U.S. Department of Labor

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

BRB No. 18-0240 BLA

KEITH L. CLEGG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEW WARWICK MINING COMPANY	)	
	)	
and	)	
	)	
THE FIRE & CASUALTY COMPANY OF CONNECTICUT	)	DATE ISSUED: 03/29/2019
	)	
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

James M. Poerio (Poerio & Walter, Inc.) Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-5716) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on December 1, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established twenty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[1] He further found that employer failed to rebut the presumption and awarded benefits.

Employer contends that the administrative law judge erred in finding that claimant is totally disabled and that employer did not rebut the presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Under Section 411(c)(4) of the Act, 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty years of underground coal mine employment. *See Skrack v. v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 5.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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 and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability may be established by pulmonary function studies, 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). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three pulmonary function studies. A study obtained by Dr. Allen on June 7, 2016 was qualifying[4] before and after use of a bronchodilator. Director's Exhibit 13. Two subsequent studies, one by Dr. Fino on October 26, 2016, and one by Dr. Saludes on August 30, 2017, are non-qualifying for total disability before and after use of a bronchodilator. Director's Exhibit 21; Claimant's Exhibit 3. The administrative law judge found that "[a]s . . . the majority and more recent studies" are non-qualifying, claimant did not establish total disability under this subsection. Decision and Order at 12. He also found that none of the blood gas studies is qualifying at 20 C.F.R. §718.204(b)(2)(ii), and there is no evidence to establish that claimant has cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). *Id.*; Director's Exhibits 13, 21; Claimant's Exhibit 1.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Allen, Saludes, and Fino. Dr. Allen performed the Department of Labor (DOL) examination of claimant on June 6, 2016. Director's Exhibit 13. She opined that claimant has severe obstruction, based on a "decreased FEV1" of "55% of predicted" and "poor oxygenation" as shown by the blood gas study. *Id*. She diagnosed chronic obstructive pulmonary disease (COPD) and opined that claimant is "disabled from his last coal mine job of roofbolting and beltman due to his pulmonary conditions." *Id*.

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

Dr. Fino examined claimant on October 26, 2016. Director's Exhibit 21. He indicated that claimant's pulmonary function study showed a mild obstructive defect with "complete reversibility" after bronchodilators were administered. *Id*. Dr. Fino diagnosed asthma because "[r]eversibilty from abnormal to normal is not consistent with a dust-related condition." *Id*. He also noted that "improvement in four months" between Dr. Allen's examination and his own examination "is also not consistent with a coal-dust related pulmonary condition." *Id*. Dr. Fino opined that claimant is not totally disabled based on the objective test results.[5]

Dr. Saludes examined claimant on August 30, 2017, and indicated that the pulmonary function study showed an "FEV1/FVC ratio of 54[percent]." Claimant's Exhibit 2. He stated that claimant's "pulmonary impairment would be estimated to be at 40 to 50 [percent]" but did not specifically address whether claimant could return to his usual coal mine work. *Id*.

The administrative law judge observed that while "[c]laimant's test results do not meet [DOL] disability levels" the medical opinions show that he has a respiratory or pulmonary impairment. Decision and Order at 16. He found that the opinions of Drs. Allen and Saludes "are the best supported by the diagnostic testing data" and are sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer generally contends that the administrative law judge erred in finding that claimant is totally disabled because a preponderance of the pulmonary function studies are non-qualifying. Employer's Brief at 19. This argument lacks merit. The regulations specifically provide that even where the pulmonary function studies and blood gas studies are non-qualifying, "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents . . . [him] from" performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv).

Employer also contends that the administrative law judge erred in finding Dr. Allen's opinion better supported by the objective evidence since claimant's post-bronchodilator pulmonary function study values are either normal or show "statistically significant improvement." Employer's Brief at 17. We disagree. Contrary to employer's assertion, the administrative law judge was not required to evaluate the credibility of the

[5] Dr. Fino acknowledged that claimant is totally disabled based on the results of Dr. Allen's pulmonary function studies. He also conceded that because claimant was on medication at the time of his own examination, claimant's "pre-bronchodilator study [with Dr. Allen] may have not been as high as I got it . . . ." Employer's Exhibit 6 at 12.

medical opinions based on claimant's post-bronchodilator results. The DOL has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "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. 13,678, 13,682 (Feb. 29, 1980). Because employer does not identify any other specific error by the administrative law judge in crediting Dr. Allen's opinion, we affirm his finding that Dr. Allen's opinion is reasoned and supported by the objective evidence.[6] 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

We also reject employer's contention that the administrative law judge erred in not crediting Dr. Fino's opinion based on his superior qualifications. As employer acknowledges in its brief, the administrative law judge is not required to give greater weight to a physician based on his qualifications. *See Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Employer's Brief at 16. As the trier-of-fact, the administrative law judge has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Employer's general assertion that Dr. Fino's opinion is the most credible amounts to a request that the Board reweigh the evidence, which we are not empowered to do.[7] *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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the administrative law judge's determination that claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's overall

[6] Because we affirm the administrative law judge's reliance on Dr. Allen's opinion to establish total disability, we need not address employer's arguments with regard to Dr. Saludes. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Additionally, employer notes that the administrative law judge did not consider claimant's treatment records, Employer's Brief at 6, but does not explain how this alleged error affected his finding on total disability. *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").

determination that claimant is totally disabled 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, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[8] 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); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that because claimant established clinical pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) was precluded. Relevant to rebuttal of causation at 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge described the sole issue as whether employer rebutted "the presumption that [c]laimant's legal coal workers' pneumoconiosis is a 'substantially contributing cause' of his total pulmonary impairments."[9] Decision and Order at 19. He found that Dr. Fino's opinion is not sufficiently reasoned and therefore does not satisfy employer's burden to rebut the presumption.

Employer's sole argument is that the administrative law judge mischaracterized Dr. Fino's opinion in finding that he expressed views on asthma that conflict with the preamble

[8] 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).

[9] Although employer did not identify this error in its brief, we note that the administrative law judge misstated the legal standard for rebutting the Section 411(c)(4) presumption. Decision and Order at 19. We need not remand this case for further consideration under the correct rebuttal standard, however, as the administrative law judge permissibly found Dr. Fino's opinion not well-reasoned and, therefore, insufficient to satisfy employer's burden of proof even if the correct rebuttal standard is applied. Moreover, the administrative law judge's incorrect "substantially contributing cause" standard for rebuttal of causation is less demanding than the correct "no part" standard he should have applied. Any error in the use of the incorrect standard thus is harmless. *See Larioni*, 6 BLR at 1-1278.

to the 2001 regulatory revisions. Employer's Brief at 19-20. Contrary to employer's contention, the administrative law judge permissibly found his opinion unpersuasive in light of the medical science credited by the DOL in the preamble. Dr. Fino diagnosed asthma and stated that it "is neither caused, nor aggravated, by coal dust." Employer's Exhibit 7 at 2. He excluded a diagnosis of legal pneumoconiosis because claimant's pulmonary function studies evidence partial or complete reversibility of the obstructive impairment after bronchodilators, which he opined is consistent with a diagnosis of asthma. *Id*. The administrative law judge correctly noted, however, that in the preamble the DOL recognized that COPD includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). It further set forth that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. Because the administrative law judge permissibly found that Dr. Fino's opinion is not sufficiently reasoned regarding the etiology of claimant's disabling respiratory impairment, we affirm his finding that employer did not rebut the Section 411(c)(4) presumption.[10] 20 C.F.R. §718.305(d)(1)(i), (ii); *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163.

[10] Because employer has the burden of proof on rebuttal and we affirm the administrative law judge's discrediting of Dr. Fino's opinion, the only opinion supportive of that burden, we need not address employer's arguments regarding the weight accorded the opinions of Drs. Allen and Saludes. *See Larioni*, 6 BLR at 1-1278.

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