U.S. Department of Labor

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

BRB No. 17-0430 BLA

DALLAS BLANTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REX COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 06/08/2018
	)	
CHARTIS CASUALTY COMPANY/AIG	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

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

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05447) of Administrative Law Judge Adele Higgins Odegard 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 April 2, 2014.

The administrative law judge found that claimant established forty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant invoked the rebuttable 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 that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in weighing the blood gas study and medical opinion evidence in finding total disability established at 20 C.F.R. §718.204(b)(2) and, thus, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge erred in evaluating the blood gas studies under the regulatory quality standards.[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 by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established forty-one years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 4; Hearing Tr. at 62. Accordingly, the Board will apply the law of

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

Employer argues that the administrative law judge erred in weighing the blood gas study and medical opinion evidence in finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[4]

Blood Gas Studies

Pursuant to 20 C.F.R. §718.204(b)(ii), the administrative law judge considered five blood gas studies dated January 22, 2013, April 25, 2014, June 26, 2014, April 5, 2016, and May 23, 2016. Decision and Order at 11-12; Director's Exhibit 14; Claimant's Exhibits 8, 9; Employer's Exhibit 3. The January 22, 2013 and April 5, 2016 blood gas studies, administered by Dr. Harlan, produced qualifying[5] values at rest; no exercise study was performed. Claimant's Exhibits 8, 9. Similarly, the April 25, 2014 blood gas study, administered by Dr. Baker, produced qualifying values at rest; no exercise study was performed. Director's Exhibit 12.

In contrast, the June 26, 2014 and May 23, 2016 blood gas studies, administered by Dr. Dahhan, produced non-qualifying values both at rest and during exercise. Director's Exhibit 14; Employer's Exhibit 3. The administrative law judge accorded less weight to Dr. Dahhan's exercise blood gas studies because they were not administered in substantial compliance with the regulations. Decision and Order at 12. Finding that the preponderance

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the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The record contains the results of four pulmonary function studies, conducted on September 5, 2013, April 25, 2014, June 26, 2014, and April 2, 2015. Director's Exhibits 12, 14; Claimant's Exhibits 6, 7. The administrative law judge correctly found that none of these pulmonary function studies produced qualifying values, and that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11, 13. The administrative law judge therefore found that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *Id*.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values specified in the table at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

of the resting blood gas studies is qualifying, the administrative law judge concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 12-13.

Employer asserts that the administrative law judge erred in discrediting the May 23, 2016 non-qualifying exercise blood gas study because it was not in substantial compliance with the quality standards set forth in 20 C.F.R. §718.105. Employer's Brief at 13-15. Employer argues that because claimant did not challenge the validity of the study at the "hearing level," the administrative law judge erred in discrediting it on this basis. *Id*. at 14, *citing Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Employer additionally argues that the administrative law judge failed to determine whether the "alleged" deficiency in the study was a critical quality standard. *Id*. at 15, *referencing Orek*, 10 BLR at 1-54. Employer's assertions lack merit.

As the Director correctly asserts, the pertinent regulation at 20 C.F.R. §718.101(b), promulgated after *Orek* was decided, provides that any medical evidence developed after January 19, 2001 in connection with a claim for benefits "shall be in substantial compliance with the applicable [regulatory quality] standard in order to constitute evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b); Director's Brief at 1. Thus, contrary to employer's assertion, the administrative law judge properly considered whether the blood gas studies of record substantially comply to the quality standards set forth in 20 C.F.R. §718.105(b) and Part 718, Appendix C.[6] *See* 20 C.F.R. §718.101(b); *see also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). Under the terms of 20 C.F.R. §718.105(b):

> A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, *blood shall be drawn during exercise*.

[6] Employer's assertion that the administrative law judge erred in considering the validity of the blood gas studies when no challenge was raised by claimant below is also unavailing. Employer's Brief at 14. The Board's holdings in *Owens* and *Orek* that a party's assertion that objective studies do not meet the applicable quality standards will not be considered unless a challenge was first raised below do not obviate the need for the administrative law judge to conduct the proper inquiry under the regulations. 20 C.F.R. §718.101(b); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987).

20 C.F.R. §718.105(b) (emphasis added). Here, the administrative law judge found, and employer concedes, that "the record reflects 10-second lapses between [c]laimant's exercise and the drawing of blood" in Dr. Dahhan's June 26, 2014 and May 23, 2016 exercise blood gas studies. Decision and Order at 12; Employer's Brief at 14. The administrative law judge also noted that neither Dr. Dahhan nor any other physician addressed the fact that blood was not drawn as specified in the regulation, or provided any information as to whether this deviation from the regulatory criteria at 20 C.F.R. §718.105(b) affected the results. *Id*. Thus, the administrative law judge permissibly concluded that the June 26, 2014 and May 23, 2016 exercise blood gas studies are not in substantial compliance with the regulations, and are insufficient to establish the fact for which they were proffered. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 12, *citing* 20 C.F.R. §718.101(b). As these findings are supported by substantial evidence, they are affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer also asserts that the administrative law judge erred in not giving greatest weight to the May 23, 2016 resting blood gas study because it is the most recent. Employer argues that the administrative law judge failed to properly consider that there was a significant time lapse between the earliest blood gas study dated January 22, 2013, which was qualifying at rest, and the most recent blood gas study dated May 23, 2016, which was non-qualifying at rest. Employer's argument lacks merit. An administrative law judge may, but need not, credit the more recent medical evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). Here, the administrative law judge acknowledged that Dr. Dahhan's May 23, 2016 non-qualifying resting blood gas study was the most recent study of record, but permissibly found that the five resting blood gas studies are equally probative because they were performed within "a relatively short time period (a little over three years)."[7] *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); Decision and Order at 12 n.27. Thus, we reject employer's assertion that the administrative law judge should have given greatest weight to Dr. Dahhan's May 23, 2016 non-qualifying resting blood gas study as the most recent. *See Schetroma*, 18 BLR at 1-22. We therefore affirm the administrative law judge's finding

[7] Moreover, while the blood gas studies overall span approximately three years, there is less than two months between Dr. Dahhan's May 23, 2016 non-qualifying resting study, and Dr. Harlan's April 5, 2016 resting study, which produced qualifying values. Claimant's Exhibit 9; Employer's Exhibit 3.

that the preponderance of the reliable blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2). *See Keathley*, 773 F.3d at 740-41, 25 BLR at 2-687-88.

Medical Opinions

The administrative law judge next considered the medical opinions of Drs. Chavda, Eubank, Baker, Dahhan, and Broudy.[8] Decision and Order at 13-25; Director's Exhibits 12, 14; Claimant's Exhibits 8, 10, 11, 23; Employer's Exhibits 5-8. Dr. Chavda responded "no" when asked whether any pulmonary impairment was the result of coal dust exposure, but did not clearly address the existence of an impairment. Claimant's Exhibit 10. Dr. Baker and Dr. Eubank, claimant's treating physician, opined that claimant is totally disabled and does not have the pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 12; Claimant's Exhibits 8, 11, 23. Drs. Dahhan and Broudy opined that claimant is not totally disabled from a respiratory or pulmonary impairment. Director's Exhibit 14; Employer's Exhibits 5-8.

The administrative law judge gave no weight to Dr. Chavda's opinion because it is ambiguous. Decision and Order at 20 n.48, 24. Further, the administrative law judge accorded less weight to Dr. Eubank's opinion, finding it inadequately explained and insufficiently documented.[9] The administrative law judge then accorded greater weight to Dr. Baker's opinion than to the opinions of Drs. Dahhan and Broudy, and found that the weight of the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Finally, weighing all of the relevant evidence together, the administrative law judge found that claimant established total disability by a preponderance of the evidence, pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 24.

Employer asserts that because the administrative law judge erroneously discredited the June 26, 2014 and May 23, 2016 exercise blood gas studies, he also erred in discrediting the opinions of Drs. Dahhan and Broudy because they relied on those studies. Employer's

[8] The administrative law judge also considered claimant's medical treatment records from Clover Fork Clinic and Quantum Healthcare of Cumberland, but noted that while the treatment records reflect office visits for respiratory conditions, they did not specifically address whether claimant has a total respiratory disability. Decision and Order at 25.

[9] The administrative law judge noted that Dr. Eubank's opinion was based on a pulse oximetry test indicating an 88% oxygen saturation rate on walking without oxygen. Decision and Order at 16, 23. She further noted, however, that Dr. Eubank did not explain the basis for her conclusions in detail or cite any data other than the pulse oximetry tests, even though she treated claimant for respiratory conditions on multiple occasions. *Id*. at 23.

Brief at 15. As discussed above, we have affirmed the administrative law judge's finding that the June 26, 2014 and May 23, 2016 exercise blood gas studies produced invalid results. Thus, we further affirm the administrative law judge's permissible determination to discredit the opinions of Drs. Dahhan and Broudy because they relied on the invalid exercise blood gas study results to conclude that claimant is not totally disabled. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 24.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *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 has not shown error in the administrative law judge's weighing of the evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 24.

We also affirm the administrative law judge's finding that the evidence, when weighed together, established total disability at 20 C.F.R. §718.204(b)(2) overall. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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 at 25. We therefore affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 26.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing 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). The administrative law judge found that employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have

pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 26-34. Furthermore, as employer does not contest the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by his pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 35-37.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

[10] As we have affirmed the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we need not address its contentions with regard to the existence of clinical pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge