U.S. Department of Labor

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

BRB No. 16-0111 BLA

JAMES E. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	
	)	DATE ISSUED: 11/28/2016
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 of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-05942) of Administrative Law Judge Dana Rosen 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 subsequent claim filed on July 28, 2011.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with thirty-one years of qualifying coal mine employment,[3] and 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). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues 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 argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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[1] Claimant filed two prior claims on October 14, 1993, and November 21, 2003. Director's Exhibits 1, 2. Claimant's 2003 claim was finally denied because claimant failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 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 claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 7. 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 (1989) (en banc).

[4] Because the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

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

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).

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

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).[6] The administrative law judge considered the medical opinions of Drs. Splan, Klayton, Fino, and Rosenberg. The administrative law judge also considered medical treatment records from Drs. Robinette and Mitchell. While Drs. Splan, Klayton, Fino, Robinette, and Mitchell each opined that claimant suffers from a disabling pulmonary impairment,[7] Dr. Rosenberg opined that claimant is not disabled from a pulmonary standpoint. Employer's Exhibits 2 at 20, 4 at 16.

The administrative law judge accorded "little weight" to Dr. Rosenberg's opinion because she found that it was "contradictory and not well reasoned." Decision and Order at 34-35. By contrast, the administrative law judge found that the opinions of Drs. Splan, Klayton, and Fino were entitled to "significant weight." *Id.* at 35. The administrative law judge also found that the opinions of Drs. Robinette and Mitchell were entitled to "significant weight," noting that Drs. Robinette and Mitchell were "treating physicians who examined [c]laimant numerous times over a long period of time." *Id.* at 37. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 38.

[6] The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 32.

[7] Dr. Splan opined that claimant "would not be able to be returned to his previous job in the mines based upon his pulmonary incapacitation." Director's Exhibit 28 at 4. Dr. Klayton opined that claimant's pulmonary impairment was severe, noting that claimant became "short of breath with minimal exertion and cannot lift [fifteen] pounds without getting short of breath." Director's Exhibit 17 at 7. Dr. Klayton also observed that claimant became "markedly dyspneic and purplish in color when he attempted to put his shoes on." *Id.* Dr. Fino opined that claimant suffers from a disabling respiratory impairment. Director's Exhibit 30 at 18; Employer's Exhibit at 26. Dr. Robinette opined that claimant is "disabled from working on the basis of his pulmonary disease alon[e]." Claimant's Exhibit 5 at 2.

Employer argues that the administrative law judge erred in her characterization of the exertional requirements of claimant's usual coal mine work, and that this error affected her weighing of the medical opinion evidence. At the hearing, claimant testified that his last coal mine work was as a continuous miner operator. Hearing Transcript at 33. Although claimant initially indicated that his work as a continuous miner operator involved roof bolting, he later clarified that his work as a roof bolter occurred before he began his work as a continuous miner operator. *Id*. at 42. Claimant characterized his work as a continuous miner operator as "hard work," explaining that he and a helper had to pull heavy electrical cable and a water line. *Id*. at 47-49. Claimant also testified that he had to do "dead work," which involved rock dusting and shoveling the belt. *Id*. at 49-50. Claimant testified that he had to carry rock dust bags weighing 50 pounds a distance of 80 to 120 feet. *Id*. at 50-51. In considering the exertional requirements of claimant's last coal mine job, the administrative law judge found that claimant's "most recent coal mine employment involved moving heavy electrical cables, carrying fifty pound bags of rock dust, working as a roof bolter, and running a continuous coal mining machine." Decision and Order at 28.

Employer accurately notes that the administrative law judge mischaracterized one aspect of claimant's most recent coal mine employment by stating that it included work as a roof bolter. Employer, however, has not explained how the administrative law judge's error undermines her assessment of the medical opinion evidence, given her accurate statements as to the other tasks required by claimant's job as a continuous miner operator, and her unchallenged decision to credit Dr. Fino's opinion that claimant lacks the respiratory capacity to perform those tasks. *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"); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253, BLR (4th Cir. 2016).

Specifically, in opining that claimant suffered from a disabling respiratory impairment, Dr. Fino, employer's examining physician, noted that claimant's last work was as a miner operator. Dr. Fino further noted that:

> There was heavy labor involved in [claimant's] last job and he described the workload in the following manner: heavy labor, 50%; moderate labor, 40%; and light labor, 10%. He said the heaviest and hardest part of the job was pulling cables.

Director's Exhibit 30 at 2. Dr. Fino did not assume that claimant's last coal mine job involved roof bolting. Because employer does not assert that Dr. Fino had an inaccurate

understanding of the exertional requirements of claimant's last coal mine employment,[8] employer has not explained why it was error for the administrative law judge to rely upon Dr. Fino's assessment of claimant's pulmonary impairment. Moreover, employer has not identified any error in the administrative law judge's determination that Dr. Fino's opinion was entitled to significant weight.[9]

Further, the administrative law judge discredited Dr. Rosenberg's medical opinion, the only medical opinion that contradicts Dr. Fino's assessment, because it was "contradictory and not well reasoned." Decision and Order at 34-35. Because employer does not challenge the administrative law judge's basis for according less weight to Dr. Rosenberg's opinion, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, 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 on 38. Because employer only challenged the administrative law judge's consideration of the medical opinion evidence, this finding is affirmed.[10]

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[8] Although employer asserts that Drs. Splan, Klayton, Robinette, and Mitchell "did not know claimant's last coal mine job when they issued their opinions of total disability," Employer's Brief at 9, employer does not assert that Dr. Fino did not have an accurate understanding of the exertional requirements of claimant's last coal mine work as a continuous miner operator.

[9] Employer contends that the administrative law judge erred in crediting the opinions of Drs. Splan and Klayton that claimant suffers from a disabling pulmonary impairment. Employer's Brief at 9-11. However, because employer does not challenge the administrative law judge's crediting of Dr. Fino's opinion that claimant suffers from a disabling pulmonary impairment, the administrative law judge's error, if any, in crediting the opinions of Drs. Splan and Klayton is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1984).

[10] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we also affirm her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

In light of our affirmance of the administrative law judge's findings that claimant established thirty-one years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's 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).

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

Because the administrative law judge found that 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 had 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.

Because it is unchallenged on appeal, we affirm the administrative law judge's findings that employer failed to establish that claimant does not have clinical pneumoconiosis and failed to establish that claimant does not have legal pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 51. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 51-56. Employer generally asserts that "Dr. Fino's opinion rebuts any presumption that claimant's disability arises out of his employment."[12] Employer's Brief at 12. Employer, however,

[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). "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] Dr. Fino opined that claimant is totally disabled from a respiratory standpoint due to a lobectomy performed in 2007. Director's Exhibit 30 at 17-18. Prior to 2007, Dr.

alleges no specific error with respect to the administrative law judge's discrediting of Dr. Fino's opinion on the issue of causation.[13] As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of claimant's disability was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Commencement Date for Benefits

The administrative law judge found that the evidence did not establish the month in which claimant became totally disabled due to pneumoconiosis. Decision and Order at 56. The administrative law judge correctly noted that where the evidence does not establish the month in which the miner became totally disabled due to pneumoconiosis, benefits commence as of the month in which the claim was filed. 20 C.F.R. §725.503(b). The administrative law judge, however, misidentified the month of filing as August 2011.

Claimant notified the district director of his intent to file a claim on July 28, 2011, and he filed his application for benefits on August 26, 2011. Director's Exhibits 4, 5. Pursuant to 20 C.F.R. §725.305, the filing of a statement "indicating an intention to claim benefits shall be considered to be the filing of a claim" if the claimant subsequently "executes and files a prescribed claim form" within the six-month time period prescribed by the regulation. 20 C.F.R. §725.305(a), (b). Consequently, the effective date of the filing of the claim is July 28, 2011. Consequently, we modify the administrative law

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Fino opined that claimant had "a very mild obstructive abnormality consistent with smoking." *Id.* at 17.

[13] The administrative law judge found that Dr. Fino's opinion was not adequately explained. Decision and Order at 54.

judge's decision to reflect that benefits shall commence as of July 2011. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8, 20 BLR 2-1, 2-10 n.8 (4th Cir. 1995); *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1-446 (1986).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, as modified to reflect July 2011 as the date from which benefits commence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge