U.S. Department of Labor

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

BRB No. 17-0583 BLA

ALGER MCINTYRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	DATE ISSUED: 11/26/2018
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilberston Law, LLC), Columbia, Maryland, 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 (2013-BLA-05996) of Administrative Law Judge Richard M. Clark, rendered on a claim filed on August 2, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that claimant established thirty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

[1] On July 10, 2018, employer filed a motion to remand this case for a new hearing before a new administrative law judge, based on the holding of the U.S. Supreme Court in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018) that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. On July 26, 2018, the Director, Office of Workers' Compensation Programs, responded to employer's motion, asserting that it should be denied because employer did not timely raise its argument. We agree with the Director. Employer first raised its Appointments Clause argument in a January 18, 2018 motion to hold the case in abeyance, more than three months after the filing of its petition for review and supporting brief. The Board denied the motion because employer failed to raise the Appointments Clause argument in its petition for review and supporting brief. *McIntyre v. ICG Knott Cnty, LLC*, BRB No. 17-0583 BLA (May 4, 2018) (unpub. Order); *see Lucia*, 138 S.Ct at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). For the same reasons, we deny employer's motion to remand.

[2] Under Section 411(c)(4), 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.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled and that it did not rebut the Section 411(c)(4) presumption.[3] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

I. 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on 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 the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). The administrative law judge found that claimant established total disability based on the pulmonary function studies and medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5] Decision and Order at 21.

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

[4] 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).

[5] The administrative law judge found that claimant is unable to establish total disability based on the arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11. He further found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. *Id*.

A. Pulmonary Function Studies

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four pulmonary function studies. Decision and Order at 9. Dr. Alam's October 10, 2012 pre-bronchodilator and post-bronchodilator studies were non-qualifying[6] for total disability. Director's Exhibit 11. Dr. Jarboe's February 14, 2013 pre-bronchodilator study was qualifying, while the post-bronchodilator study was non-qualifying. Director's Exhibit 13. Dr. Ajjarapu's December 15, 2014, and March 29, 2016, pre-bronchodilator studies were qualifying and no post-bronchodilator studies were obtained. Claimant's Exhibits 4, 5.

The administrative law judge gave determinative weight to the pre-bronchodilator values over the post-bronchodilator values and found that the three most recent pre-bronchodilator values were qualifying. Decision and Order at 10. He also gave greatest weight to the qualifying, March 29, 2016 study because it was "significantly more recent" than the other studies of record. *Id*. Thus, the administrative law judge found that claimant established total disability by a preponderance of the pulmonary function study evidence.

Employer contends that the administrative law judge erred in giving greater weight to the qualifying pre-bronchodilator studies over the non-qualifying post-bronchodilator studies. We disagree. The administrative law judge permissibly credited the pre-bronchodilator studies because "they reflect the miner's ability to perform his usual coal mine employment without the aid of medication." Decision and Order at 10; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The administrative law judge observed correctly that the Department of Labor 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." Decision and Order at 10 n.11, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

We also reject employer's contention that the administrative law judge erred in crediting the March 29, 2016 pulmonary function study because it does not have two

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

tracings of the MVV.[7] Employer's Brief at 13, *citing* 20 C.F.R. §718.103(b).[8] The Board has held that pulmonary function studies that do not fully conform to the quality standards at 20 C.F.R. §718.103 are not precluded from consideration on that basis alone. *DeFore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). While missing tracings render a pulmonary function study non-conforming, the study is not necessarily unreliable. *See Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983). Although the administrative law judge did not specifically discuss the MVV tracings, he determined that the March 29, 2016 study was in substantial compliance with the quality standards in other respects.[9] Decision and Order at 10; *see* 20 C.F.R. §718.101(b). He also noted that employer

[7] The regulation at 20 C.F.R. §718.103(b) states:

> All pulmonary function [study] results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10 [percent] of each other shall be sufficient.

20 C.F.R. §718.103(b).

[8] Employer asserts that "the administrative law judge did not explain why the absence of two tracings of the MVV "did not weigh against reliance on [the] March 29, 2016 study. Employer's Brief at 13. Employer asserts that because the FVC values on both the December 15, 2014 and March 29, 2016 studies were non-qualifying, "the lack of a valid MVV result is critical." *Id*.; *see* 20 C.F.R. §718.204(b)(2)(i) (a pulmonary function study must have a qualifying FEV1 *and* either a qualifying FVC or a qualifying MVV, or an FEV1/FVC ratio equal to or less than 55, in order to establish total disability).

[9] The administrative law judge found that the March 29, 2016 study "included the report of [c]laimant's 'good' effort, the best of three efforts, and what appeared to be three tracings and a flow volume loop." Decision and Order at 10 n. 13. He also noted that "the results were apparently reviewed by Dr. Esther S. Ajjarapu as her initials, 'esa MD' appear [on the report] and a copy of Dr. Ajjarapu's curriculum vitae is attached to the report." *Id*. The administrative law judge further observed that Dr. Ajjarapu is Board-certified in family medicine and "lists her experience to include the review of hundreds of spirometry tests of miners." *Id*. Contrary to employer's contention, the administrative law judge drew a permissible inference that the study had been reviewed by Dr. Ajjarapu and that she considered the results to be valid. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (holding that the Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge).

"presented no evidence to dispute the validity of [the] results" of the study. Decision and Order at 10. In the absence of evidence to establish that the March 29, 2016 pulmonary function study is unreliable, we affirm the administrative law judge's decision to "place full weight" on that study in finding that claimant is totally disabled.[10] Decision and Order at 10; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014). We further affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

B. Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant established total disability based on Dr. Alam's opinion. Decision and Order at 19. Employer argues that the administrative law judge did not explain the basis for his finding that claimant's usual coal mine employment as a section foreman required moderate manual labor, and therefore erred in crediting Dr. Alam's opinion that claimant is totally disabled,[11] and in giving little weight to Dr. Jarboe's contrary opinion. Employer's Brief at 9, 17-19.

Employer's argument regarding Dr. Jarboe's opinion is without merit. Although the pre-bronchodilator study conducted by Dr. Jarboe qualified for total disability, Dr. Jarboe opined that claimant is not totally disabled because he had non-qualifying post-bronchodilator values and normal resting blood gas studies. Director's Exhibit 13. As discussed above, however, the administrative law judge permissibly determined that the non-qualifying post-bronchodilator studies are not reliable for determining whether claimant has a totally disabling respiratory or pulmonary impairment. *See* 45 Fed. Reg. at

[10] We also note that the remaining two qualifying pre-bronchodilator studies of record have qualifying values for the FEV1 and MVV and employer does not challenge the validity of those studies based on the quality standards.

[11] Although Dr. Alam opined that claimant is "disabled from a pulmonary standpoint," Director's Exhibit 11, the administrative law judge found that Dr. Alam's opinion lacks a specific conclusion that claimant is totally disabled or that he "is unable to perform his usual coal mine job as a section foreman from a respiratory or pulmonary standpoint." Decision and Order at 17. The administrative law judge determined, however, that Dr. Alam's opinion, "which includes a finding of a moderate defect . . . in addition to abnormal physical findings and diagnosed pulmonary conditions[,]" was reasoned and documented to support a finding of total disability "when considered in conjunctions [sic] with the at least moderate level of exertion [] required by [c]laimant's usual coal mine job as a section foreman." *Id.*

13,682; Decision and Order at 10. He also correctly noted that pulmonary function studies and blood gas studies measure different types of impairment and "non-disabling values from one type of test do not necessarily undermine disabling values from the other." Decision and Order at 10; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). We see no error in the administrative law judge's permissible finding that Dr. Jarboe did not adequately explain his opinion in view of the qualifying pre-bronchodilator results. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10. Thus, we affirm the administrative law judge's finding that Dr. Jarboe's opinion is entitled to little weight on the issue of total disability.

Because we affirm the administrative law judge's discrediting of Dr. Jarboe's opinion – the only medical opinion to conclude that claimant is not totally disabled – we need not address employer's remaining allegations of error regarding the exertional requirements of claimant's usual coal mine employment and the administrative law judge's crediting of Dr. Alam's opinion. Employer's Brief at 9, 17-19. Even if the administrative law judge erred in finding that claimant established total disability based on Dr. Alam's opinion, that error would be harmless in view of our affirmance of his determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment based on the qualifying pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i), and in consideration of the lack of credible evidence to the contrary. *See Rafferty*, 9 BLR at 1-232; Decision and Order at 21. Thus, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).

II. **Rebuttal of the Section 411(c)(4) Presumption**

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[12] or that "no

[12] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

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). The administrative law judge found that employer failed to establish rebuttal by either method. Employer argues that the administrative law judge erred in finding that Dr. Jarboe's opinion was not sufficiently reasoned and persuasive to disprove the presumed facts of legal pneumoconiosis and disability causation.[13] Employer's arguments are without merit.

A. **Legal Pneumoconiosis**

In order to disprove that claimant has legal pneumoconiosis, employer must establish that he does not suffer from a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

Dr. Jarboe diagnosed chronic obstructive pulmonary disease (COPD) in the form of asthma and chronic bronchitis due to smoking. Director's Exhibit 13. He opined that coal mine dust exposure was not a causative factor for claimant's asthma because medical literature indicates that asthma is a disease of the general public. *Id*. In rejecting Dr. Jarboe's opinion, the administrative law judge permissibly found that he did not adequately explain why claimant's "substantial history of [thirty-one] years of underground coal mine employment" could not have been a significant contributing or substantially aggravating factor in claimant's asthma. Decision and Order at 23; *see* 20 C.F.R. §§718.201(a)(2), (b); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. The administrative law judge also permissibly rejected Dr. Jarboe's opinion to the extent that it was based on his analysis of the statistical probability of smoking being a causative factor for COPD, rather than an analysis of the facts of claimant's particular case. *See Barrett*, 478 F.3d at 356; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order a 24. Further, he rationally found that Dr. Jarboe's analysis was not credible because it "did not recognize the additive risk that exists between [the effects of] coal dust exposure and smoking" in causing COPD. Decision and Order at 23, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017).

[13] The administrative law judge's finding that employer failed to disprove that claimant has clinical pneumoconiosis is not challenged and is therefore affirmed. *Skrack*, 6 BLR at 1-711.

Additionally, Dr. Jarboe opined that claimant's chronic bronchitis was not related to coal dust exposure because claimant had symptoms of "mucus hypersecretion" one year after he left the mines but continued to smoke. Director's Exhibit 13. The administrative law judge permissibly concluded that Dr. Jarboe's opinion was unpersuasive in view of 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." Decision and Order at 24, *quoting* 20 C.F.R. §718.201(c); *see Keathley*, 773 F.3d at 739; *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc).

Employer's arguments with regard to Dr. Jarboe amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

B. Disability Causation

The administrative law judge found that employer did not rebut the Section 411(c)(4) presumption by establishing that "no part of [claimant'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); *see* Decision and Order at 29. Contrary to employer's contention, the administrative law judge rationally discounted Dr. Jarboe's opinion that claimant's respiratory disability is not due to pneumoconiosis because Dr. Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 28. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge