U.S. Department of Labor

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

BRB No. 16-0113 BLA

BILLY CON NOBLE Claimant-Respondent v. LAWSON TRUCKING COMPANY, INCORPORATED and AMERICAN MINING CLAIMS SERVICE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/28/2016 DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-5014) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits on a claim filed on August 13, 2010, pursuant to 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 at least seventeen years in underground coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). However, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv) and 718.204(b)(2) overall. The administrative law judge therefore found 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).[1] Further, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his analysis of the evidence relevant to invocation of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has at least seventeen years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's coal mine employment was in Kentucky.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Evidentiary Issue

Employer initially asserts that the administrative law judge abused his discretion in considering Dr. Fino's medical report, which employer contends was not properly admitted into the record. Specifically, employer asserts that, at the hearing, it withdrew Dr. Fino's report from submission into the record, that "claimant opted not to designate Dr. Fino's narrative report as affirmative evidence," and that Dr. Fino's report was "not reintroduced by any party." Employer's Brief at 4-5.

Employer's contention lacks merit. In this case, employer initially listed Dr. Fino's June 28, 2011 report and Dr. McSharry's March 27, 2015 report in an evidence summary form as medical opinion evidence in support of its affirmative case. At the April 21, 2015 hearing, however, employer's counsel withdrew Dr. Fino's June 28, 2011 report from submission into the record. Hearing Tr. at 8. Because the administrative law judge determined that employer changed its designation of the medical opinion evidence "at the last minute," Hearing Tr. at 9, he provided claimant with sixty days to change his designation of the medical evidence, and to respond to employer's medical evidence that was served on the twenty-day deadline for the exchange of documentary evidence.[4] *Id*. at 8-12; *see* 20 C.F.R. §725.456(b)(2). In a letter dated June 17, 2015, claimant's counsel requested additional time, post-hearing, to re-designate his evidence and to respond to employer's evidence.[5] By Order dated June 29, 2015, the administrative law judge granted claimant's counsel an extension of time, until July 24, 2015, to submit his post-hearing evidence. By Order dated August 4, 2015, the administrative law judge allowed the parties additional time, until August 17, 2015, to submit their post-hearing evidence.

Director's Exhibits 3, 6; Hearing Tr. at 17. Accordingly, this case arises within the jurisdiction 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).

[4] Claimant's counsel requested sixty days to respond to Dr. McSharry's report, Dr. Caffrey's pathology report, and a computed tomography (CT) scan by Dr. Scott because employer served them on the twenty-day deadline. Hearing Tr. at 10.

[5] Claimant's counsel explained that he was awaiting receipt of a rereading of the CT scan at Employer's Exhibit 6 and a review of the slides that were the subject of Dr. Caffrey's pathology report at Employer's Exhibit 5.

On July 27, 2015, claimant filed his amended evidence summary form. Contrary to employer's assertion, claimant listed Dr. Fino's June 28, 2011 report, at Director's Exhibit 12, as the sole medical report submitted in support of his affirmative case. Claimant also listed, as rebuttal evidence, Dr. Abraham's biopsy report, at Claimant's Exhibit 5, and Dr. DePonte's computed tomography (CT) scan reading, at Claimant's Exhibit 6. In its post-hearing brief, filed on August 19, 2015, employer noted that claimant submitted additional evidence, post-hearing, at Claimant's Exhibits 5-6, but did not reference, or object to, claimant's designation of Dr. Fino's report as affirmative evidence. Employer's Closing Argument at 1 n.2. Rather, employer asserted that only Dr. Alam diagnosed total disability. Employer's Brief at 6. Claimant filed a post-hearing brief on August 24, 2015, again referencing Dr. Fino's opinion at Director's Exhibit 12, and arguing that Dr. Fino's opinion supported a finding of total disability. Claimant's Post-Hearing Brief at 6. Employer did not respond. In his decision, the administrative law judge noted that "[t]he parties submitted their post-hearing briefs on August 19 and August 24, 2015, respectively, and the record is now closed." Decision and Order at 2. Thus, contrary to employer's assertion, Dr. Fino's June 28, 2011 report was adopted as affirmative case evidence by claimant, and was reintroduced into the record by claimant on July 27, 2015.

Based on the facts of this case, where claimant properly designated Dr. Fino's medical report on his evidence summary form, and employer did not object, the administrative law judge acted within his discretion in admitting Dr. Fino's report into the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). We therefore reject employer's assertion that the administrative law judge erred in considering Dr. Fino's opinion.

Merits of Entitlement

Employer argues that the administrative law judge erred in finding that claimant has a twenty pack-year smoking history, and that this error tainted the administrative law judge's evaluation of the evidence. Employer's Brief at 5. Employer contends that the administrative law judge should have found that "the claimant smoked 3/4 of a pack of cigarettes per day from 1968 until 2008, for a smoking history of 30 years." Employer's Brief at 3, 5-6. We disagree.

The administrative law judge found that claimant has a twenty pack-year smoking history, based on claimant's testimony[6] and the smoking histories reported by the

[6] The administrative law judge noted that claimant testified at the hearing that he smoked one-half pack of cigarettes per day for approximately forty years. Decision and Order at 4; Hearing Tr. at 27-28.

majority of physicians.[7] The length and extent of claimant's smoking history is a factual, not medical, determination committed to the administrative law judge's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the credibility of witnesses and the weight to be accorded the hearing testimony are within the discretion of the administrative law judge. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Because the record reflects that the administrative law judge considered the complete range of claimant's reported smoking histories,[8] and permissibly relied on claimant's sworn testimony to determine that claimant has a twenty pack-year smoking history, the administrative law judge's finding is affirmed. *See Lafferty*, 12 BLR at 1-192; *Mabe*, 9 BLR at 1-68 (1986); *Brown*, 7 BLR at 1-732. Moreover, as both Drs. Fino and McSharry relied on a smoking history commensurate with that found by the administrative law judge, employer has not shown how the administrative law judge's reliance on a twenty pack-year smoking history, rather than a thirty pack-year smoking

[7] The administrative law judge noted that "[Dr. Alam] reported that the [c]laimant smoked '1 to 1/2' packs per day for 40 years, having quit in 2007." Decision and Order at 4. However, the administrative law judge noted that "Dr. Alam later reported on September 3, 2014, that the [c]laimant smoked cigarettes for 40 years at the rate of one-half pack[] per day, having quit in 2007." *Id*. Similarly, the administrative law judge noted that Dr. Rosenberg reported a twenty pack-year smoking history on the basis that claimant smoked one-half pack of cigarettes per day for forty years. Lastly, the administrative law judge noted that Dr. Fino recorded a smoking history of one-half pack per day for approximately thirty-eight years. The administrative law judge did not mention Dr. McSharry's report. Nevertheless, Dr. McSharry reviewed Dr. Fino's examination of claimant and observed that "[a] long history of smoking was documented, estimated at 38 years of at least half a pack of cigarettes daily." Employer's Exhibit 4.

[8] Employer argues that the administrative law judge erred in considering Dr. Rosenberg's reference to a twenty pack-year smoking history on a pulmonary function study because "this information on this report was not introduced into evidence by the employer." Employer's Brief at 5. Contrary to employer's argument, the administrative law judge admitted Dr. Rosenberg's February 27, 2012 pulmonary function study into the record as Employer's Exhibit 2. Hearing Tr. at 9-10. Further, employer has not shown how it was prejudiced by the administrative law judge's reference to the smoking history noted on Dr. Rosenberg's study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

history, materially affected his evaluation of their opinions.[9] *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Relevant to whether the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption, employer asserts that the administrative law judge erred in finding that the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). The record consists of four pulmonary function studies dated October 13, 2010, June 16, 2011, February 27, 2012, and September 3, 2014. The October 13, 2010 study administered by Dr. Alam and the February 27, 2012 study administered by Dr. Rosenberg yielded qualifying[10] values, Director's Exhibit 11; Employer's Exhibit 2, whereas the June 16, 2011 study administered by Dr. Fino and the September 3, 2014 study administered by Dr. Alam yielded non-qualifying values, Director's Exhibit 12; Employer's Exhibit 19. The administrative law judge acknowledged that the September 3, 2014 pulmonary function study is part of claimant's medical treatment record, and thus is not subject to the quality standards set forth at 20 C.F.R. §718.103. The administrative law judge discredited the September 3, 2014 pulmonary function study, however, because he found it to be unreliable. Decision and Order at 8. After noting that two of the three credible pulmonary function studies yielded qualifying values, the administrative law judge permissibly gave greatest weight to the February 27, 2012 study because it is the most recent evidence of record, and is therefore "more probative with regard to the [c]laimant's current condition." Decision and Order at 15; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). The administrative law judge also noted that the record reflected that the sole credible non-qualifying result was obtained when claimant was on supplemental oxygen. Decision and Order at 15; Director's Exhibit 12. Thus, the administrative law judge found that the weight of the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

[9] Both Dr. McSharry and Dr. Fino diagnosed COPD related solely to smoking, based on a smoking history that was less than a pack per day for thirty years.

[10] 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).

Employer argues that the administrative law judge erred in assigning no probative value to the September 3, 2014 pulmonary function study. We disagree. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical evidence. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As the administrative law judge correctly noted, while quality standards do not apply to objective tests contained in treatment notes, *see* 20 C.F.R. §718.101(b), the administrative law judge must still address whether the tests are sufficiently reliable. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 8 n.29. Contrary to employer's assertion, the administrative law judge did not discredit the September 3, 2014 pulmonary function study solely because it was unaccompanied by the attachments required by the quality standards. Employer's Brief at 7. Rather, the administrative law judge permissibly found that "because the circumstances surrounding the pulmonary function study were unknown," such as whether the test had the proper tracings or flow-volume loop, and whether claimant was on supplemental oxygen, he was "not persuaded that the [September 3, 2014 study] is reliable for forming a basis for a finding of total disability or lack thereof." Decision and Order at 8 n.29; *see* 65 Fed. Reg. at 79,928; *Mabe*, 9 BLR at 1-68. Thus, we reject employer's assertion that the administrative law judge erred in discrediting the September 3, 2014 pulmonary function study.

Employer next asserts that the administrative law judge failed to consider whether the qualifying pulmonary function study results are due to obesity, and do not reflect the presence of a totally disabling respiratory or pulmonary impairment. Employer's Brief at 7. Employer's contention lacks merit.

In evaluating the probative value of objective data, the administrative law judge must rely upon the medical evidence and cannot substitute his or her opinion for that of the medical experts. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Employer points to no medical opinion in support of its assertion that claimant's qualifying pulmonary function studies may be the result of obesity. We, therefore, reject employer's contention that the administrative law judge erred in failing to consider this factor in evaluating the pulmonary function study evidence. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the weight of the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

As employer raises no other challenges to the administrative law judge's weighing of the evidence relevant to total disability, we affirm the administrative law judge's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b) overall. In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen 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).

Further, because employer does not challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, this finding is also affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-24. We, therefore, affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge