heavy manual labor. Director's Exhibit 16. In contrast, Dr. Green opined claimant is not totally disabled from a pulmonary standpoint. Employer's Exhibit 9. Dr. Zaldivar opined in his 2015 medical report that from a pulmonary standpoint, claimant very likely would not be able to perform very heavy manual labor due to reduced ventilation. Employer's Exhibit 5. In his 2016 medical report, however, Dr. Zaldivar opined claimant's pulmonary impairment is variable and his ventilatory capacity was sufficient at the time of Dr. Green's April 23, 2016 evaluation to allow claimant to perform heavy labor. Employer's Exhibit 10.

The administrative law judge initially found Drs. Rasmussen, Green, and Zaldivar equally qualified based on their Board-certifications and expertise in diagnosing and treating coal workers' pneumoconiosis. Decision and Order on Remand at 5, *citing* 2016 Decision and Order at 27. She then credited Dr. Rasmussen's opinion as documented and reasoned, but discredited Dr. Green's opinion as inadequately explained, and Dr. Zaldivar's opinion as equivocal and unclear. *Id*. at 6-7. Relying on the November 17, 2014 blood gas study, which produced qualifying values at rest, and Dr. Rasmussen's opinion, the administrative law judge found the preponderance of the evidence as a whole established total disability at 20 C.F.R. §718.204(b)(2). *Id*. at 7.

Initially, we reject employer's assertion that the administrative law judge erred in crediting Dr. Rasmussen's opinion as well-reasoned and documented despite his reliance solely on his own objective test results and his failure to review the more recent blood gas study evidence of record. Employer's Brief at 5. The administrative law judge permissibly determined Dr. Rasmussen's opinion is adequately documented based on his reliance on objective testing, claimant's reported symptoms and a physical examination. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 6.

The administrative law judge also addressed Dr. Rasmussen's explanations for his conclusions and acknowledged his speculation claimant's hypoxia would have worsened if he had exercised longer.[11] Decision and Order on Remand at 6. She acted within her

§718.204(b)(2)(iii) is inapplicable, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 18 n.21, 19.

[11] Based on the qualifying resting blood gas study he obtained, Dr. Rasmussen found claimant has minimal resting hypoxia. Director's Exhibit 16. Dr. Rasmussen also observed that the exercise study indicated "poor exercise tolerance and impairment in

discretion, however, in finding Dr. Rasmussen "accounted" for the non-qualifying exercise blood gas study by "pointing out" that claimant's resting results were qualifying and his exercise results were "within 4 mmHg of qualifying" and "at only 55% of his predicted maximum." Decision and Order on Remand at 6; *see Hicks*, 138 F.3d at 533. The administrative law judge therefore found Dr. Rasmussen adequately explained how the qualifying and non-qualifying results of the blood gas study supported his disability opinion. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). Thus, contrary to employer's contention, the administrative law judge permissibly determined that Dr. Rasmussen's opinion is adequately reasoned. *See Minich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (administrative law judge properly considered whether the objective data offered as documentation adequately supported the opinion); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993) (administrative law judge may, but need not, credit the more recent medical evidence). We therefore affirm her crediting of Dr. Rasmussen's opinion diagnosing a totally disabling respiratory impairment.

Employer's assertion that the administrative law judge applied an inconsistent standard in discounting Dr. Green's opinion because he relied solely on his own testing is also unavailing.[12] Employer's Brief at 6. The administrative law judge acknowledged that both Dr. Rasmussen and Dr. Green relied on the objective studies performed during their respective examinations of claimant. Decision and Order on Remand at 6. The administrative law judge further noted, however, that in contrast to Dr. Rasmussen, Dr. Green "did not further elaborate on Claimant's symptoms or explain any observations or additional factors that support his diagnosis of no disability." *Id.* This finding is rational and supported by substantial evidence, as Dr. Green diagnosed mild hypoxemia based on claimant's non-qualifying resting blood gas study but offered no explanation as to why this impairment did not affect claimant's ability to perform his usual coal mine employment.[13]

---

oxygen transfer during "very light exercise." *Id*. He found it "quite likely that he would have developed further hypoxia with more exercise." *Id*.

[12] Dr. Green examined claimant on April 23, 2016 and conducted a pulmonary function study and a blood gas study. Employer's Exhibit 9. Noting that claimant does not meet "the Federal guideline criteria" for establishing a totally disabling respiratory or pulmonary impairment, Dr. Green opined that he is not totally disabled from a pulmonary capacity standpoint. *Id*.

[13] Because the administrative law judge provided a valid reason for discrediting Dr. Green's opinion, any error in discrediting his opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4

See Akers, 131 F.3d at 441; Employer's Exhibit 9; Decision and Order on Remand at 6. We therefore affirm the administrative law judge's finding that Dr. Green's opinion is entitled to little weight.

We also reject employer's allegation that the administrative law judge erred in discrediting Dr. Zaldivar's opinion.[14] The administrative law judge acted within her discretion in determining:

> [I]t is uncertain whether Dr. Zaldivar opined in his most recent supplemental report that claimant was not disabled only at the time of the evaluation and was otherwise disabled, whether he was overall revising his previous assessment of disability and opining that he no longer believes that claimant is disabled, or whether the claimant is sometimes disabled and other times not disabled.

Decision and Order on Remand at 7; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting). Accordingly, we affirm the administrative law judge's finding that Dr. Zaldivar's opinion on total disability "is not persuasive." Decision and Order on Remand at 7; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988).

As the trier-of-fact, the administrative law judge has the authority to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 324. Because it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion, as supported by the

---

(1983). We therefore need not address employer's remaining arguments regarding the weight accorded to Dr. Green's opinion.

[14] In his 2015 report, Dr. Zaldivar reviewed Dr. Rasmussen's testing and referred to the results of his own examination of claimant on September 9, 2015. Based on the pulmonary function study he performed, Dr. Zaldivar diagnosed a moderate irreversible obstruction, hyperinflation with air trapping, and normal diffusion. He concluded from a pulmonary standpoint, "judging by the FEV_1 measured," it is very likely claimant may not be able to perform very heavy manual labor because of reduced ventilation. Employer's Exhibit 5 at 6. In his 2016 supplemental report, Dr. Zaldivar reviewed Dr. Green's testing and stated that his opinions remain the same as given in his 2015 report. Employer's Exhibit 10 at 5. He then opined claimant's pulmonary impairment is variable, and "at the time of the last evaluation [by Dr. Green]," his ventilatory capacity was sufficient to allow him to perform heavy labor. *Id*. at 5-6.

November 17, 2014 blood gas study, established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Doss v. Director, OWCP*, 53 F.3d 654, 659 (4th Cir. 1995). We also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 7-8.

In light of our affirmance of the administrative law judge's findings that claimant established at least thirty-two years of underground coal mine employment and a totally disabling respiratory impairment, we further affirm her determination claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i), (iii); Decision and Order on Remand at 8. Based on the administrative law judge's appropriate reinstatement of her finding employer failed to rebut the presumption, claimant has established entitlement to benefits. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); Decision and Order on Remand at 8.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge