U.S. Department of Labor

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

BRB No. 18-0324 BLA

WILLIAM G. DIXON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	DATE ISSUED: 06/28/2019
	)	
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 Awarding Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Paul E. Jones (Denise Hall Scarberry), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-06132) of Administrative Law Judge William T. Barto, 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 claim filed on January 7, 2013.

The administrative law judge accepted employer's concession claimant had twenty-one years of underground coal mine employment and found claimant established total disability. He therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[1] He further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the findings that claimant invoked the Section 411(c)(4) presumption and employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response 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 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) 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. 20 C.F.R. §718.204(b)(1). A miner's total disability may be established by qualifying[4] pulmonary

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be 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 impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as conceded by employer and unchallenged on appeal, the administrative law judge's finding claimant established twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5.

[3] This case 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, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 6.

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20

function or 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). Evidence supporting a finding of total disability must be weighed against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 determined claimant established total disability by the pulmonary function studies, blood gas studies, and medical opinions. Employer challenges each of these findings.

A. Pulmonary Function Studies

The administrative law judge considered four pulmonary function studies dated February 7, 2013, February 25, 2013, September 26, 2013, and August 25, 2015. Decision and Order at 6-7, 11; Director's Exhibits 8, 9; Claimant's Exhibit 3; Employer's Exhibit 1. Each study was performed before and after the administration of bronchodilators, and all but the February 25, 2013 study produced qualifying results. The administrative law judge determined all of the studies are valid with the exception of the non-qualifying post-bronchodilator test performed by Dr. Dahhan on February 25, 2013. Decision and Order at 7; Director's Exhibit 9.

Weighing the studies together, he determined the qualifying pre- and post-bronchodilator tests performed on February 7, 2013, are in equipoise with the non-qualifying pre-bronchodilator study performed on February 25, 2013. Decision and Order at 7; Director's Exhibits 8, 9. Giving greater weight to the more recent qualifying studies from September 26, 2013 and August 25, 2015, he concluded the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7; Claimant's Exhibit 3; Employer's Exhibit 1.

Employer challenges the administrative law judge's findings that the qualifying pulmonary function studies dated February 7, 2013 and August 25, 2015 are valid, and that the non-qualifying post-bronchodilator study dated February 25, 2013 is invalid. Employer's Brief at 6-10. We reject employer's allegations of error.

The February 7, 2013 study was performed as part of Dr. Alam's examination. He signed the results of the study on which claimant's effort and cooperation were characterized as "good." Director's Exhibit 8 at 20. He also wrote several comments on

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

the printout, noting the results showed moderate to severe airflow obstruction without a bronchodilator response and a severe reduction in claimant's MVV. *Id.* He then relied on the study to diagnose a totally disabling pulmonary impairment. *Id*. at 31. Dr. Vuskovich reviewed the tracings from the study and concluded: "[Claimant] did not put forth the effort required to generate valid spirometry results. His initial efforts were not maximal which artificially lowered his FEV1 results. He prematurely terminated his expiratory efforts which artificially lowered his FVC results." Director's Exhibit 10 at 4-5.

The administrative law judge rationally determined Dr. Alam's status as the administering physician entitled his opinion to greater weight than the opinion of Dr. Vuskovich. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (holding that an administrative law judge may rely on the opinion of the physician who actually administered the ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); Decision and Order at 19. He also permissibly credited Dr. Alam's observation of claimant's good effort and reliance on the study to diagnose total pulmonary disability to find the results of the study acceptable.[5] *See Tennessee 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 7. Thus, we affirm the administrative law judge's conclusion that the qualifying February 7, 2013 study supports a finding of total disability.

We also reject employer's assertion that the administrative law judge erred in finding the February 25, 2013 non-qualifying post-bronchodilator study invalid. Employer's Brief at 6-7, *citing* 20 C.F.R. §718.103. The report of the pulmonary function study administered by Dr. Dahhan describes claimant's effort on the post-bronchodilator test as fair and his narrative report specifically states, the "[p]ost[-]bronchodilator study was invalid due to poor effort." Director's Exhibit 9 at 16, 39. As it is supported by substantial evidence, we affirm the administrative law judge's determination that the February 25, 2013 non-qualifying post-bronchodilator is invalid.[6] *See Hunt*, 124 F.3d at 744.

[5] Dr. Gaziano also reviewed the February 7, 2013 study and concluded the results are acceptable under the quality standards. Director's Exhibit 8 at 14.

[6] Moreover, the administrative law judge gave greatest weight to the more recent qualifying studies of record as better indicators of claimant's impairment at the time of the hearing. Decision and Order at 7. Thus, employer has not explained how further consideration of Dr. Dahhan's earlier non-qualifying post-bronchodilator test would have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the

Finally, we affirm as supported by substantial evidence the administrative law judge's finding that the August 25, 2015 qualifying pulmonary function study is valid. Dr. Green, who administered the study, did not invalidate it, but rather relied on it to diagnose a totally disabling pulmonary impairment. Claimant's Exhibit 3. In addition, Dr. Dahhan reviewed the results of the study and acknowledged the values are "consistent with the Department of Labor disability criteria" without calling into question the study's validity. Employer's Exhibit 5 at 3-4. Although Dr. Vuskovich stated claimant's heavy use of cigarettes on that date "artificially lowered his spirometry results,"[7] Employer's Exhibit 4, the administrative law judge permissibly found his opinion outweighed by the opinions of Drs. Green and Dahhan, neither of whom stated the study is invalid. Decision and Order at 7. We therefore affirm the administrative law judge's finding that the qualifying August 25, 2015 pulmonary function study supports a finding of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002) (reviewing authority must defer to the administrative law judge's rational weighing of evidence); Decision and Order at 7.

Because employer raises no other allegations of error regarding the administrative law judge's weighing of the pulmonary function studies, we affirm his decision to give greatest weight to the two most recent qualifying studies and his finding the pulmonary function evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7.

B. Blood Gas Studies

The administrative law judge considered four blood gas studies dated February 7, 2013, February 29, 2013, September 25, 2013, and August 25, 2015. Decision and Order at 8-9; Director's Exhibits 8, 9; Claimant's Exhibit 3; Employer's Exhibit 1; Decision and Order at 25. The February 7, 2013 and February 29, 2013 studies yielded non-qualifying values, while the September 26, 2013 and August 25, 2015 studies are qualifying. Director's Exhibits 8, 9; Claimant's Exhibit 3; Employer's Exhibit 1. The administrative law judge discredited the opinions of Drs. Vuskovich and Dahhan invalidating the qualifying August 25, 2015 study and gave "little weight" to the non-qualifying exercise

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appellant must explain how the "error to which [it] points could have made any difference").

[7] Based on claimant's carboxyhemoglobin level of 10.1, Dr. Vuskovich estimated claimant smoked three packs of cigarettes by the time the pulmonary function test began at 8:09 a.m. Employer's Exhibit 4 at 4.

study on February 29, 2013 because it was terminated early due to fatigue. Decision and Order at 9; Employer's Exhibit 4; Director's Exhibit 9 at 42. Giving greater weight to the two most recent qualifying tests, he found claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9.

Employer argues the administrative law judge erred in giving little weight to the non-qualifying exercise blood gas study performed on February 29, 2013. Employer's Brief at 11-12; Decision and Order at Director's Exhibit 9 at 39, 42. We disagree. Dr. Dahhan, the administering physician, stated, "[t]he patient exercised for only two minutes" and the test was terminated due to claimant's fatigue. Director's Exhibit 9 at 39. The administrative law judge permissibly declined to treat the non-qualifying results produced by exercise of such short duration as an accurate reflection of claimant's ability to perform his last coal mine job. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Frazio v. Consolidation Coal Co.*, 8 BLR 1-223, 1-224 (1985); Decision and Order at 9. Accordingly, we affirm, as otherwise unchallenged, the administrative law judge's discrediting of the non-qualifying exercise blood gas study dated February 29, 2013.

We also reject employer's argument the administrative law judge erred in finding the qualifying August 25, 2015 study valid. Employer's Exhibit 4; Employer's Brief at 11. The administrative law judge permissibly discredited Dr. Vuskovich's opinion that the results are "compatible with testing venous blood instead of arterial blood" as he "provided no further explanation for his conclusion." Decision and Order at 8; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013) (determinations of credibility and the weight given to medical opinions are left to the administrative law judge and they will not be disturbed if they are supported by substantial evidence). Furthermore, Dr. Green, during whose examination the study was administered, made no indication in his report that venous rather than arterial blood was drawn and relied on the results to diagnose chronic respiratory failure and hypoxia. Claimant's Exhibit 3. Dr. Dahhan also reviewed the study and did not state venous blood was used. Employer's Exhibit 5 at 3-4. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the August 25, 2015 blood gas study supports a finding of total disability.

As employer raises no other allegations of error regarding the administrative law judge's weighing of the blood gas studies, we affirm his finding that the two most recent qualifying blood gas studies are entitled to greatest weight and establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9.

C. Medical Opinions[8]

The administrative law judge considered the medical opinions of Drs. Alam, Green, Jarboe, and Dahhan. Decision and Order at 10-11. Drs. Alam, Green, and Jarboe diagnosed total pulmonary disability, while Dr. Dahhan opined claimant is not totally disabled. Although he found all of the medical opinions "poorly documented" because "no physician provided a comprehensive review of the medical record in this case," he gave each opinion "full weight . . . as to the physician's interpretation of the results of his own exams." *Id*. at 11. He found Dr. Dahhan's opinion entitled to "very little weight," however, as the physician did not "provide any explanation" for claimant's more recent qualifying pulmonary function studies and blood gas studies that the administrative law judge determined were entitled to the greatest weight. *Id*. He thus concluded the preponderance of the medical opinions establishes claimant has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11. He further determined the evidence as a whole is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2) and claimant invoked the Section 411(c)(4) presumption. *Id*.

Employer argues that because the administrative law judge found all four physicians' opinions poorly documented, he erred in determining total disability was established by the medical opinion evidence. Employer's Brief at 12-13. We disagree.

Although the administrative law judge determined the medical opinions to be "poorly documented" in terms of a "comprehensive" review of the entire medical record, he permissibly found that each physician's opinion was adequately documented by the data from their respective examinations of claimant. *See Napier*, 301 F.3d at 713-714; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); Decision and Order at 11. Based on this finding, the administrative law judge reasonably concluded that the diagnoses of total pulmonary disability made by Drs. Alam, Jarboe, and Green, each supported by qualifying pulmonary function studies and consistent with his finding the most recent objective testing establishes total disability, outweighs Dr. Dahhan's contrary opinion which lacks an explanation regarding the most recent qualifying testing.[9] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281

[8] The administrative law judge found claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because there is no evidence of cor pulmonale with right-sided congestive heart failure.

[9] The administrative law judge found Dr. Dahhan "gave a brief review of Dr. Green's report and exam but provided no conclusion regarding total disability in his supplemental report." Decision and Order at 11 n.79. We see no error in the administrative law judge's rejection of his opinion on this basis. As previously noted, the administrative

(1994); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding claimant established total disability by a preponderance of the medical opinion evidence and a preponderance of the evidence of record considered as a whole. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Defore*, 12 BLR at 1-28-29. In light of our affirmance of the administrative law judge's findings that claimant has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).

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

Upon invocation of the Section 411(c)(4) presumption, the burden shifts to employer to establish claimant has neither legal nor clinical pneumoconiosis[10] 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)(i), (ii). The administrative law judge found employer failed to rebut the presumption by either method. Decision and Order at 12-20.

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law judge permissibly rejected Dr. Dahhan's opinion that the qualifying blood gas study from Dr. Green's exam was invalid on the basis that it was drawn from venous blood. Further, Dr. Dahhan stated the qualifying results of the pulmonary function study from that exam "show much lower measurements *consistent with the Department of Labor disability criteria*." Employer's Exhibit 5 at 4 (emphasis added). He also acknowledged claimant "has an obstructive ventilatory impairment" that "*has rapidly deteriorated over the last 2.5 years* which is possibly due to continuation of smoking or some other superimposed condition not caused by, related to, or associated with inhalation of coal dust that ceased in 2011." *Id*. (emphasis added). Thus, while the administrative law judge accurately stated Dr. Dahhan did not provide a specific conclusion on total disability in light of Dr. Green's disabling objective testing, employer has not explained how his opinion detracts from rather than supports a finding of total disability. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988).

[10] "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).

A. Existence of Pneumoconiosis

Employer asserts the administrative law judge improperly rejected the opinions of Drs. Broudy and Dahhan that claimant's impairment is due to smoking, not coal mine dust exposure. Employer's Brief at 15-16, 34-37. We disagree.

To disprove legal pneumoconiosis, employer must demonstrate 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), 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 rationally rejected the opinions of Drs. Dahhan and Jarboe because they failed to persuasively explain why claimant's twenty-one years coal mine employment, mostly at the face in heavy dust conditions, was not a significant contributing or substantial aggravating factor in claimant's impairment along with smoking.[11] *See Brandywine Explosives & Supply v. Director,*

[11] The administrative law judge stated:

> In weighing Dr. Dahhan's opinion, I note that he referenced [c]laimant's air trapping, hyperinflation indicative of emphysema, [arterial blood-gas] results, and bronchodilator treatment. However, Dr. Dahhan provided no explanation as to how these factors indicated smoking as a cause or excluded coal mine dust exposure as a substantially aggravating or significantly related cause of [c]laimant's obstruction. He also noted that smoking has been shown to cause an impairment "comparable to" [c]laimant's impairment and that [c]laimant's loss in FEV1 and rapid decline in [pulmonary function test] values cannot be accounted for by coal mine dust exposure. However, I am unpersuaded by Dr. Dahhan's opinion that the lowered FEV1 and decline in [pulmonary function test] results indicates a smoking etiology. Under the regulations, coal mine dust need only substantially aggravate or significantly relate to an impairment or condition for the condition to constitute legal pneumoconiosis. It does not need to be the most significant cause or factor.
> …
>
> Dr. Jarboe cited to scientific studies to support his conclusion that [c]laimant's air trapping, residual volume, and reduction in diffusion capacity indicated a smoking etiology for his impairment. These studies conclude that these factors are more related to smoking than to coal mine dust exposure . . . However, as I noted previously, the regulations do not require that coal mine dust be the most significant cause or factor. Dr. Jarboe failed to explain why coal mine dust could not have substantially aggravated

OWCP [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 16-18; Employer's Exhibits 1, 5. Thus, the administrative law judge rationally found their opinions entitled to very little probative weight. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 20. As there are no other medical opinions supportive of employer's burden, we affirm his finding that employer failed to rebut the Section 411(c)(4) by disproving the existence of legal pneumoconiosis. *See Kennard*, 790 F.3d at 668; *Minich*, 25 BLR at 1-155 n.8. Employer's failure to disprove legal pneumoconiosis precludes a finding that employer established claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

B. Disability Causation

The administrative law judge permissibly determined the same deficiencies in the opinions of Drs. Dahhan and Jarboe that claimant does not suffer from legal pneumoconiosis undercut their opinions that no part of his disabling impairment was caused by the disease. *See* 20 C.F.R. §718.305(d)(1)(ii); *Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); Decision and Order at 19-20. We therefore affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption.

> or been significantly related to [c]laimant's impairment, in addition to [c]laimant's smoking.

Decision and Order at 16, 18; Employer's Exhibits 1, 5.

[12] Consequently, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 12 BLR 1-1276, 1-1278 (1984).

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