U.S. Department of Labor

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

BRB No. 17-0113 BLA

CLIFFORD CRANK Claimant-Respondent v. SCANT BRANCH COAL COMPANY, INCORPORATED and AMERICAN INTERNATIONAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC), Lexington, 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 Awarding Benefits (2013-BLA-5086) of Administrative Law Judge Dana Rosen, rendered on a subsequent claim filed on January 25, 2011,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with sixteen years of underground coal mine employment and determined that the evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and also invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

[1] Claimant filed a previous claim on February 26, 2001, which was denied by Administrative Law Judge Thomas F. Phalen, Jr. on November 16, 2005, because the evidence was insufficient to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1.

[2] 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). As claimant's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis and total disability, claimant had to submit new evidence establishing either element in order to obtain a merit review of his subsequent claim. 20 C.F.R. §725.309(c).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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.[4] 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).

Employer challenges the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] Under this subsection, the administrative law judge credited the opinions of Drs. Rasmussen[6] and Cohen[7] that claimant is totally disabled based on the diffusion capacity measurements obtained by Dr. Rasmussen on August 31, 2011. Decision and Order at 23. The

[4] Because the administrative law judge determined that claimant's last coal mine employment was in Kentucky, and that determination is not challenged by the parties on appeal, 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); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 19.

[5] The administrative law judge determined that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 20-21.

[6] Dr. Rasmussen examined claimant on August 31, 2011. Director's Exhibit 13. He opined that claimant has "evidence of marked loss of lung function as reflected by his marked reduction in diffusing capacity as well as his moderate impairment in oxygen transfer during light exercise. *Id*. Dr. Rasmussen stated that claimant's "single breath diffusing capacity was reduced to 40% of predicted," which is a "Class IV or severe impairment" under the *AMA Guides to the Evaluation of Pulmonary Impairment*, 6th Edition. *Id*. Dr. Rasmussen opined that "such a reduction would indicate a totally disabling respiratory insufficiency." *Id*. at 2.

[7] Dr. Cohen reviewed medical records, including the examination reports of Drs. Rasmussen, Broudy and Rosenberg. Claimant's Exhibit 2. Dr. Cohen opined that Dr. Rasmussen's August 31, 2011 diffusion capacity test was valid and showed "severe diffusion impairment." *Id*. at 22. Dr. Cohen noted that subsequent diffusion capacity measurements by Drs. Broudy and Rosenberg were also reduced, but he considered the testing to be invalid. *Id*. at 20-21. Dr. Cohen explained that the diffusion capacity measurements were more reliable for assessing pulmonary capacity in this case because claimant's exercise blood-gas studies did not reflect the exertional requirements of claimant's usual coal mine employment. *Id*. at 31. Thus, Dr. Cohen concluded that claimant was totally disabled based on the results of Dr. Rasmussen's diffusion capacity test.

administrative law judge gave less weight to the contrary opinions of Drs. Broudy[8] and Rosenberg[9] that claimant is not totally disabled, based on the non-qualifying pulmonary function and blood-gas studies.[10] *Id.*

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Cohen because they diagnosed total disability based on a diffusion capacity measurement, "a value not outlined in the regulations as a permissible method of establishing total disability." Employer's Brief at 19. Employer contends that the administrative law judge failed to rationally explain how claimant is totally disabled, in light of the non-qualifying pulmonary function and blood-gas studies. Employer also argues that the administrative law judge did not give proper consideration to the specific conclusions by Drs. Broudy and Rosenberg that claimant is capable of performing his

[8] Dr. Broudy examined claimant on February 3, 2012. Director's Exhibit 14. He obtained a pulmonary function study, a diffusion capacity test and a resting blood-gas study only. *Id*. Dr. Broudy indicated that the pulmonary function study and diffusion capacity test were "not technically valid." Employer's Exhibit 8 at 3. Dr. Broudy agreed that Dr. Rasmussen's diffusion capacity measurements were "low" but opined that claimant is not totally disabled because claimant had "a normal response to exercise" with the PO2 value increasing during Dr. Rasmussen's exercise blood-gas study. Employer's Exhibit 6 at 24.

[9] Dr. Rosenberg examined claimant on February 20, 2014. Employer's Exhibit 2. He noted that claimant had "reduced diffusing capacity measurements" but that the pulmonary function studies were performed with "incomplete efforts." Employer's Exhibit 2. Dr. Rosenberg stated, "From a pulmonary perspective, however [claimant] does not have qualifying spirometric values. Additionally, while he has a low diffusing capacity measurement, his oxygenation is not qualifying. He clearly is not disabled from a pulmonary perspective." *Id*. at 6. In a letter dated September 5, 2014, Dr. Rosenberg reviewed a pulmonary function study dated August 31, 2014 from Pikeville Medical Center and noted that the diffusing capacity was "27% predicted (corrected for lung volumes 60% predicted)." Employer's Exhibit 4. Noting that claimant's PO2 increased with exercise during the February 20, 2014 blood-gas study and during Dr. Rasmussen's August 31, 2011 blood-gas study, Dr. Rosenberg opined that claimant is not totally disabled. *Id.*

[10] 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).

usual coal mine work in light of the non-qualifying exercise blood-gas studies. Employer's arguments lack merit.

The regulations specifically provide that a physician may base a reasoned medical judgment of total disability upon "medically acceptable clinical and laboratory diagnostic techniques . . . ."[11] 20 C.F.R. §718.204(b)(2)(iv); *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991) (An administrative law judge erred in discrediting a physician's diagnosis of total disability based on a diffusion capacity test merely because that test was not listed in the regulations). Moreover, total disability may be established 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); s*ee Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000) (A doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying). In this case, the administrative law judge rationally found that the opinions of Drs. Rasmussen and Cohen are reasoned and documented, to the extent that each physician explained how the objective testing supported their diagnoses of a total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23.

We also see no error in the administrative law judge's reliance on Dr. Cohen's explanation as to why the diffusion capacity measurements in this case are more reliable than the exercise blood-gas studies for determining claimant's respiratory capacity.[12] *Napier*, 310 F.3d at 713-714; 22 BLR at 2-553; Decision and Order at 22. Contrary to

[11] Employer does not argue that a diffusion capacity test is not a medically acceptable clinical or laboratory diagnostic technique.

[12] The administrative law judge found that "Dr. Cohen described in detail why, under these circumstances, the exercise study results are not sufficient to assess [c]laimant's pulmonary capacity and that, therefore, the diffusing capacity results are a better assessment in this particular case." Decision and Order at 22. Specifically, Dr. Cohen noted that during Dr. Rasmussen's exercise blood-gas study, claimant's heart rate went from 63 to 86, which is a low heart rate and reflective of limited exercise. Claimant's Exhibit 2 at 28. Dr. Cohen concluded that the level of exercise claimant performed during Dr. Rasmussen's blood-gas testing was not comparable to heavy manual labor. *Id.* at 29, 31. Dr. Cohen also noted that Dr. Rosenberg's exercise blood-gas study was inconclusive because claimant was on a beta blocker that prevented claimant's heart rate from elevating to a sufficient level to assess disability. *Id.* at 29.

employer's contention, the administrative law judge specifically recognized that Drs. Broudy and Rosenberg opined that claimant could perform his usual coal mine work involving heavy manual labor, based on the non-qualifying exercise blood-gas studies.[13] Decision and Order at 15, 17-18. The administrative law judge permissibly rejected their conclusions, however, because neither Dr. Broudy nor Dr. Rosenberg adequately addressed Dr. Cohen's assertion that claimant was not exercised during his blood-gas testing at a level commensurate with the exertional requirements of his coal mine employment.[14] *See Napier*, 310 F.3d at 713-714; 22 BLR at 2-553; *Clark,* 12 BLR at 1-155; Decision and Order at 22-23. The administrative law judge also reasonably credited Dr. Cohen's opinion to the extent Dr. Cohen explained how the "spirometry may be well preserved in someone with a gas exchange impairment." Decision and Order at 22; *Clark,* 12 BLR at 1-155.

Employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen on the issue of total disability amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20, 1-22 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We also affirm the administrative law judge's overall finding that claimant established a totally disabling respiratory or pulmonary impairment, taking into consideration all of the contrary probative evidence under 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 18. Thus, we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement and invocation of the Section 411(c)(4) presumption.[15] Decision and Order at 22-23.

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[13] The administrative law judge also found that claimant's usual coal mine employment required heavy manual labor. Decision and Order at 21.

[14] Dr. Broudy agreed that claimant's exercise was "very minimal" during Dr. Rasmussen's blood-gas testing but explained that claimant was in "poor physical condition and could not exercise beyond the duration which he exercised." Employer's Exhibit 6. Further, as noted by the administrative law judge, "Dr. Broudy acknowledged that Dr. Rosenberg could not obtain an exercise study with an increased heart rate, yet he dismissed that analysis by referring to the non-qualifying results." Decision and Order at 22; *see* Employer's Exhibit 6.

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

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 the miner had neither legal nor clinical pneumoconiosis, 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. As employer raises no challenges on appeal to the administrative law judge's determination that employer did not establish rebuttal of the Section 411(4) presumption, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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