U.S. Department of Labor

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

BRB No. 17-0157 BLA

RUDOLPH SIMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/13/2018
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice, LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2014-BLA-05808) of Administrative Law Judge Carrie Bland, 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 subsequent claim filed on November 5, 2013.[1]

The administrative law judge credited claimant with fourteen and three-quarter years of coal mine employment.[2] Because claimant did not establish at least fifteen years of coal mine employment, the administrative law judge found that claimant could not invoke 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).[3] The administrative law judge further found that the new evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R §725.309. The administrative law judge denied benefits accordingly.

On appeal, claimant contends that the administrative law judge erred in crediting him with less than fifteen years of coal mine employment. Claimant also challenges the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] Claimant therefore contends that the administrative law judge erred in finding that he did not invoke the Section 411(c)(4) presumption or establish a change in the applicable condition of entitlement pursuant to 20

[1] Claimant filed six previous claims for benefits, all of which were finally denied. Director's Exhibits 1-6. Claimant's most recent previous claim, filed on May 13, 2003, was denied by the district director on March 2, 2004, because the evidence did not establish that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 6 at 13 (unpaginated).

[2] Claimant's coal mine employment was in West Virginia. Hearing Transcript at 14; Decision and Order at 4. 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] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

C.F.R §725.309. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

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).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 6. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing total disability.[5]

In weighing the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinion of Dr. Rasmussen that claimant is totally disabled, and the contrary opinions of Drs. Zaldivar and Tuteur that claimant is not totally disabled. Decision and Order at 9-18, 22-24; Director's Exhibit 16; Employer's Exhibits 3-6. Dr. Rasmussen diagnosed a moderate loss of lung function as reflected by claimant's diffusing capacity testing. Director's Exhibit 16. Specifically, he opined that claimant's diffusing capacity was reduced to fifty-one percent of predicted, representing a Class III impairment under the American Medical Association Guides to Impairment, 6th Edition. *Id*. He characterized claimant's resting arterial blood gas study as normal. *Id*. During claimant's exercise blood gas study, Dr. Rasmussen found that claimant was able to achieve an oxygen consumption of only 12.9 ml/kg/min., or 56% of the predicted maximum oxygen uptake, indicating a "Class IV Impairment of [the] Whole Person." *Id.* Dr. Rasmussen opined that the blood gas testing reflected "poor exercise tolerance possibly related to deconditioning and/or cardiovascular disease including inferior earlier anaerobic threshold and increased dead space ventilation." *Id*. Based on

[5] Thus, we need not address the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis. Decision and Order at 19-21. As claimant's previous claim was denied because he did not establish total disability, the existence of pneumoconiosis was not an applicable condition of entitlement in this claim. *See* 20 C.F.R. §725.309(c)(3).

claimant's reduced diffusing capacity, Dr. Rasmussen opined that claimant lacks the pulmonary capacity to perform his usual coal mine employment, which required heavy to very heavy manual labor. *Id*.

Dr. Zaldivar agreed that the diffusing capacity recorded by Dr. Rasmussen was moderately abnormal, but he noted that diffusing capacity testing is used "as a surrogate" for arterial blood gas testing. Employer's Exhibit 5 at 22. Specifically, Dr. Zaldivar explained that if an arterial blood gas study cannot be performed, a low diffusing capacity would raise the possibility that a person has become hypoxic during exercise, as diffusing capacity testing measures an individual's ability to transfer gases across the lungs and into the bloodstream. *Id*. at 22-24. But where blood gas studies have been performed and are normal, Dr. Zaldivar noted that a diffusing capacity test would be "redundant," and a reduced diffusion capacity value would not be "of clinical significance . . . ." *Id*. at 22-23. Dr. Zaldivar noted that here, claimant was able to perform blood gas testing and there was no evidence of any abnormal blood gas levels during exercise. *Id*. 18, 21-24. Because, according to Dr. Zaldivar, blood gas testing "trumps" diffusing capacity testing, and claimant had normal arterial blood gas studies, Dr. Zaldivar opined that the diffusing capacity test was redundant and of "no physiological significance" in this case. *Id*. at 24. He further opined that claimant is not totally disabled by a respiratory or pulmonary impairment, based on his normal pulmonary function and arterial blood gas study results. *Id*. at 29; Employer's Exhibit 3.

Dr. Tuteur opined that a diffusing capacity test is "not a very good test in terms of assessing oxygen transfer in contrast to an arterial blood gas" study. Employer's Exhibit 6 at 22-24, 30. He explained that a diffusing capacity test can give some indication of gas transfer efficiency across the lungs, but that it is not as "accurate, robust, resolute, [or] meaningful as an arterial blood gas analysis." *Id*. at 29-30. Dr. Tuteur further explained that, unless the diffusing capacity value is very low or very high, it is not very helpful. *Id*. He noted that in claimant's case, the improvement of his pO2 with exercise on arterial blood gas testing indicated that there was no impairment of gas exchange. *Id*. at 36. Based on his review of claimant's pulmonary function and arterial blood gas testing, Dr. Tuteur opined that claimant is not totally disabled by a respiratory or pulmonary impairment.[6] *Id*. at 18-19, 37; Employer's Exhibit 4.

[6] Dr. Tuteur concluded that claimant has "luxurious breathing reserve," along with "excellent oxygen gas exchange at the level of the alveolar/blood interface, and . . . no indication [of] poor utilization of oxygen at the tissue level." Employer's Exhibit 6 at 17. He opined that claimant did not "get oxygen to the tissues [during exercise] because the heart wasn't beating fast enough." *Id*.

The administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Tuteur than to that of Dr. Rasmussen, because she found their opinions to be better reasoned and explained and, therefore, more persuasive. Decision and Order at 24. In contrast, she found that Dr. Rasmussen did not adequately explain why claimant's reduced diffusion capacity result indicated that claimant is totally disabled, in light of claimant's normal blood gas studies and pulmonary function studies. She further found that Dr. Rasmussen did not discuss the significance of claimant's normal oxygen transfer as measured on his blood gas studies. The administrative law judge therefore found that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that the administrative law judge failed to provide valid reasons for her weighing of the conflicting medical opinions, and did not adequately explain her analysis. Claimant's Brief at 12-14. We disagree.

Contrary to claimant's contention, the administrative law judge permissibly found that the opinions of Drs. Zaldivar and Tuteur were "well-reasoned," as they "persuasively explain[ed] why Dr. Rasmussen's reliance on [claimant's] abnormal [diffusing] capacity, in the face of consistently normal pulmonary function and arterial blood gas study results, was misplaced" in this case. Decision and Order at 24; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310, 25 BLR 2-115, 2-122 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997). The administrative law judge also permissibly found that Dr. Rasmussen did not adequately explain why claimant's "lowered [diffusing] capacity, along with normal spirometry and arterial blood gas test results, indicated that he ha[s] a disabling respiratory impairment, or discuss the significance of [claimant's] normal oxygen transfer, as reflected in his arterial blood gas studies."[7] *Id*.

[7] Claimant argues that the administrative law judge focused on claimant's blood gas studies, but failed to recognize that Dr. Rasmussen also identified a reduced oxygen consumption in support of his opinion that claimant is totally disabled. Claimant's Brief at 12-13. This argument lacks merit. Dr. Rasmussen specified that claimant is totally disabled "[b]ased on [his] reduced diffusing capacity . . . ." Director's Exhibit 16 at 41 (unpaginated). Moreover, Dr. Rasmussen opined that claimant's oxygen consumption measurement reflected a "Class IV Impairment of [the] *Whole Person*." Director's Exhibit 16 (emphasis added). The question before the administrative law judge was whether claimant "has a pulmonary or respiratory impairment which, standing alone," prevents him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(1); *see Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991)(holding that "non-respiratory and non-

Claimant argues that the administrative law judge erred in discounting Dr. Rasmussen's opinion, because the United States Court of Appeals for the Fourth Circuit has "upheld Dr. Rasmussen's reliance" on a diffusion capacity study. Claimant's Brief at 13-14, *citing Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991). We disagree. In *Walker*, the Fourth Circuit held that an administrative law judge "erred as a matter of law" in discrediting Dr. Rasmussen's diagnosis of total disability merely because the diffusion capacity test that Dr. Rasmussen relied upon was not among the tests listed in the regulations. *Walker*, 927 F.2d at 184-85, 15 BLR at 2-23-24. The court, however, declined to "suggest what weight a fact finder should give" a medical opinion that is based on a diffusion capacity test, and instructed the administrative law judge, on remand, to weigh Dr. Rasmussen's opinion together with all the relevant evidence. *Id.* at 184-85, 15 BLR at 2-24-25.

In this case, the administrative law judge did not discredit Dr. Rasmussen's opinion because he relied on a diffusion capacity test; she weighed his opinion against the contrary opinions of Drs. Zaldivar and Tuteur, and found that they "persuasively explain[ed]" why Dr. Rasmussen's reliance on the diffusion capacity testing was "misplaced" on the facts of this case. Decision and Order at 24; *see Walker*, 927 F.2d at 184-85, 15 BLR at 2-23-24. The Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the administrative law judge's permissible decision to credit the opinions of Drs. Zaldivar and Tuteur over that of Dr. Rasmussen.[8] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[9]

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pulmonary impairments have no bearing on establishing total disability"). Therefore, the administrative law judge did not err in focusing on whether Dr. Rasmussen adequately explained his opinion that claimant is totally disabled by a respiratory impairment reflected on a diffusion capacity test, in light of the other evidence of record. *Id.*

[8] Claimant argues that the administrative law judge failed to adequately consider Dr. Rasmussen's qualifications. Claimant's Brief at 13-14. Contrary to claimant's argument, the administrative law judge was not required to defer to Dr. Rasmussen's qualifications, as she found that Dr. Rasmussen's opinion was not sufficiently explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998).

[9] Because the administrative law judge provided valid reasons for discrediting Dr. Rasmussen's opinion, which we have affirmed, we need not address claimant's remaining

In light of our affirmance of the administrative law judge's finding that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determinations that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[10] *See* 20 C.F.R. §718.305(b), (c)(1); *White*, 23 BLR at 1-3.

arguments regarding the weight the administrative law judge accorded Dr. Rasmussen's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[10] By Order dated July 25, 2017, the Board denied claimant's motion to withdraw his appeal and stated that it would address the administrative law judge's finding regarding the length of claimant's coal mine employment in its Decision and Order. After review of the case, however, the Board concludes that claimant's failure to establish total disability precludes invocation of the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4). Therefore, we need not address claimant's contention that the administrative law judge erred in crediting claimant with less than fifteen years of coal mine employment, as any error by the administrative law judge in that finding would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge