U.S. Department of Labor

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

BRB No. 16-0336 BLA

FLEMON E. SALMONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL, LLC	)	
	)	DATE ISSUED: 05/03/2017
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-5003) of Administrative Law Judge Richard A. Morgan 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 miner's subsequent claim[1] filed on November 18, 2011.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge found that the claim was timely filed, and accepted the stipulation of the parties that claimant had twenty-five years of underground coal mine employment. The administrative law judge 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), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[3] and entitling claimant to invoke 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 this subsequent claim was timely filed. Alternatively, employer asserts that the administrative law judge erred in finding total disability established at 20 C.F.R. §718.204(b)(2), and thus erred in finding that claimant invoked the Section 411(c)(4)

[1] The record reflects that claimant's initial claim for benefits, filed on February 9, 2001, was denied by the district director, who subsequently was unable to locate the claim file. Director's Exhibit 1; Decision and Order at 2. Claimant's second claim, filed on September 2, 2008, was withdrawn by claimant and, therefore, is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2; Decision and Order at 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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); *see* 20 C.F.R. §718.305.

[3] Where a miner 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).

presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response urging the Board to affirm the administrative law judge's finding that this claim was timely filed.[4]

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.[5] 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).

Timeliness of Claim

Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). To rebut the presumption that the claim is timely filed, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), (c). A medical determination of total disability due to pneumoconiosis predating a denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594, 25 BLR 2-273, 2-279-80 (6th Cir. 2013); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006).

The administrative law judge acknowledged claimant's testimony that he had been diagnosed as totally disabled by pneumoconiosis "around 1999 or 2000" by the physician who examined him for his Social Security disability claim. Decision and Order at 4; Employer's Exhibit 2 at 15; Hearing Transcript at 25-26. Noting that claimant's first claim for benefits was timely filed on February 9, 2001 and was denied for failure to

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

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 13.

establish that claimant was totally disabled due to pneumoconiosis, the administrative law judge found that any medical determination of total disability due to pneumoconiosis prior to the denial of the 2001 claim was a misdiagnosis. Finding that there is no evidence that a communication of total disability due to pneumoconiosis was received by claimant subsequent to the denial of his 2001 claim, the administrative law judge concluded that the current claim was timely filed. Decision and Order at 4.

Employer contends that the administrative law judge erred in finding that the current claim was timely filed in light of claimant's testimony that he was first diagnosed as totally disabled due to pneumoconiosis in 1999 or 2000, more than three years prior to the filing of this subsequent claim,. Employer's Brief at 6. We disagree.

In a subsequent claim, the prior denial must be accepted as both final and correct. *Hatfield*, 556 F.3d at 483**,** 24 BLR at 2-153; *Williams*, 453 F.3d at 616, 23 BLR at 2-361; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-222 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Thus, a medical determination of total disability due to pneumoconiosis predating a denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *See Brigance*, 718 F.3d at 594, 25 BLR at 2-279-80; *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54. The administrative law judge properly found that the intervening final denial of claimant's first claim, on the grounds that claimant was not totally disabled due to pneumoconiosis, must be considered final and correct, and necessarily repudiates the physician's opinion upon which employer relies. *Id.*; Decision and Order at 4. Consequently, we affirm the administrative law judge's determination that the current claim was timely filed.

Invocation of the Section 411(c)(4) Presumption – Total Disability

Employer argues that the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence in finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

A. Pulmonary Function Studies at Section 718.204(b)(2)(i)

The administrative law judge considered the results of pulmonary function studies dated February 27, 2012 and March 7, 2012.[6] Decision and Order at 8-9; Director's

[6] The administrative law judge also considered a 2008 pulmonary function study developed by Dr. Zaldivar in connection with claimant's withdrawn claim that was not

Exhibits 12, 13. The administrative law judge determined that the February 27, 2012 study administered by Dr. Zaldivar and the March 7, 2012 study administered by Dr. Rasmussen produced qualifying values[7] both pre-bronchodilation and post-bronchodilation.[8] Decision and Order at 8-9; 23; Director's Exhibits 12, 13.

Employer contends that the administrative law judge mischaracterized the pulmonary function study results as qualifying for total disability. Employer asserts that the FEV_1 is the only measurement below the applicable table values listed in Appendix B to 20 C.F.R. Part 718. Employer's Brief at 6-7. Employer's argument lacks merit.

A pulmonary function study is determined to be qualifying for total disability if it yields an FEV_1 value that is qualifying "for an individual of the miner's age, sex, and height," *and* also yields either an FVC or an MVV value that is qualifying, or an FEV_1/FVC ratio of 55 percent or less. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge correctly observed that the FEV_1/FVC ratios for Dr. Zaldivar's study yielded values of 43% pre-bronchodilation and 47% post-bronchodilation, and Dr. Rasmussen's study yielded values of 47% and 46%, respectively. Because both studies yielded qualifying FEV_1 values for claimant's height and age and yielded FEV_1/FVC ratios of less than 55%, we affirm the administrative law judge's determination that all of the pulmonary function study results are qualifying pursuant to 20 C.F.R. §718.204(b)(2)(i).[9] Decision and Order at 8-9; 23.

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admitted into the record. Hearing Transcript at 30-31; *see* 20 C.F.R. §§725.306, 725.414. Any error in the administrative law judge's consideration of this pulmonary function study is harmless, however, as the study was invalidated by Drs. Zaldivar and Sood, and was accorded little weight by the administrative law judge. Decision and Order at 8, 23; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[7] A "qualifying" pulmonary function study or 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height for purposes of the studies was 69 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 9 n.14.

[9] Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the only qualifying blood gas study, conducted by Dr. Rasmussen on March 7, 2012, was invalidated by Dr. Vuskovich. Decision and Order at 23; Director's Exhibit 12;

B. Medical Opinions at Section 718.204(b)(2)(iv)

The administrative law judge considered the medical opinions of Drs. Sood, Rasmussen, Cohen, Vuskovich and Zaldivar. Decision and Order at 11-18; Director's Exhibits 12, 13; Employer's Exhibits 3, 4, 5; Claimant's Exhibits 1, 2. Drs. Sood, Rasmussen, Cohen, and Vuskovich all opined that claimant is totally disabled, as demonstrated by his pulmonary function studies, and Dr. Zaldivar did not offer an opinion as to whether claimant has a totally disabling respiratory or pulmonary impairment.[10] Decision and Order at 14, 24-25. The administrative law judge found that Dr. Zaldivar's opinion was not probative on the issue of total disability and that the opinions of Drs. Sood,[11] Rasmussen,[12] and Cohen[13] were well-reasoned, well-documented, and supported by the opinion of Dr. Vuskovich.[14] *Id*.

Employer's Exhibit 3. At 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge determined that a diagnosis of cor pulmonale with right-side congestive heart failure is unsupported by the evidence. Decision and Order at 23.

[10] Dr. Zaldivar examined claimant on February 27, 2012 and provided supplemental reports dated November 9, 2015 and February 18, 2016. He diagnosed a moderate irreversible airway obstruction, but did not address whether claimant is totally disabled or whether he has the respiratory capacity to return to his usual coal mine employment. Director's Exhibit 13; Employer's Exhibits 4, 5.

[11] On October 19, 2015, Dr. Sood performed a medical records review and observed that claimant's pulmonary function study results met the federal guidelines for total pulmonary disability. He opined that claimant's chronic obstructive pulmonary disease is totally disabling and that he could no longer do his last mining job because of his pulmonary impairment. Claimant's Exhibit 2 at 11.

[12] Dr. Rasmussen performed the Department of Labor examination on March 7, 2012. He diagnosed a severe, irreversible obstructive ventilatory impairment and opined that claimant does not retain the pulmonary capacity to perform his regular coal mine employment. Director's Exhibit 12.

[13] In his deposition on November 11, 2015, Dr. Cohen opined that claimant is totally disabled due to his severe obstructive lung disease and mild to moderate diffusion impairment. Claimant's Exhibit 1 at 41.

[14] On June 8, 2012, Dr. Vuskovich performed a medical records review and opined that claimant has a moderate obstructive impairment and did not have the pulmonary

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Sood and Rasmussen to find that claimant is totally disabled, arguing that the opinions are neither well-reasoned nor supported by the objective evidence.[15] With respect to Dr. Sood's opinion, employer asserts that the physician relied solely on Dr. Rasmussen's March 7, 2012 pulmonary function study and did not consider claimant's prior treatment for tuberculosis,[16] his normal total lung capacity, and his non-qualifying blood gas study results. Employer's Brief at 8-9.

Contrary to employer's arguments, the administrative law judge determined that Dr. Sood provided a records review that included the results of pulmonary function studies and blood gas studies conducted by Drs. Rasmussen and Zaldivar. Dr. Sood also reviewed claimant's lung volume testing and determined that claimant's total lung capacity demonstrated air trapping, consistent with a diagnosis of chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 2 at 5. The administrative law judge noted that Dr. Sood considered each of the objective tests and that he based his assessment of disability on the exertional requirements of claimant's coal mine employment and the valid, qualifying pulmonary function study results. Decision and Order at 15-16; Claimant's Exhibit 2. To the extent employer argues that claimant's non-qualifying exercise blood gas study results show that he is not totally disabled, we reject

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capacity to perform coal mine work or similar work in a dust-free environment. Employer's Exhibit 3 at 27.

[15] Employer also asserts that Dr. Zaldivar's 2008 opinion supports a finding that claimant is not totally disabled. Employer's Brief at 7. We reject employer's assertion, as Dr. Zaldivar's December 27, 2008 report was developed in connection with claimant's withdrawn claim and was not submitted into evidence by either party pursuant to 20 C.F.R. §725.414. *See* 20 C.F.R. §725.306; *Clevenger v. Mary Helen Coal Co*., 22 BLR 1-193, 197 (2002) (en banc); *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 188 (2002) (en banc).

[16] The proper inquiry under each subsection of 20 C.F.R. §718.204(b)(2) is whether claimant has established a totally disabling respiratory or pulmonary impairment. The cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption has been rebutted by proving that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii). We note, however, that Dr. Sood specifically considered claimant's comorbidities of chronic obstructive pulmonary disease, polyarthritis, hypertension, possible tuberculosis with treatment in 2008 and history of pneumonia. Claimant's Exhibit 2 at 3.

that assertion, as pulmonary function studies and blood gas studies measure different types of impairment.[17] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993). Thus, the administrative law judge permissibly concluded that Dr. Sood's opinion was well-reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

With respect to Dr. Rasmussen's opinion that claimant lacks the pulmonary capacity to perform his usual coal mine employment, employer asserts that the opinion is unsupported by the objective evidence as claimant's total lung capacity was measured as normal with minimally increased residual volume. Employer's Brief at 9-10. We disagree. The significance of clinical test results is a medical assessment for the physician to make. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Dr. Rasmussen specifically referenced the results of claimant's clinical studies, determining that:

> Ventilatory function studies revealed severe, irreversible obstructive ventilatory impairment. Total lung capacity was normal. Residual volume was minimally increased. The single breath carbon monoxide diffusing capacity was minimally reduced.

Director's Exhibit 12 at 3. In crediting Dr. Rasmussen's opinion that claimant is totally disabled, the administrative law judge determined that Dr. Rasmussen examined the miner and based his opinion on claimant's symptoms, the exertional requirements of claimant's coal mine employment, medical history, pulmonary function testing, and blood gas testing. Decision and Order at 13, 24.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). The determination of whether a medical opinion is documented and reasoned is for the administrative law judge, and we may not substitute our judgment. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the

[17] The Sixth Circuit has held that a claimant may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the underlying objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000).

opinions of Drs. Sood and Rasmussen are sufficiently reasoned to support a finding of total disability. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields*, 10 BLR at 1-22.

Because employer raises no other specific allegation of error with regard to the administrative law judge's weighing of the medical opinion evidence, we affirm his finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm the administrative law judge's determination that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) based on his consideration of all of the evidence. *See Fields*, 10 BLR at 1-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986). Thus, we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 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,[18] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer generally contends that "it was inappropriate of the [administrative law judge] to discredit the opinion of Dr. Zaldivar." Employer's Brief at 10. Employer asserts that because Dr. Zaldivar "adequately and sufficiently explained his diagnoses, findings and reasoning for such findings," his opinion is well-reasoned and establishes

[18] "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).

rebuttal of the Section 411(c)(4) presumption. *Id.* Employer, however, has not identified any specific error of law or fact in the administrative law judge's weighing of the evidence relevant to rebuttal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a). Because employer provides the Board with no basis upon which to review the administrative law judge's rebuttal findings, we affirm the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits. Decision and Order at 31-36; *see* 20 C.F.R. §718.305(d)(1)(i), (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