U.S. Department of Labor

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

BRB No. 15-0273 BLA

LARRY GENE DARNELL Claimant-Respondent v. PHOENIX COAL/SCHOATE MINING COMPANY, LLC and AMERICAN INTERNATIONAL SOUTH INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2016 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5869) of Administrative Law Judge Peter B. Silvain, Jr. rendered on a claim filed 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 October 8, 2009. Applying

Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012),[1] the administrative law judge credited claimant with twenty-five years of qualifying coal mine employment,[2] and found that the evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). 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 claimant is totally disabled pursuant to 20 C.F.R §718.204(b)(2)(i) and (iv). Therefore, employer contends, the administrative law judge erred in finding claimant entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response to employer's appeal.

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

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and where a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4)(2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Part 718.

[2] Specifically the administrative law judge found that claimant had eighteen months of underground coal mine employment, and that the rest of his coal mine employment was above-ground in conditions substantially similar to those in underground mining. Decision and Order at 4-5, 31.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the parties stipulated, and the record establishes, that claimant established twenty-five years of qualifying coal mine employment pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged on appeal, the administrative law judge's finding that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Skrack*, 6 BLR at 1-711.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

Section 411(c)(4) Invocation
20 C.F.R. §718.204(b)(2)(i)

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains seven pulmonary function studies conducted on August 26, 2003, January 24, 2008, October 16, 2009, August 19, 2010, February 17, 2011, December 19, 2011, and April 10, 2012, respectively. Decision and Order at 11, 29, 33-34; Claimant's Exhibits 3, 7, 8; Director's Exhibit 23; Employer's Exhibits 1, 3. In considering the pulmonary function study evidence, the administrative law judge found that, although the oldest and most recent studies were non-qualifying, the remaining five pulmonary function studies were qualifying[5] and that the "FEV_1%" value on the most recent study was, in fact, "only one point above the qualifying value of 55." Decision and Order at 34. The administrative law judge concluded, therefore, that a preponderance of the pulmonary function study evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer contends that the administrative law judge erred in finding that a preponderance of the pulmonary function study evidence was qualifying. Specifically, employer argues that the administrative law judge failed to adequately consider that the most recent 2012 pulmonary function study was, in fact, non-qualifying and failed to account for the fact that the 2011 studies, although qualifying pre-bronchodilator, were non-qualifying post-bronchodilator.[6] Thus, employer contends that the administrative law judge should have found that the preponderance of the pulmonary function study

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3 at 1; Decision and Order at 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

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

[6] Employer acknowledges that the two pulmonary function studies conducted in 2011 were qualifying pre-bronchodilator. Employer's Brief at 12.

evidence was non-qualifying and did not establish total respiratory disability based on these three most recent studies.[7] We disagree.

First, contrary to employer's assertion, the administrative law judge considered the non-qualifying post-bronchodilator results obtained on the February 17, 2011 study, and the December 19, 2011 study.[8] Decision and Order at 29, 34 n.80. We, therefore, reject employer's argument that the 2011 post-bronchodilator results were not considered. We further reject employer's contention that the administrative law judge improperly assigned probative weight to the qualifying pre-bronchodilator results, when the results of corresponding post-bronchodilator testing were non-qualifying.

The quality standards governing the administration of pulmonary function studies state that any report of a pulmonary function study must indicate:

> [w]hether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained.

20 C.F.R. §718.103(b)(8). There is no regulatory provision, however, that requires that controlling weight be given to the post-bronchodilator results. 20 C.F.R. §718.103. Moreover, the comments to the regulations caution against reliance on post-bronchodilator results in determining total disability: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980). Thus, as the administrative law judge considered both the pre-bronchodilator and post-bronchodilator results, we affirm the administrative law judge's decision to find that the two 2011 pulmonary function studies were qualifying. Decision and Order at 34.

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[7] Additionally, employer asserts that the administrative law judge "has ignored the most recent [pulmonary function study] from August of 2012." The administrative law judge's review of the evidence, however, does not include an August, 2012 pulmonary function study. Further, employer's summary of its evidence, listing the objective test results does not include an August 2012 pulmonary function study. Nor does employer provide any further identifying information or an exhibit number for an August 2012 pulmonary function study. It is probable, from the context of employer's assertion, that employer has inadvertently referred to the April 10, 2012 study, as dating from August 2012. *See* Employer's Brief at 3, 12; Decision and Order at 11, 33-34.

[8] Employer acknowledges that the administrative law judge did note the results of both pre-bronchodilator and post-bronchodilator results on the 2011 studies. Employer's Brief at 13.

Further, the administrative law judge scrutinized the most recent non-qualifying pulmonary function study of April 10, 2012, and observed that it was only four months more recent than the prior qualifying study, dated December 19, 2011. Thus, he rationally concluded that the most recent study was not entitled to greater weight based on its recency. *See generally Aimone v. Morrison Knudson Co.*, 8 BLR 1-32, 1-34 (1985) (Board held that it was proper to find that eight months is not a significant period of time separating objective evidence). Moreover, the United States Court of Appeals for the Sixth Circuit has held that it is irrational to credit evidence solely on the basis of recency. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

In this case, the administrative law judge found that the "FEV_1%" value on the most recent pulmonary function study was "only one point above the qualifying value of 55." Decision and Order at 34. The administrative law judge also found that the most recent non-qualifying study was only four months more recent than the previous qualifying study. Additionally, the administrative law judge noted that all five of the studies, conducted prior to the most recent non-qualifying study were qualifying.[9] Consequently, the administrative law judge permissibly determined that the most recent non-qualifying pulmonary function study was not entitled to greater weight due to its recency. *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85. Therefore, we reject employer's assertion that the administrative law judge was required to give greater weight to the most recent pulmonary function study, which was non-qualifying. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's evaluation of the pulmonary function study evidence, his determination that a preponderance of the pulmonary function study evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is affirmed.

20 C.F.R. §718.204(b)(2)(iv)

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The medical opinion evidence consists of the opinions of Drs. Chavda and Houser, who found that claimant was unable to perform his usual coal mine employment, and the opinions of Drs. Selby and Anderson, who found that claimant was not precluded from performing his usual coal mine employment.

[9] The administrative law judge focused here on the pre-bronchodilator tests; however, even if the qualifying and non-qualifying post-bronchodilator results were added to the results of the pre-bronchodilator tests, the preponderance of the tests would be qualifying. *See* Employer Brief at 3.

The administrative law judge found that claimant's usual coal mine work required "medium to heavy exertion."[10] Decision and Order at 35-36. He further found that, while the doctors "agree that [c]laimant has some degree of respiratory impairment[,] [t]hey gave diverse opinions, … as to whether [c]laimant's impairment is sufficiently severe to prevent him from performing his … coal mine employment." Decision and Order at 36. Considering the opinions "in conjunction with the results of the objective tests," the administrative law judge accorded greater weight to the opinions of Drs. Chavda and Houser, that claimant was unable to perform his usual coal mine employment. Specifically, the administrative law judge found the opinion of Dr. Chavda, claimant's treating physician, entitled to "probative weight," because it was, among other reasons, consistent with the evidence available to him," and because "Dr. Chavda had [the] opportunity to examine … [c]laimant on more occasions than any other physician of record." Decision and Order at 35. Regarding the opinion of Dr. Houser the administrative law judge accorded it "great probative weight" because it was consistent with claimant's "relevant histories," his findings on "physical examination" and the results of claimant's "objective testing." Decision and Order at 36. The administrative law judge found the opinions of Drs. Selby and Anderson, that claimant could perform his usual coal mine employment, less persuasive, because they were each in conflict with the qualifying results of the pulmonary function studies they each conducted, and with the qualifying results of the "preponderant weight" of the pulmonary function study evidence. Decision and Order at 35. Consequently, the administrative law judge found that the medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), based on the opinion of Dr. Chavda, as supported by Dr. Houser.

The administrative law judge is charged with weighing the evidence. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997). Here, the administrative law judge permissibly gave greatest weight to the opinion of Dr. Chavda because of his greater familiarity with claimant's condition. *See* 20 C.F.R. §718.104(d)(5); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). The administrative law judge also credited Dr. Houser's opinion as supportive of Dr. Chavda's opinion.[11] Decision and Order at 35-36; *see Clark v. Karst-Robbins Coal Co.*,

[10] As employer does not contest this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[11] Employer does not challenge the administrative law judge's finding that the opinions of Drs. Houser and Chavda are well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *see also Skrack*, 6 BLR at 1-711. Rather, it contends that the administrative law judge erred in according less weight to the opinions of Drs. Selby and Anderson because they did not adequately explain how the pulmonary

12 BLR 1-149 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Consequently, we affirm the administrative law judge's findings that the medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and total respiratory disability was established pursuant to Section 718.204(b) overall.[12] Decision and Order at 36-37; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

In light of our affirmance of the administrative law judge's findings that claimant established twenty-five years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's determination that claimant is entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

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

In order to rebut the presumption, employer must establish that claimant does not have either legal or clinical pneumoconiosis,[13] 20 C.F.R. §718.305(d)(1)(i), or that "no

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function studies of record supported their findings on the issue of total disability. *See Clark*, 12 BLR at 1-159. Employer fails, however, to explain how the results of the pulmonary function studies conducted by Drs. Selby and Anderson would change the administrative law judge's decision to credit the opinions of Drs. Houser and Chavda. Employer's Brief at 14-17. Although the administrative law judge could have more fully explained his reasoning, it is clear that he found the doctors' conclusory explanations inadequate.

[12] After considering the pulmonary function study and medical opinion evidence along with the two non-qualifying blood gas studies, the administrative law judge found that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b), based on the preponderance of the relevant evidence. Decision and Order at 35-37.

[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). 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).

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii); 30 U.S.C. §921(c)(4)(2012); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see also Barber v. Director, OWCP*, 43 F.3d 899, 900-901, 19 BLR 2-61, 2-65-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In this case, the administrative law judge found that employer failed to establish rebuttal by either method.

Employer asserts that the administrative law judge erred in finding that the presumption was not rebutted because "the [administrative law judge's] finding of legal [pneumoconiosis] was based on an improper weighing of the evidence[.]" Employer's Brief at 17. Additionally, employer contends that the administrative law judge erred in according diminished weight to the opinion of Dr. Anderson because he "chang[ed] his opinion as to whether legal or clinical [coal worker's pneumoconiosis] was present" when, in fact, "Dr. Anderson was simply reacting to new studies being conducted which revealed [the] reversibility of [c]laimant's condition and the overall weight of the evidence establishing that clinical [pneumoconiosis] was not established." Employer's Brief at 17. In sum, employer argues that the administrative law judge "misinterpreted the evidence, and has penalized Drs. Anderson and Selby for failing to do so." Employer's Brief at 7.

The evidence relevant to rebuttal at 20 C.F.R. §718.305(d)(i)(1)(A), (B) consists of negative x-ray readings, and the opinions of Drs. Selby and Anderson.[14] Addressing the issue of clinical pneumoconiosis, the administrative law judge found that the x-ray evidence was inconclusive as to the presence or absence of clinical pneumoconiosis, because the positive and negative x-ray readings were in equipoise. Decision and Order at 39-40. Turning to the opinions of Drs. Selby and Anderson, the administrative law judge credited Dr. Selby's opinion that claimant does not have clinical pneumoconiosis. Decision and Order at 41. Regarding Dr. Anderson's opinion, the administrative law judge found that it failed to disprove the existence of clinical pneumoconiosis because Dr. Anderson opined on separate occasions, both that claimant had clinical pneumoconiosis and that he did not. Consequently, based on the totality of the x-ray evidence and the opinions of Drs. Selby and Anderson, the administrative law judge concluded that employer failed to carry its burden of disproving the presumed existence

[14] The administrative law judge found that, although the record contains three CT scan interpretations, they did not address the existence or non-existence of clinical pneumoconiosis. The administrative law judge did not, therefore, make any finding regarding the issue of clinical pneumoconiosis based on the CT scan evidence. Decision and Order at 13 n.40. This finding is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Hill*, 123 F.3d at 415, 21 BLR at 2-196; Decision and Order at 41-43.

Next, the administrative law judge rejected Dr. Selby's opinion that claimant does not have legal pneumoconiosis because the doctor failed to recognize that pneumoconiosis may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c); Decision and Order at 41. Additionally, the administrative law judge rejected Dr. Selby's opinion as poorly reasoned because the doctor failed to explain why coal mine dust exposure did not aggravate claimant's respiratory impairment when the doctor "specifically admitted that it was possible." *See* 20 C.F.R. §718.201(b); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 42. As these findings are uncontested on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see* Employer's Brief at 17-18.

In considering Dr. Anderson's opinion that claimant does not have legal pneumoconiosis, the administrative law judge properly rejected it because he found it to be "inconsistent and contradictory" as to the presence of legal pneumoconiosis, namely that Dr. Anderson opined that claimant both suffered from legal pneumoconiosis and that he did not.[15] Although employer argues that Dr. Anderson merely adjusted his opinion based on more recent evidence to say that claimant does not suffer from legal pneumoconiosis, the record does not support that contention. We note that, in his supplemental report of June 18, 2012, Dr. Anderson specifically opined that claimant has legal pneumoconiosis. Decision and Order at 27; Employer Exhibit 5 at 2.[16] The administrative law judge, therefore, permissibly rejected Dr. Anderson's opinion as "inconsistent and contradictory." Decision and Order at 43; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. 30 U.S.C.

[15] We do not address employer's argument that the administrative law judge erred in according less weight to Dr. Anderson's opinion on the issue of legal pneumoconiosis because it was based on an erroneous length of coal mine employment since the administrative law judge provided another valid reason for according less weight to Dr. Anderson's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[16] Dr. Anderson's supplemental report of June 18, 2012 was the latest expression of his opinion on the subject of legal pneumoconiosis. His responses to a questionnaire signed June 26, 2012, related solely to Dr. Meyer's review of a February 17, 2011 x-ray and the existence of clinical pneumoconiosis.

§921(c)(4)(2012); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-4.

Further, as employer has not challenged the administrative law judge's finding that it failed to rebut the presumption of disability causation, that finding is affirmed. *Skrack*, 6 BLR at 1-711. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4)(2012); *Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge