U.S. Department of Labor

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

BRB No. 18-0382 BLA

DOUGLAS L. GENTRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & W RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 07/08/2019
	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry, (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05537) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed on March 10, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established 21.55 years of coal mine employment, working in conditions substantially similar to those in an underground mine, and is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding that claimant established total disability and invoked the Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

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[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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.

[2] We affirm as unchallenged on appeal the administrative law judge's finding that claimant established 21.55 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 26.

[3] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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 and comparable gainful 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 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 supporting evidence against all relevant 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 considered three blood gas studies.[4] Decision and Order at 12-13. Dr. Rasmussen conducted the Department of Labor's (DOL's) pulmonary evaluation on May 1, 2014, which included a blood gas study that was qualifying for total disability at rest and during exercise. Director's Exhibit 10. Dr. Jarboe examined claimant on October 16, 2014, and obtained a non-qualifying blood gas study at rest. Director's Exhibit 13. Dr. Jarboe also conducted an exercise study, but because the blood gas sample was "inadequate" no results were reported. *Id*. Dr. Rosenberg examined claimant on November 11, 2014, and obtained a resting blood gas study, which was non-qualifying, and no exercise study was performed due to claimant's hypertension. Director's Exhibit 15. The administrative law judge gave greatest weight to Dr. Rasmussen's qualifying exercise blood gas study to find claimant established total disability at 20 C.F.R. §718.204(b)(ii).

Employer contends the non-qualifying studies at rest are more probative because they are more recent. Employer's Brief at 5 (unpaginated). We disagree. The administrative law judge permissibly found the May 1, 2014 exercise study to be more probative "on the question of [claimant's] ability to perform the exertional requirements of his last coal mine job than the resting studies."[5] Decision and Order at 29; *see Coen v.*

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[4] The administrative law judge found claimant did not establish total disability based on the pulmonary function studies, and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. 718.204(b)(2)(i), (iii); Decision and Order at 28.

[5] We reject employer's speculative argument that if either Dr. Jarboe or Dr. Rosenberg had obtained exercise blood gas results they would have been non-qualifying. Employer's Brief at 5 (unpaginated).

Director, OWCP, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980). It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) is rational and supported by substantial evidence, it is affirmed.

We also reject employer's contention that the administrative law judge erred in crediting Dr. Rasmussen's opinion that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv). Dr. Rasmussen opined claimant has "very marked loss of lung function as reflected primarily by his impairment in oxygen transfer and limited ventilatory capacity during very light exercise." Director's Exhibit 10. He further opined claimant's exercise hypoxia would preclude claimant from performing his usual coal mine employment as a drill operator.[6] *Id.* The administrative law judge rationally concluded that Dr. Rasmussen's disability opinion is reasoned, as it is supported by a physical examination, an accurate understanding of the physical demands of claimant's job, and the qualifying exercise blood gas study.[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

In contrast, the administrative law judge permissibly found the opinions of Drs. Jarboe and Rosenberg were not reasoned on the issue of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522 (6th Cir. 2002); Decision and Order at 30-31. As noted by the administrative law judge, Dr. Jarboe opined that claimant is not totally disabled and has only mild hypoxemia at rest. Employer's Exhibit 13. Despite acknowledging that Dr. Rasmussen's exercise study showed a "disabling level of gas exchange," the administrative law judge found Dr. Jarboe gave no explanation as to why

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[6] The administrative law judge found that claimant's last job as a drill operator required moderate manual labor. Decision and Order at 27.

[7] The administrative law judge noted Dr. Rasmussen reviewed all of the later blood gas studies but maintained his opinion that claimant is totally disabled. Decision and Order at 30. He permissibly credited Dr. Rasmussen's opinion that "resting arterial blood gases are notoriously unreliable and [] effected by non-pulmonary causes," while exercise blood gas results are the "primary final arbiter in pulmonary evaluation." *Id.*, *quoting* Director's Exhibit 10; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

claimant is not totally disabled from performing his usual coal mine employment. Decision and Order at 30, *quoting* Director's Exhibit 13. He similarly found that Dr. Rosenberg "failed to provide any justification as to why he found [claimant] had adequate blood gas transfer despite the only exercise [blood gas study] revealing disabling results." Decision and Order at 31; *see* Director's Exhibit 15. The administrative law judge permissibly discredited the opinions of Drs. Jarboe and Rosenberg because they did not address whether claimant's qualifying exercise blood gas study would preclude the performance of his usual coal mine employment. *See Cornett*, 227 F.3d at 577; *Clark*, 12 BLR at 1-155.

We thus affirm the administrative law judge's finding that claimant established total disability based on Dr. Rasmussen's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 32. We further affirm the administrative law judge's overall determination that claimant has a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence. *See Rafferty* at 1-232; *Shedlock*, 9 BLR at 1-198. Thus, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 32.

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

Because claimant invoked the Section 411(c)(4) presumption the burden shifted to employer to establish claimant 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). The administrative law judge found that employer failed to establish rebuttal 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),

[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] Although the administrative law judge found that employer disproved clinical pneumoconiosis, employer must also disprove legal pneumoconiosis in order to rebut the presumption under the first method at 20 C.F.R. §718.305(d)(1).

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 found employer failed to satisfy its burden because the opinions of its medical experts are not adequately reasoned. Contrary to employer's arguments, we see no error in the administrative law judge's credibility findings.

Dr. Jarboe opined that claimant has a "mild to moderate impairment" with a "moderate degree of airflow obstruction" caused by smoking and "mild hypoxemia" consistent with obesity and obstructive sleep apnea. Director's Exhibit 13. Dr. Rosenberg opined that claimant suffers from chronic obstructive pulmonary disease caused solely by smoking. Director's Exhibit 15; Employer's Exhibit 2.

The administrative law judge permissibly found their opinions less credible because they relied on an inaccurate employment history.[10] *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993). Furthermore, he correctly noted that Drs. Jarboe and Rosenberg eliminated a diagnosis of legal pneumoconiosis because claimant has a marked reduction of his FEV1/FVC ratio which they opined is consistent with smoking, not coal mine dust inhalation. Decision and Order at 35-36; Director's Exhibits 13, 15. The administrative law judge permissibly discredited their opinions because their views conflict with the medical science accepted by the DOL that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 31.

The administrative law judge also rationally found their opinions unpersuasive because they "attribute all of [c]laimant's impairment to any one of multiple causes, while simultaneously offering no other explanation for why coal dust exposure could not have contributed to[,] or aggravated, any of those conditions." Decision and Order at 37; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002). Because the administrative law judge gave valid reasons for rejecting the opinions of Drs. Jarboe and Rosenberg as not reasoned on the issue of legal pneumoconiosis, we affirm his finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 39.

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[10] Drs. Jarboe and Rosenberg considered a fifteen-year coal mine employment history which the administrative law judge found to be "about 30% less" than his finding of 21.55 years. Decision and Order at 37.

The administrative law judge next considered whether employer established 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)(ii). He discounted the opinions of Drs. Jarboe and Rosenberg because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that employer failed to disprove that claimant has the disease. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Employer raises no specific challenge to the administrative law judge's finding on disability causation, other than to argue that claimant does not have legal pneumoconiosis. Having rejected employer's arguments on legal pneumoconiosis, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge