U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0535 BLA

RAYMOND E. ROBERTS Claimant-Respondent v. MEADE SHEPHERD COAL COMPANY, INCORPORATED and COMMERCE & INDUSTRY/CHARTIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/30/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher (Fogle Keller Purdy, PLLC), Lexington, Kentucky for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5180) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a

claim filed on March 31, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established thirty years[1] of coal mine employment in conditions substantially similar to those in underground mines, and a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge 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).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that claimant established total disability for invocation of the Section 411(c)(4) presumption. Employer also contends that the administrative law judge did not give proper reasons for the weight accorded employer's evidence relevant to rebuttal of the presumption. Claimant has not filed a response brief.[3] The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless specifically requested to do so by the Board.[4]

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,

[1] The parties stipulated to thirty years of surface coal mine employment. Decision and Order at 5; Hearing Transcript at 9.

[2] 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.

[3] On April 26, 2017, the Board received claimant's motion to file his response brief out of time, accompanied by claimant's response brief. The Board herein denies claimant's motion. 20 C.F.R. §802.212(a).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the claimant established thirty years of coal mine employment in conditions that were substantially similar to those in underground mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

and in accordance with applicable law.[5] 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).

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTON - TOTAL DISABILITY

The regulations provide that a miner is considered 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). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood-gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge is required to determine the exertional requirements of the miner's usual coal mine work and consider them in conjunction with the medical reports assessing disability. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). It is claimant's burden to establish the exertional requirements of his usual coal mine employment so the administrative law judge may compare the physical demands with each physician's assessment of impairment. *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of six pulmonary function tests.[6] Decision and Order at 24. Tests performed

[5] This claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6.

[6] The administrative law judge noted that there were four additional pulmonary function tests in the treatment records, dating from 2006 to 2008, but he did not consider them to be reliable for determining whether claimant is totally disabled because the

on October 26, 2009, March 8, 2011, February 1, 2012, February 15, 2012, and March 19, 2012 were non-qualifying for total disability,[7] while a test performed on June 11, 2010 had qualifying values. *Id.*; Director's Exhibits 10, 11, 13; Claimant's Exhibits 1, 2; Employer's Exhibit 2. The administrative law judge indicated that he gave most weight to the more recent non-qualifying tests, and found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 24.

The administrative law judge next found that because "nine of eleven [arterial blood-gas studies] are non-qualifying, including the most recent study [dated February 28, 2012 by Dr. Klayton]," claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 25. The administrative law judge further noted that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(iii), as there is no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. *Id.* at 23.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited the opinions of Drs. Habre, Splan, and Klayton, that claimant is totally disabled.[8] In contrast, the administrative law judge rejected Dr. Broudy's opinion that claimant is not totally disabled, on the ground that Dr. Broudy "disregarded or failed to consider the extertional requirements of [c]laimant's last coal mine employment." Decision and Order at 25. The administrative law judge also rejected Dr. Dahhan's opinion that claimant has no significant respiratory or pulmonary impairment, finding that Dr. Dahhan did not have "the benefit of reviewing [c]laimant's more recent and near qualifying [arterial blood-gas

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"circumstances surrounding the [pulmonary function tests] are unknown (i.e., tracings, flow-volume loop, the Claimant's use of supplemental oxygen etc.)." Decision and Order at 9 n.26.

[7] A "qualifying" pulmonary function test yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i). A "qualifying" blood-gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[8] For each of these physicians the administrative law judge described that they based their opinions "upon relevant histories, physical examination and objective testing," and that their opinions are "consistent with the evidence available to [them]." Decision and Order at 24-25.

study]" and thus, "he did not have a complete picture of [claimant's] condition." *Id*. at 26. The administrative law judge concluded:

> All physicians who examined [claimant] or reviewed his medical records agree that his pulmonary condition is abnormal, although they give diverse opinions as to whether [claimant] suffers from a respiratory or pulmonary impairment that is sufficiently severe to prevent him from performing his last coal mine employment. Considering all of the medical opinion evidence together, I find that the opinions of Drs. Habre, Splan, and Klayton that [claimant] is totally disabled from a pulmonary standpoint outweigh the opinions of Drs. Broudy and Dahhan. Unlike Drs. Broudy and Dahhan, Drs. Habre, Splan, and Klayton effectively explained how [claimant's] condition made him unable to return to his previous coal mine employment. Furthermore, neither Dr. Broudy [n]or Dr. Dahhan explained how [claimant] still retained the respiratory capacity to return to his previous coal mine employment given the heavy exertional level of his position, and [claimant's] credible assertions of being unable to climb one flight of stairs, [walk] one hundred yards, [climb] onto work equipment without becoming short of breath among other breathing-related issues. When these opinions are considered in conjunction with the heavy exertional level of [claimant's] last coal mine employment, I find that [claimant] has a pulmonary or respiratory impairment that is sufficiently severe to prevent him from performing his last coal mine employment.

Decision and Order at 26-27. Thus, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 27. Weighing all of the evidence together, the administrative law judge found that claimant suffers from a totally disabling respiratory or pulmonary impairment. *Id.*

Employer's primary argument in this appeal is that the administrative law judge did not apply the same level of scrutiny in determining the credibility of employer's physicians in comparison with claimant's physicians. Employer contends that the administrative law judge erred in finding that Dr. Broudy did not understand the exertional requirements of claimant's usual coal mine work. Employer further contends that the administrative law judge erred in finding that Dr. Dahhan's opinion did not take into consideration all of the relevant arterial blood-gas study evidence in rendering his opinion. Employer's arguments have merit.

The administrative law judge rejected Dr. Broudy's opinion on the grounds that he was unable to determine whether Dr. Broudy had an accurate understanding of claimant's

usual coal mine work. The administrative law judge, however, did not identify claimant's usual coal mine job. The administrative law judge also did not make any specific findings as to whether Drs. Habre, Splan and Klayton were accurate in their understanding of claimant's job duties. To the extent that the administrative law judge's decision states that claimant's work required heavy manual labor, the administrative law judge overlooks that Dr. Broudy specifically stated that claimant "retained the capacity to perform his former coal mine employment or similarly arduous work." Director's Exhibit 13. Dr. Broudy also indicated during his deposition that he understood the physical requirements of several of the jobs that claimant held in the mines. Employer's Exhibit 6 at 22-23. Thus, even if Dr. Broudy did not discuss claimant's specific job duties, it is clear that Dr. Broudy believes that claimant is capable of performing arduous manual labor. We therefore conclude that the administrative law judge failed to adequately explain the weight accorded Dr. Broudy's opinion as required by the Administrative Procedure Act.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Regarding Dr. Dahhan's opinion, employer is correct that the administrative law judge erred in stating that Dr. Dahhan did not have the opportunity to review Dr. Klayton's February 28, 2012 blood gas study, as Dr. Dahhan specifically reviewed that study during his April 10, 2015 deposition. Employer's Exhibit 7 at 17-18. Moreover, it was improper for the administrative law judge to assign less weight to Dr. Dahhan's opinion for not considering more recent evidence, but not also consider whether the opinions of claimant's physicians were less credible because they also did not review more recent evidence.[10] Indeed, the administrative law judge credited claimant's physicians because their opinions were consistent with the evidence available to them at the time they prepared their reports, while requiring employer's physicians not only to

[9] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).

[10] The administrative law judge specifically found that the opinions of Drs. Habre, Splan, and Klayton were reasoned and documented because they rely "upon relevant histories, physical examination and objective testing," and their conclusions were "*consistent with the evidence available to* [*them*]." Decision and Order at 24-25 (emphasis added).

address the evidence available to them but also address any contrary evidence.[11] Consequently, based on the administrative law judge's errors and disparate treatment of the medical opinions, we vacate the administrative law judge's findings that claimant established a totally disabling respiratory or pulmonary impairment, and that claimant invoked the Section 411(c)(4) presumption. *See Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must identify the exertional requirements of claimant's usual coal mine work and compare them with the physicians' opinions regarding claimant's physical limitations and reach a conclusion as to whether claimant is totally disabled. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Ward*, 93 F.3d at 218-19, 20 BLR at 2-374. When reconsidering whether claimant has satisfied his burden of establishing total disability, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[12] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). If the administrative law judge finds that claimant has established total disability under 20 C.F.R. §718.204(b)(2)(iv), he must then weigh all of the evidence together, and reach a conclusion as to whether claimant has a totally

[11] Dr. Habre did not review any other evidence after issuing his report on June 18, 2010. Director's Exhibit 11. Dr. Habre diagnosed total disability based on the qualifying June 18, 2010 pulmonary function test, but all of the tests subsequent to Dr. Habre's examination were non-qualifying. Director's Exhibits 11, 13; Claimant's Exhibits 1, 2; Employer's Exhibit 2. In his February 1, 2012 report, Dr. Splan opined that the miner was disabled based on the results of the February 1, 2012 blood gas study he obtained. Claimant's Exhibit 2. However, Dr. Splan did not review subsequent blood gas studies obtained by Dr. Dahhan on February 15, 2012, which had higher PO2 and PCO2 values, and Dr. Klayton on February 28, 2012, which had a higher PO2 value. Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Klayton also did not review the test results obtained by other physicians when he prepared his March 19, 2012 report. Claimant's Exhibit 1.

[12] We instruct the administrative law judge to first resolve the conflict in the record as to whether Dr. Habre's pulmonary function test was valid, prior to determining the weight to accord his opinion. Drs. Broudy and Dahhan each opined that Dr. Habre's test was not valid. Employer's Brief in Support of Petition for Review at 20; Employer's Exhibits 6, 7. Additionally, the administrative law judge should resolve whether Dr. Klayton's exercise blood-gas study is valid, based on Dr. Dahhan's deposition testimony. Employer's Brief in Support of Petition for Review at 24; Employer's Exhibit 7 at 18.

disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). *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).

II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In the interest of judicial economy, in the event that claimant invokes the Section 411(c)(4) presumption on remand, we address employer's arguments relevant to rebuttal. Once the Section 411(c)(4) presumption is invoked, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[13] or 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)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1,2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method.

As to the issue of whether employer disproved the existence of legal pneumoconiosis, we disagree with employer that the administrative law judge did not give proper reasons for rejecting the opinions of Drs. Broudy and Dahhan. Dr. Broudy attributed any respiratory or pulmonary impairment that claimant may suffer from to claimant's smoking history, which Dr. Broudy described as "massive." Director's Exhibit 13. However, the administrative law judge observed that claimant had a "significant" coal mine employment history of thirty years, and he permissibly found that Dr. Broudy failed to adequately explain why he completely excluded coal dust exposure as a causative factor for claimant's impairment. Decision and Order at 31; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law judge's rejection of Dr. Broudy's opinion that claimant does not have legal pneumoconiosis.[14] *Id.*

[13] 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).

[14] Because the administrative law judge gave a valid reason for rejecting Dr. Broudy's opinion on the issue of legal pneumoconiosis, it is not necessary that we address employer's assertion that the administrative law judge erred in finding that Dr.

With regard to Dr. Dahhan's opinion, the administrative law judge noted correctly that Dr. Dahhan attributes all of claimant's respiratory or pulmonary impairment to an "idiopathic" condition. Employer's Exhibit 3. The administrative law judge permissibly concluded that Dr. Dahhan's opinion was insufficient to satisfy employer's burden of proof, as Dr. Dahhan also failed to adequately explain why he excluded coal dust exposure as a significant cause or substantial aggravating factor in claimant's respiratory impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). Thus, we affirm the administrative law judge's rejection of Dr. Dahhan's opinion. We therefore affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), and his conclusion that employer was unable to establish the first method of rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i).[15]

Employer also asserts that the administrative law judge erred in finding that it failed to establish the second method of rebuttal by disproving the presumed fact of disability causation. We disagree. The administrative law judge permissibly determined that because neither Dr. Broudy nor Dr. Dahhan diagnosed legal pneumoconiosis, their opinions were not credible to establish that no part of claimant's respiratory disability was caused by legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453, 2-474 (6th Cir. 2013); Decision and Order at 33. Thus, we affirm the administrative law judge's finding that employer is unable to establish rebuttal of the presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

On remand, we instruct the administrative law judge that if he finds that claimant established total disability and is entitled to invocation of the Section 411(c)(4)

Broudy expressed views that were contrary to the Act. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[15] As employer must disprove both legal and clinical pneumoconiosis, rebuttal under the first method is precluded, based on our affirmance of the administrative law judge's finding that employer failed to disprove that claimant has legal pneumoconiosis. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Moreover, as we affirm the administrative law judge's finding on legal pneumoconiosis we decline to address employer's arguments as they pertain to clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

presumption, he may reinstate the award of benefits. However, if claimant is unable to establish total disability, which is a requisite element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge