U.S. Department of Labor

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

BRB No. 17-0313 BLA

RALPH E. ENGLISH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/22/2018
PITTSBURG & MIDWAY COAL MINING	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05542) of Administrative Law Judge Jonathan C. Calianos 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 claim filed on May 12, 2011.

After crediting claimant with twenty-three years of qualifying coal mine employment,[1] the administrative law judge found 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 invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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,

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because employer does not challenge the administrative law judge's finding that claimant had twenty-three years of qualifying coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 – Total Disability

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] The administrative law judge considered the medical opinions of Drs. Chavda, Houser, Repsher, and Jarboe. Decision and Order at 9. While Drs. Chavda and Houser opined that claimant suffers from a disabling pulmonary impairment,[5] Drs. Repsher and Jarboe opined that claimant is not disabled from a pulmonary standpoint.[6]

Before addressing the conflicting medical opinion evidence, the administrative law judge considered the exertional requirements of claimant's usual coal mine work:

> Claimant testified [that] his work as general inside laborer required shoveling around the belt line which required lifting 15-20 pounds of coal per shovel, lifting and moving 40 to 50 pounds of cable, walking [for] two to three miles along the belt line, and building brattices which required lifting concrete blocks weighing about 40 pounds. Claimant also worked as a roof bolter which required lifting and carrying 25[-]pound bundles of roof bolts and drilling holes overhead. This job also required walking two miles a day. Claimant performed this work in 42 [inch] coal seams and, thus, he worked slumped over as he is six feet tall. Claimant also worked as a shuttle car operator and as a tipple mechanic. As a tipple mechanic he lifted come-

[4] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 6-8. Moreover, because the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[5] Dr. Chavda opined that claimant is totally disabled from a pulmonary standpoint, and is unable to perform his last coal mine employment. Director's Exhibit 11 at 9, 36; Employer's Exhibit 2 at 36. Dr. Houser opined that claimant has a disabling respiratory impairment that would physically preclude him from performing his last coal mine employment. Claimant's Exhibit 5 at 2.

[6] Dr. Repsher opined that claimant has no pulmonary impairment. Employer's Exhibit 1 at 4. Dr. Jarboe opined that claimant retains the pulmonary functional capacity to perform his last coal mining job. Employer's Exhibit 10 at 15.

> alongs which weighed 25 to 30 pounds and he shoveled coal around the belt which require[d] lifting 15-20 pound[s] of coal per shovel. Claimant's testimony is credible and clearly establishes his work in coal mine employment required heavy and arduous labor.

Decision and Order at 9 (citations omitted).

Employer argues that the administrative law judge erred in crediting claimant's testimony with respect to the exertional requirements of his usual coal mine employment, because claimant "lied . . . under oath about his smoking history and its duration." Employer's Brief at 17. We disagree. The administrative law judge, in his role as fact-finder, evaluates the credibility of the evidence of record, including witness testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge permissibly determined that claimant's unrefuted testimony[7] established that his usual coal mine employment required heavy and arduous labor. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's usual coal mine employment involved "heavy and arduous labor." Decision and Order at 9.

Having found that claimant's usual coal mine employment required heavy labor, the administrative law judge considered the conflicting medical opinion evidence. He accorded less weight to Dr. Repsher's opinion, because he found that the doctor incorrectly stated that none of the pulmonary function studies of record were interpretable, due to poor effort. Decision and Order at 15. The administrative law judge next credited the opinions of Drs. Chavda and Houser over that of Dr. Jarboe, because they accounted for the exertional requirements of claimant's usual coal mine work in opining that claimant suffers from a totally disabling respiratory impairment. *Id.* at 15-16. The administrative law judge therefore concluded that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 16.

Employer contends that the administrative law judge erred in his consideration of Dr. Repsher's opinion. Employer's Brief at 18. We disagree. After noting that claimant's pulmonary function studies "show moderately severe restrictive disease with moderately severe loss of diffusing capacity," Dr. Repsher opined that none of claimant's pulmonary

[7] Employer does not cite to any contrary evidence which would undermine claimant's description of his previous coal mine employment.

function studies were interpretable, "due to [claimant's] very poor effort and cooperation with the testing procedures." Employer's Exhibit 1 at 3.

The administrative law judge questioned the basis for Dr. Repsher's conclusion. First, the administrative law judge found that Dr. Repsher failed to adequately explain why he determined that claimant provided poor effort during the pulmonary function study associated with his own examination, given that the technician who administered the June 19, 2012 study commented that claimant's effort was good, and because the report itself did not indicate that any of the reported values were outside of the confidence level. Decision and Order at 15. Second, the administrative law judge accurately noted that Dr. Repsher "did not identify specific changes on the tracings of the studies conducted by other physicians to support his conclusion that [c]laimant's effort was poor."[8] *Id*. Because the administrative law judge found that Dr. Repsher failed to adequately explain why he concluded that claimant provided poor effort on all the pulmonary function studies, the administrative law judge permissibly accorded his opinion less weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer also argues that the administrative law judge erred in determining that the opinions of Drs. Chavda and Houser were sufficiently reasoned to support a finding of a totally disabling pulmonary impairment. Employer's Brief at 19-20. Dr. Chavda interpreted claimant's July 27, 2011 pulmonary function study results as showing moderate

[8] Dr. Repsher stated that Dr. Chavda's pulmonary function studies were "uninterpretable due to very poor effort and cooperation during the testing procedures, as demonstrated by the chaotic tracings." Employer's Exhibit 1 at 1. Dr. Chavda, who examined claimant on behalf of the Department of Labor, administered two pulmonary function studies in connection with that examination. The first, dated May 31, 2011, was invalidated upon review of the tracings by Dr. Gaziano. Director's Exhibit 11 at 20. Based upon Dr. Gaziano's invalidation, the administrative law judge accorded "no weight" to Dr. Chavda's initial May 31, 2011 pulmonary function study. Decision and Order at 7. Dr. Chavda, however, conducted a second pulmonary function study on July 27, 2011. Director's Exhibit 11 at 16. As noted by the administrative law judge, Dr. Repsher did not identify any specific changes on the tracings from that study to support his general conclusion that they were "chaotic" and revealed poor effort. Decision and Order at 15. Moreover, there is no indication that Dr. Repsher reviewed the April 24, 2012 pulmonary function study conducted by Dr. Houser. Claimant's Exhibit 6. Dr. Repsher also did not review the results of an additional pulmonary function study, administered by Dr. Chavda on April 1, 2014, after Dr. Repsher's examination. Claimant's Exhibit 4.

obstructive airway disease. Director's Exhibit 11 at 9. Based upon the results of this study, Dr. Chavda opined that claimant is totally disabled from a pulmonary standpoint:

> [Based on the results of the July 27, 2011 pulmonary function study], I could say that [claimant] does not have enough lung capacity to work in the coal mines. Even though [the study] does not meet federal disability criteria, an FEV1 of less than 2 liters means significant reduction in lung function. [Claimant] had worked in the coal mines . . . and his jobs included car driver, pinner, and work on the belt. This requires significant exertion, pushing, pulling, [and] lifting weight. [Claimant] would not be able to do that job.

Director's Exhibit 11 at 9.

Dr. Houser also opined that claimant's pulmonary function study results support a finding of a totally disabling pulmonary impairment. Dr. Houser interpreted the results of claimant's April 24, 2012 pulmonary function study as showing "evidence of moderate restrictive and mild obstructive ventilatory impairment." Claimant's Exhibit 5 at 2. Based upon the results of this study, Dr. Houser opined that claimant has a "disabling respiratory impairment which would physically preclude him from performing his last [coal mine employment]."[9] *Id.*

Employer argues that the administrative law judge erred in relying upon the opinions of Drs. Chavda and Houser because they based their opinions on non-qualifying pulmonary function study results.[10] Employer's Brief at 19-20. We disagree. Contrary to employer's argument, a claimant may establish total disability with reasoned medical opinion evidence, even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [and] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, despite non-qualifying objective studies. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000).

[9] Dr. Houser noted that the physical demands of claimant's last coal mine employment "involved lifting up to 75 pounds occasionally and various parts and pieces of metal that weighed up to this amount on a frequent basis." Claimant's Exhibit 5 at 2.

[10] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Moreover, the determination of whether a medical opinion is adequately reasoned is committed to the administrative law judge. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge specifically found that Drs. Chavda and Houser set forth the rationale for their findings, based on their interpretation of the medical evidence of record, and explained why they concluded that claimant is unable to perform the duties of his usual coal mine work. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore affirm the administrative law judge's finding that the opinions of Drs. Chavda and Houser are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge also permissibly accorded less weight to Dr. Jarboe's opinion because, unlike Drs. Chavda and Houser, he did not address the significance of claimant's objective test results in light of the specific exertional requirements of claimant's usual coal mine work. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 15-16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *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); Decision and Order at 16. Because employer does not allege any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In light of our affirmance of the administrative law judge's findings that claimant established twenty-three 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 finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor

clinical pneumoconiosis,[11] 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.

In determining whether employer established that claimant does not have legal pneumoconiosis,[12] the administrative law judge considered the medical opinions of Drs. Repsher and Jarboe.[13] Decision and Order at 22-23. Both doctors opined that claimant does not suffer from legal pneumoconiosis, but the administrative law judge found that neither opinion was adequately reasoned. Decision and Order at 23; Employer's Exhibits 1, 10. He therefore found that employer failed to establish that claimant does not have legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Jarboe. Employer's Brief at 13-14. We disagree. Dr. Repsher opined that claimant has no pulmonary impairment (and therefore no impairment arising out of his coal mine dust exposure) based on his view that the record contains no pulmonary function studies constituting a valid measure of impairment. Employer's Exhibit 1. Because Dr. Repsher relied on a premise that was contrary to the administrative law judge's finding, the administrative law judge permissibly found that the doctor's opinion was not sufficiently credible to rebut the presumed fact that claimant has legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 22.

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[11] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[12] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 22.

[13] Drs. Chavda and Houser diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11 at 37; Claimant's Exhibit 5 at 2-3.

Although Dr. Jarboe diagnosed chronic bronchitis, he indicated that the condition "will generally resolve after withdrawal from [coal mine] dust exposure . . . ." Employer's Exhibit 10 at 14. Because claimant left the coal mines fifteen years ago, Dr. Jarboe excluded coal mine dust exposure as a contributing factor to claimant's chronic bronchitis, and attributed the condition to his cigarette smoking history. *Id*. The administrative law judge permissibly discredited Dr. Jarboe's reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[14] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 23.

As the administrative law judge permissibly discredited the opinions of Drs. Repsher and Jarboe, the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23-24. The administrative law judge rationally discounted the disability causation opinions of Drs. Repsher and Jarboe because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d

[14] Because we affirm the administrative law judge's decision to discredit Dr. Jarboe's opinion for the reason set forth above, we need not address employer's additional challenges to the administrative law judge's analysis of this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Furthermore, as the administrative law judge did not discredit Dr. Jarboe's opinion because he relied on an inflated smoking history, we need not address employer's argument that the administrative law judge did not accurately determine the length of claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 24. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge