U.S. Department of Labor

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

BRB No. 17-0673 BLA

JOHN R. FOX, JR. (DECEASED)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 11/30/2018
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05434) of Administrative Law Judge Lystra A. Harris, rendered 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 claim filed on February 28, 2014.[1]

The administrative law judge determined that employer was properly named as the responsible operator. She accepted the parties' stipulation that claimant had thirty years of coal mine employment, including four years underground and twenty-six years aboveground, and further determined that his aboveground employment occurred in conditions substantially similar to those in an underground mine. Based on her finding that claimant also had a totally disabling respiratory impairment, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She further found that employer did not rebut the presumption and awarded benefits accordingly.

[1] Claimant is the miner, who died on January 7, 2017, while his case was pending before the Office of Administrative Law Judges. Unmarked Post-hearing Exhibit. His widow is pursuing this claim and filed a survivor's claim on February 16, 2017, which was not consolidated with the miner's claim. The administrative law judge awarded benefits in the miner's claim on September 18, 2017, and in a separate Decision and Order issued on October 30, 2017, awarded benefits in the survivor's claim. Employer timely appealed the award in the miner's claim on September 25, 2017. On November 21, 2017, employer appealed the award of benefits in the survivor's claim. Subsequently, employer requested that the Board hold its appeal in the survivor's claim in abeyance pending the Board's resolution of its appeal in the miner's claim. The Board denied employer's motion and consolidated the appeals for purposes of decision only. *Fox v. Consolidation Coal Co.*, BRB No. 18-0073 BLA (Jan. 29, 2018) (unpub. Order). The Board also instructed employer to submit a petition for review and brief in its appeal of the award of benefits in the survivor's claim. Because employer did not comply with this instruction, the Board dismissed the appeal. *Fox v. Consolidation Coal Co.*, BRB No. 18-0073 BLA (June 28, 2018) (unpub. Order). Based on our affirmance of the award of benefits in the miner's claim, set forth below, and employer's failure to otherwise challenge the award of benefits in the survivor's claim, the miner's widow is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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 challenges its designation as the responsible operator, the finding that claimant was totally disabled, and the administrative law judge's exclusion of CT scans and x-rays found in claimant's treatment records. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[3]

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). The administrative law judge's disposition of procedural and evidentiary issues is reviewed under an "abuse of discretion" standard." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

Responsible Operator

The "responsible operator" is the "potentially liable operator"[5] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the district director has designated a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c)(1), (2). Relevant to employer's appeal, the term "operator"

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 2 n.2, 8.

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last 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 11.

[5] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not contest that it meets the definition of a potentially liable operator.

includes any person who employs an individual in the transportation of coal "to the extent such individual was exposed to coal mine dust" during that employment. 20 C.F.R. §725.491(a)(2)(i). For the purpose of determining whether an employer is an operator, it is presumed that an employee is "regularly and continuously exposed to coal mine dust during the course of the employment," unless the evidence establishes "that the employee was not exposed to coal mine dust for significant periods during such employment." 20 C.F.R. §725.491(d).

Employer alleges that it was improperly identified as the responsible operator because Fox Trucking, Incorporated (Fox Trucking), a company owned by claimant, employed him for at least one year after his tenure with employer and otherwise meets the criteria for a potentially liable operator. Citing 20 C.F.R. §725.491(d), employer asserts that Fox Trucking meets the definition of an operator because claimant is presumed to have been regularly and continuously exposed to coal dust during the course of his employment as a truck driver hauling coal. Employer's contention is without merit.

Although claimant testified that he was employed by Fox Trucking for at least one year after his employment with employer, the administrative law judge rationally found that Fox Trucking is not an operator because claimant also testified that he was not exposed to coal mine dust while working there. The administrative law judge summarized claimant's testimony from an August 20, 2014 deposition. After working for employer, claimant was self-employed as a truck driver with Fox Trucking for three years, primarily hauling coal for Adkins Coal Corporation, Peerless Eagle Coal Corporation, and Baker & Adkins Coal Company. Decision and Order at 4, *citing* Director's Exhibit 19 at 9. When asked whether he was exposed to coal dust in this employment, claimant answered, "No, sir. I had air conditioning."[6] *Id.*, *quoting* Director's Exhibit 19 at 10. Contrary to employer's argument, the administrative law judge permissibly determined that claimant's testimony "established that he was not regularly and continuously exposed to coal mine dust during his employment in his trucking business." *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc); Decision and Order at 5-6. Furthermore, employer

[6] Although the administrative law judge considered claimant's deposition testimony, she declined to consider claimant's hearing testimony relating to the responsible operator because employer did not notify the district director that claimant was a possible witness on that issue. Decision and Order at 5, citing 20 C.F.R. §725.414(c) (requiring parties to notify the district director of "any potential witnesses whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator" and prohibiting the admission of such testimony before the administrative law judge absent "extraordinary circumstances"). We affirm the administrative law judge's evidentiary determination as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

does not contest her finding that it "has not presented any evidence contradicting [c]laimant's testimony" that he was not exposed to coal dust while employed by Fox Trucking. *Id*.; Employer's Brief at 4-5. Thus, the administrative law judge rationally concluded that Fox Trucking is not an "operator" under 20 C.F.R. §725.491(a)(2)(i) and therefore is not a "potentially liable operator" under 20 C.F.R. §725.494. Decision and Order at 6. Because employer did not satisfy its burden to establish that it is not the potentially liable operator that most recently employed the miner for at least one year, we affirm the administrative law judge's finding that employer was properly named the responsible operator. *Id*.

Establishment of 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. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying[7] pulmonary function or 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii),[8] the administrative law judge considered blood gas studies conducted on April 28, 2014, September 24, 2014, September 7, 2016, and September 13, 2016. Decision and Order at 10-12. The April 28, 2014 blood gas study conducted by Dr. Rasmussen produced qualifying values both at rest and with exercise.[9]

[7] 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).

[8] The administrative law judge found that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and that 20 C.F.R. §718.204(b)(2)(iii) is inapplicable, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 10, 12.

[9] Dr. Vuskovich reviewed the qualifying blood gas studies administered by Dr. Rasmussen on April 28, 2014, and indicated that there was "likely" a measurement error in the resting test because the hyperventilation on claimant's pCO2 should have resulted in higher pH and pO2 values. Director's Exhibit 21. The administrative law judge discredited Dr. Vuskovich's opinion as "speculative." Decision and Order at 12. We affirm this finding as it is unchallenged on appeal. *See Skrack,* 6 BLR at 1-711.

Director's Exhibit 11. The studies dated September 24, 2014 and September 7, 2016, conducted only at rest by Drs. Zaldivar and Green, respectively, produced qualifying results. Director's Exhibit 21; Claimant's Exhibit 1. The most recent blood gas study, conducted only at rest on September 13, 2016 by Dr. Habre, produced non-qualifying values. Employer's Exhibit 10. The administrative law judge concluded that a preponderance of the blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11.

We reject employer's contention that the administrative law judge erred in declining to give more weight to the September 13, 2016 non-qualifying blood gas study, as it is the most recent study of record. Employer's Brief at 5-7. The administrative law judge considered recency as a factor but accurately observed that the September 13, 2016 blood gas study is only six days more recent than the study dated September 7, 2016, which produced qualifying values. Thus, she permissibly concluded that the September 13, 2016 study was not entitled to greater weight based on its date. *See Aimone v. Morrison Knudson Co.*, 8 BLR 1-32, 1-34 (1985); Decision and Order at 11. We therefore affirm the administrative law judge's finding that the blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinions of Drs. Hippensteel, Rasmussen, Green, and Zaldivar. Decision and Order at 17-18. She determined that Dr. Hippensteel did not offer an opinion on total disability and gave "little probative weight" to the diagnoses of total pulmonary disability made by Drs. Rasmussen and Green.[10] Decision and Order at 17; Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibit 7. The administrative law judge also gave "little weight" to Dr. Zaldivar's opinion that claimant did not have a totally disabling respiratory or pulmonary impairment because he failed to explain how the most recent blood gas study established that claimant's pulmonary impairment was variable and that claimant was not totally disabled. Decision and Order at 17-18; Director's Exhibit 21; Employer's Exhibits 6, 8, 11. She therefore concluded that the medical opinion evidence is insufficient to establish total disability. Decision and Order at 18.

[10] The administrative law judge found that Dr. Rasmussen's opinion was entitled to little weight because he did not have the opportunity to review the most recent medical evidence. Decision and Order at 17; Director's Exhibit 11. She gave little weight to Dr. Green's opinion on the grounds that he was unaware of the exertional requirements of claimant's usual coal mine work and did not review the most recent medical evidence. Decision and Order at 17; Claimant's Exhibit 1.

Weighing all relevant evidence together, the administrative law judge found that the qualifying blood gas study evidence outweighs the non-qualifying pulmonary function studies and unpersuasive medical opinions, as well as the admitted treatment records which do not reflect any diagnoses of total respiratory or pulmonary disability. Decision and Order at 18. Accordingly, she determined that total disability was established at 20 C.F.R. §718.204(b)(2). *Id*.

Employer argues that the administrative law judge erred in giving greater weight to the qualifying blood gas studies than to Dr. Zaldivar's opinion, because he analyzed all of the blood gas studies and discussed why he diagnosed a variable, non-disabling pulmonary impairment. Employer's Brief at 7-8. We disagree. After reviewing the most recent blood gas study, dated September 13, 2016, Dr. Zaldivar stated:

> When I examined [claimant] on 9/24/14, he was hypoxic with a pCO2 of 56, pO2 35, pH 7.41, but now, you have sent me this report from Dr. Habre, which revealed absolutely no hypoxia.
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> …
>
> Judging by these blood gas results, which include[] the one I reviewed from Dr. Gaziano, my opinion is that his impairment is variable and is not related to a pulmonary fibrosis.
>
> …
>
> From the pulmonary standpoint, according to Dr. Habre's study of 9/13/2016, there is no pulmonary impairment at all or any evidence of lung fibrosis. From the pulmonary standpoint, judging by these results, [claimant's] lungs are capable of sustaining any kind of activity that his musculoskeletal and cardiovascular system can generate.

Employer's Exhibit 11. The administrative law judge rationally determined that Dr. Zaldivar did not provide an explanation for his conclusion that the most recent blood gas study established that claimant's impairment was variable and that he was not totally disabled, when claimant's prior studies were uniformly qualifying, including the study performed six days before the September 13, 2016 study. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18; Director's Exhibits 11, 21; Claimant's Exhibit 1; Employer's Exhibit 10. Accordingly, she permissibly found that Dr. Zaldivar's opinion does not constitute contrary probative evidence sufficient to outweigh the qualifying blood gas study 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); Decision and Order at 18. We therefore affirm her determination that claimant established total disability at 20 C.F.R. §718.204(b)(2).

Based on our affirmance of the administrative law judge's findings that claimant had thirty years of qualifying coal mine employment and totally disabling impairment, we affirm her determination that claimant invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis. Decision and Order at 19.

Rebuttal of the Presumption – Exclusion of Claimant's Treatment Records

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he had neither legal nor clinical pneumoconiosis, 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). The administrative law judge found that employer failed to disprove the presence of either form of pneumoconiosis or that his total disability was caused by the disease. Decision and Order at 28-32. Employer's sole argument with respect to these findings is that the administrative law judge erred in excluding from consideration certain CT scans and x-rays found in claimant's treatment records. Employer thus contends that it was error for the administrative law judge to discredit Dr. Zaldivar's opinion that claimant did not have clinical pneumoconiosis "because of his reliance on CT scans and x-rays that were not in the record." Employer's Brief at 8-9.

As an initial matter, employer's argument relates solely to the issue of clinical pneumoconiosis, but does not address the administrative law judge's separate finding that employer failed to disprove that claimant had legal pneumoconiosis. Specifically, the administrative law judge found that Dr. Zaldivar's exclusion of a diagnosis of legal pneumoconiosis is "internally inconsistent and not well[-]reasoned" and employer, therefore, did not disprove that claimant had the disease. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 29-30. This finding is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the presence of pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).

Furthermore, the administrative law judge did not, as employer contends, deny it the opportunity to "cure the defect" in the excluded treatment records. Employer's Brief at 8-9. At the hearing, the administrative law judge admitted Claimant's Exhibit 2, consisting of over 200 pages of treatment records from Beckley Medical Center, pending receipt of a cover sheet explaining the relevance of the evidence and directing her attention

to specific portions of the records.[11] Hearing Transcript at 33. She advised the parties that the treatment records would be excluded if she did not receive the summary by December 5, 2016. *Id*. at 33-34, 40. By Order dated August 15, 2017 the administrative law judge excluded Claimant's Exhibit 2 from the record because claimant did not submit an explanatory statement identifying relevant portions of the treatment records. Order Directing Claimant to Submit Evidence and Excluding Evidence from the Record at 2.

Employer was aware that the treatment records would be excluded if claimant's counsel did not submit the requested explanatory statement, and it received the Order excluding the records, but it made no objection to those evidentiary determinations. Employer failed to raise the issue before the administrative law judge and cannot raise it for the first time on appeal. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). We therefore affirm the administrative law judge's exclusion of Claimant's Exhibit 2 from the record and her rejection of Dr. Zaldivar's opinion on clinical pneumoconiosis on the basis that he relied on evidence that is not in the record. *See Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-108-09 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). As employer raises no other arguments with respect to clinical pneumoconiosis, we affirm the administrative law judge's finding that employer did not disprove that claimant had the disease. 20 C.F.R. §718.305(d)(1)(i)(B).

Finally, employer raises no separate arguments with respect to the administrative law judge's finding that it failed to disprove disability causation at 20 C.F.R. §718.305(d)(1)(ii). That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

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[11] The administrative law judge's Pre-Hearing Order, issued on July 14, 2016, contained the following provision:

> Parties who wish to submit hospitalization or treatment records are reminded of the provision of 20 C.F.R. §725.414(a)(4), which permits admission of such records relating to "a respiratory or pulmonary related disease" (emphasis added). Additionally, any party submitting records exceeding 20 pages in length is directed to attach a cover sheet explaining the relevance of the records to the issue(s) before me for adjudication, and directing my attention to specific entries, or portions of the records, the submitting party avers to be of particular importance.

July 14, 2016 Pre-Hearing Order at 6.

Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant established his entitlement to benefits.

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