U.S. Department of Labor

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

BRB No. 15-0125 BLA

HAROLD D. FORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 03/03/2016
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 of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (13-BLA-5331) of Administrative Law Judge Scott R. Morris awarding benefits 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 subsequent claim filed on February 7, 2012.[1]

The administrative law judge credited claimant with 37.18 years of qualifying coal mine employment,[2] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and 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).[3] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new blood gas study evidence and medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv) and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further asserts that the administrative law judge erred in finding that it did not rebut the presumption.[4] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

[1] Claimant's first claim, filed on April 30, 2002, was finally denied by the district director on July 2, 2003, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] 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 qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Employer does not challenge the administrative law judge's finding that claimant established 37.18 years of qualifying coal mine employment. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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).

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

In considering whether claimant established total disability, the administrative law judge initially found that the new pulmonary function studies were non-qualifying[5] pursuant to 20 C.F.R. §718.204(b)(2)(i). Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered four new blood gas studies that were administered between March of 2012 and January of 2014. The March 13, 2012 blood gas study, conducted by Dr. Rasmussen, yielded non-qualifying values at rest, but qualifying values during exercise. Director's Exhibit 12. The December 5, 2012 blood gas study, conducted by Dr. Zaldivar, yielded non-qualifying values both at rest and during exercise. Employer's Exhibit 1. However, two subsequent blood gas studies yielded only qualifying values. Specifically, the March 27, 2013 blood gas study, conducted by Dr. Gallai, yielded qualifying values at rest,[6] and the January 28, 2014 blood gas study, conducted by Dr. Rasmussen, yielded qualifying values both at rest and during exercise. Claimant's Exhibits 2, 5.

The administrative law judge found that claimant's blood gas studies established total disability. In so finding, he considered that three of the four blood gas studies yielded qualifying values, that qualifying values were obtained both before and after Dr. Zaldivar's December 5, 2012 non-qualifying study, that the blood gas studies yielded qualifying values both at rest and with exercise, and that the two most recent studies were qualifying. Decision and Order at 14-15.

Finally, turning to the new medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that all of the physicians agreed that claimant is totally disabled by a respiratory or pulmonary impairment. Weighing all of the relevant new 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). Decision and Order at 14, 22.

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

[6] No exercise values were reported for the March 27, 2013 blood gas study.

Employer contends that the administrative law judge erred in his consideration of the blood gas study evidence, and did not adequately explain his findings. Employer's Brief at 20-25. Employer asserts that the administrative law judge erred in "reject[ing]" Dr. Zaldivar's testimony that "it was difficult to compare Dr. Gallai's [blood gas] study with the other studies . . . because the barometric pressure was not reported on the study." *Id*. at 20. Further, employer argues that the administrative law judge mechanically accorded greater weight to the more recent blood gas studies, failed to address the significance of claimant's statement that someone supported him as he walked on the treadmill during Dr. Rasmussen's January 28, 2014 exercise blood gas study, and did not adequately explain why the fact that claimant's blood gas studies were qualifying both at rest and with exercise weighed heavily in establishing total disability. *Id*. at 23-25.

After reviewing the arguments on appeal, the administrative law judge's findings, and the relevant evidence, we affirm the administrative law judge's determination that the blood gas study evidence established total disability under 20 C.F.R. §718.204(b)(2)(ii). Substantial evidence supports the administrative law judge's discretionary finding that, considered both quantitatively and qualitatively, claimant's blood gas studies are predominantly qualifying and establish that claimant is totally disabled. *See 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). Contrary to employer's contention, the administrative law judge reasonably considered, among other factors, that the two most recent blood gas studies from 2013 and 2014 yielded only qualifying values. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014).

Moreover, employer has not explained how further analysis of the blood gas studies would have changed the administrative law judge's finding that claimant is totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"). As the administrative law judge found, all of the physicians who rendered medical opinions in the current claim pursuant to 20 C.F.R. §718.204(b)(2)(iv), Drs. Gallai, Rasmussen, and Zaldivar, diagnosed claimant as totally disabled based on the values of his blood gas studies.[7] Decision and Order at 16-21; Director's Exhibit 12; Claimant's Exhibits 2, 5; Employer's Exhibits 1, 4. Further, contrary to the suggestions in employer's brief, no physician stated that any blood gas study was invalid.[8] Employer's own physician, Dr.

[7] Drs. Rasmussen and Zaldivar also relied upon claimant's reduced diffusion capacity in opining that claimant is totally disabled. Director's Exhibit 12 at 3; Claimant's Exhibit 5 at 3; Employer's Exhibit 4 at 36-37.

[8] A review of the record does not reveal a statement by Dr. Zaldivar, or an argument by employer to the administrative law judge, that any blood gas study was

Zaldivar, considered all of the blood gas study evidence of record and relied, in part, on the studies conducted by Drs. Rasmussen and Gallai in reaching his conclusion that claimant is totally disabled by a respiratory impairment. Employer's Exhibit 4 at 35-36.

Thus, employer's arguments do not undermine the finding of total disability based on the blood gas study evidence. We therefore conclude that the administrative law judge rationally found total disability established pursuant to 20 C.F.R. §718.204(b)(2)(ii). Further, to the extent employer relies on the same arguments to challenge the administrative law judge's finding that the medical opinion evidence also established total disability under 20 C.F.R. §718.204(b)(2)(iv), Employer's Brief at 20-22, its arguments lack merit. Substantial evidence supports the administrative law judge's finding that the physicians agree that claimant is totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 12; Claimant's Exhibits 2, 5; Employer's Exhibits 1, 4.

In light of the administrative law judge's findings that the new blood gas studies and the new medical opinions establish that claimant is totally disabled, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability by a preponderance of the evidence pursuant to 20 C.F.R. §718.204(b)(2).[9] Accordingly, we further affirm the administrative law judge's findings

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invalid. Dr. Zaldivar noted that the lack of a barometric pressure notation on Dr. Gallai's 2013 blood gas study made it hard for him to compare Dr. Gallai's study to Dr. Rasmussen's 2012 study to determine *the cause* of Dr. Gallai's much lower values, not whether the study was valid or reflected total disability. Employer's Exhibit 4 at 32-33. Specifically, Dr. Zaldivar stated that, since pneumoconiosis causes a fixed impairment, then assuming the elevation and barometric pressure were the same for both blood gas studies, Dr. Gallai's study values should not be much lower than those obtained by Dr. Rasmussen, if pneumoconiosis were the cause of the impairment. *Id*. With respect to Dr. Rasmussen's 2014 blood gas study, Dr. Zaldivar noted that, because claimant was held upright as he walked on the treadmill, he did less work than he otherwise would have had to do on the exercise study. *Id*. at 34-35. Nevertheless, Dr. Zaldivar agreed that Dr. Rasmussen's 2014 blood gas study revealed a disabling blood gas impairment. *Id*. at 35-36.

[9] The administrative law judge found that claimant's non-qualifying pulmonary function studies do not outweigh his qualifying blood gas studies under 20 C.F.R. §718.204(b)(2), because the two tests measure different types of impairments. Decision and Order at 14; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993). This finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption.

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,[10] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner'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). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer initially contends that the administrative law judge improperly restricted it to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). Employer's Brief at 29-30. Employer's contention is identical to the one that the United States Court of Appeals for the Fourth Circuit rejected in *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 138-43, BLR (4th Cir. 2015), and we reject it here for the reasons set forth in that decision.

Employer also asserts that the administrative law judge erred in applying the "no part," or "rule out," standard on rebuttal when addressing disability causation, and argues that rebuttal of the disability causation element may be established by proving that pneumoconiosis was not a substantially contributing cause of claimant's disabling impairment. Employer's Brief at 29-30 & n.4. The Board, however, rejected these arguments in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting), as did the Fourth Circuit, in *Bender*, 782 F.3d at 137-43. For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

We next address employer's contention that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Noting that the x-ray and

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

medical opinion evidence established that "[c]laimant has, at a minimum, clinical pneumoconiosis," the administrative law judge found that employer did not meet its burden to establish that claimant does not have pneumoconiosis, and therefore failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 29. This finding is not challenged on appeal and is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Turning to whether employer could establish that no part of claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge considered the medical opinion of Dr. Zaldivar, who examined claimant and reviewed the medical evidence of record.[11]

Dr. Zaldivar opined that claimant has clinical pneumoconiosis, and a mild degree of airway obstruction due mostly to smoking,[12] but which Dr. Zaldivar opined could also have been contributed to by coal mine dust exposure. Employer's Exhibit 1 at 4; Employer's Exhibit 4 at 37. Dr. Zaldivar further diagnosed claimant with pulmonary fibrosis caused by "mixed collagen disease,"[13] and by smoking. Employer's Exhibit 4 at 36-38, 40. Dr. Zaldivar concluded that claimant's total disability is unrelated to pneumoconiosis because the pattern of claimant's impairment—a severe diffusion capacity impairment with only mild obstruction—indicates that claimant is totally

[11] The administrative law judge also summarized the medical opinions of Drs. Gallai and Rasmussen, who diagnosed claimant with both clinical and legal pneumoconiosis, and opined that he is totally disabled due to pneumoconiosis. Director's Exhibit 12; Claimant's Exhibits 2, 5.

[12] The administrative law judge found that claimant has a fifty pack-year smoking history. Decision and Order at 5.

[13] Dr. Zaldivar also referred to claimant's mixed collagen disease as "polymyalgia rheumatica," and noted that claimant has been treated for it since 2006. Employer's Exhibit 1 at 6. Dr. Zaldivar opined that mixed collagen disease is unrelated to coal mine dust exposure. Employer's Exhibit 4 at 14. The record reflects that Dr. Rasmussen similarly diagnosed claimant with "collagen vascular disease," and explained that collagen vascular disease causes joint, skin, and muscle disease, "and can affect the lung[,] causing primarily fibrotic and restrictive lung disease, although in some cases obstructive airways disease." Director's Exhibit 12 at 4; *see also* Claimant's Exhibit 5 at 4. Dr. Rasmussen, however, opined that the respiratory effects of claimant's pneumoconiosis and his collagen vascular disease could not be separated. *Id.*

disabled by pulmonary fibrosis due solely to mixed collagen disease and smoking.[14] *Id*. at 25, 27, 37. Dr. Zaldivar noted that many diseases cause pulmonary fibrosis, and that coal workers' pneumoconiosis may also cause it, but only if progressive massive fibrosis is present on x-ray. *Id*. at 38-39. Dr. Zaldivar reiterated that the pattern of claimant's impairment reflects total disability that "has nothing to do with coal workers' pneumoconiosis. It has a lot to do with smoking, and it has a lot to do with [claimant's mixed collagen] disease." *Id*. at 38.

The administrative law judge indicated that he was unpersuaded by Dr. Zaldivar's opinion that, although claimant has clinical pneumoconiosis, he is totally disabled solely by pulmonary fibrosis related to collagen disease and smoking. Decision and Order at 30. In so finding, the administrative law judge noted that, under the regulations, clinical pneumoconiosis is defined as including a "fibrotic reaction of the lung tissue" to the deposition of coal mine dust. Decision and Order at 32, *citing* 20 C.F.R. §718.201(a)(1) and *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 791 n.1, 15 BLR 2-225, 2-226 n.1 (4th Cir. l990). The administrative law judge also noted the Department of Labor's discussion of medical literature that associated coal mine dust exposure with the development of lung fibrosis, set forth in the preamble to the 2001 regulatory revisions. In light of the recognized "relationship between coal dust exposure, pulmonary fibrosis[,] and pneumoconiosis," the administrative law judge found Dr. Zaldivar's opinion, that the effects of claimant's disabling pulmonary fibrosis are completely separate from his clinical pneumoconiosis, to be "unpersuasive." Decision and Order at 32. In this context, the administrative law judge further found that Dr. Zaldivar's statement, that pulmonary fibrosis is caused by many diseases, detracted from his opinion that claimant's total disability "was caused by another disease besides pneumoconiosis." *Id*.

Employer contends that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation. Employer's Brief at 11-20. We reject employer's contention. The administrative law judge accurately characterized Dr. Zaldivar's opinion, and correctly stated that the doctor attributed claimant's disabling impairment to pulmonary fibrosis caused by smoking and connective tissue disease. Decision and Order at 31. However, the administrative law judge rationally found that Dr. Zaldivar failed to persuasively explain how clinical pneumoconiosis could be ruled out as a cause of claimant's respiratory disability, in light of the regulation defining clinical pneumoconiosis as a "fibrotic reaction of the lung

[14] Dr. Zaldivar further opined that, if claimant had only his airway obstruction, he would not be disabled. Employer's Exhibit 4 at 38. Specifically, Dr. Zaldivar stated that, "compared to his smoking habit, the degree of obstruction from airway obstruction [sic] is very minimal. . . . So the obstruction does have a role, but the obstruc—If all he had was an obstruction, he would not be impaired at all." *Id*.

tissue" to the deposition of coal mine dust, and Dr. Zaldivar's acknowledgement that pulmonary fibrosis has many causes. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

The administrative law judge has broad discretion to assess the credibility of the medical opinions, *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge's credibility findings are rational and supported by substantial evidence, we affirm his determination that Dr. Zaldivar's opinion was unconvincing, and therefore did not establish that no part of claimant's respiratory disability was caused by his clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Bender*, 782 F.3d at 135; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-266 (4th Cir. 2013); Decision and Order at 32. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and we affirm the award of benefits.[15] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); *Bender*, 782 F.3d at 138-43; *Minich*, BRB No. 13-0544 BLA, slip op. at 11.

[15] Because the administrative law judge provided a valid reason for discounting Dr. Zaldivar's opinion regarding the cause of claimant's disabling blood gas impairment, the administrative law judge's error, if any, in according less weight to his opinion for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinion of Dr. Zaldivar. Moreover, we decline to address employer's contentions of error regarding the weight accorded to the opinions of Drs. Gallai and Rasmussen, Employer's Brief at 26-29, as employer bears the burden of proof on rebuttal, and the opinions of Drs. Gallai and Rasmussen do not aid employer in satisfying that burden. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge