U.S. Department of Labor

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

BRB No. 17-0027 BLA

KIMBERLY SERGENT[1] (o/b/o DOUGLAS HALL, deceased)	)	
Claimant-Respondent	)	
v.	)	
DLX, INCORPORATED	)	DATE ISSUED: 10/12/2017
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
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 of William Dorsey, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

[1] The miner died on August 7, 2015. Claimant, the miner's daughter, is pursuing the miner's claim.

William A. Lyons (Lewis & Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05055) of Administrative Law Judge William Dorsey 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 August 2, 2011.[2]

After crediting the miner with twenty-seven years of underground coal mine employment,[3] the administrative law judge found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that the miner demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and 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).[4] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new evidence established total disability and, therefore, erred in determining that

[2] The miner's first claim for benefits, filed on February 7, 1995, was denied by the district director on May 3, 1996, for failure to establish any element of entitlement. Director's Exhibit 1.

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

the miner invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that it failed to 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]

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 – Total Disability

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] The administrative law judge considered the opinions of Drs. Alam, Rosenberg, and Broudy. Drs. Alam and Rosenberg opined that the miner was totally disabled by a respiratory impairment, despite the non-qualifying[7] results of his pulmonary function studies and blood gas studies. Director's Exhibits 17, 18; Employer's Exhibit 7. Dr. Alam explained that the miner's "clinical exam[ination was] far more impressive than his laboratory testing," leading Dr. Alam to conclude that the miner was totally disabled.[8]

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 39-40.

[7] 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).

[8] Dr. Alam noted that, due to "significant shortness of breath," the miner was unable to do an exercise blood gas study. Director's Exhibit 17 at 1. Dr. Alam further noted that, although the miner's pulmonary function study FEV1 value was "62% [of] predicted . . . on a clinical exam[ination] the patient was much more short of breath. He [was] not able to do walking in the hallways. He ha[d] significant wheezing on examination and . . . hyperresonance on percussion suggestive of significant air trapping." *Id*. at 2. Based on those observations, Dr. Alam reported that the miner's "clinical exam[ination] is a lot worse than his predicted FEV1." *Id.*

Director's Exhibit 17 at 2. Dr. Rosenberg opined that, because the miner's diffusion capacity measurements were "severely reduced," the miner was totally disabled. Employer's Exhibit 7 at 14. Dr. Broudy noted that the miner's pulmonary function studies and blood gas studies "exceed[ed] the . . . criteria for disability," but also stated that the miner had a "significant impairment," which "may" interfere with the performance of arduous work. Director's Exhibit 18; Employer's Exhibit 8 at 17, 20.

The administrative law judge credited Dr. Alam's opinion, finding that it was supported by the physician's clinical observations, and Dr. Rosenberg's opinion, because he found that it was supported by the miner's diffusion capacity test results. Decision and Order at 41-42. The administrative law judge found that Dr. Broudy's opinion was "more equivocal," but could be read either "consistently with a finding of total disability," or as "not contradict[ing] the opinions of Drs. Alam and Rosenberg." *Id*. at 41. Considering the medical opinion evidence as a whole, the administrative law judge found that it established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in finding that the new medical opinion evidence established total disability, when the miner's pulmonary function studies and arterial blood gas studies were non-qualifying. Employer's Brief at 24. This argument lacks merit. Contrary to employer's contention, a finding of total disability may be based on reasoned medical opinion evidence even where the pulmonary function studies and blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-123 (6th Cir. 2000).

Employer argues further that the administrative law judge erred in his consideration of the opinions of Drs. Alam, Rosenberg, and Broudy. Employer contends that Dr. Alam's opinion was unreasoned because the doctor relied upon "pure conjecture" that the miner's exercise blood gas study would have been qualifying had the miner been able to perform the study. Employer's Brief at 22-23. We disagree. The administrative law judge considered Dr. Alam's explanation that, although the miner's objective studies were non-qualifying, the results of his clinical examination were "far more impressive" than his objective testing and demonstrated the miner's total disability. Decision and Order at 40-41; Director's Exhibit 17. Contrary to employer's argument, the administrative law judge permissibly relied upon Dr. Alam's opinion because he found that it was supported by the physician's clinical observations that the miner was unable to walk down the hallway due to shortness of breath, and had significant wheezing and physical findings of significant air trapping. *See Cornett*, 227 F.3d at 577, 22 BLR at 2-122; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 40-41; Director's Exhibit 17.

Employer next contends that the administrative law judge erred in relying upon Dr. Rosenberg's opinion, because the doctor did not base his diagnosis of total disability on pulmonary function studies or blood gas studies. Employer's Brief at 25. This contention lacks merit. Dr. Rosenberg opined that the miner was totally disabled based upon his severely reduced diffusion capacity values. Decision and Order at 41. The applicable regulation provides that a physician may base a reasoned medical judgment upon "medically acceptable clinical and laboratory diagnostic techniques . . . ."[9] 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) (holding that 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). Thus, the administrative law judge did not err in finding that Dr. Rosenberg's opinion supported total disability.

Employer further contends that the administrative law judge erred in relying upon Dr. Rosenberg's opinion to find total disability, when Dr. Rosenberg opined that the miner's respiratory impairment was due solely to lung cancer. Employer's Brief at 23. Contrary to employer's contention, the relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner's respiratory or pulmonary impairment precluded the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of the miner's pulmonary impairment relates to the issue of disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Although Dr. Rosenberg concluded that the miner did not have a lung disease due to coal mine dust exposure, Dr. Rosenberg specifically opined that the miner was totally disabled by a respiratory impairment. Director's Exhibit 18. We therefore reject employer's allegation that the administrative law judge erred in relying upon Dr. Rosenberg's opinion at 20 C.F.R. §718.204(b)(2)(iv).

Additionally, employer argues that the administrative law judge erred in finding Dr. Broudy's opinion to be equivocal, and should have instead found it to be a definitive opinion that the miner was not totally disabled. Employer's Brief at 24. We disagree. Given Dr. Broudy's conflicting statements,[10] the administrative law judge reasonably

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

[10] Dr. Broudy opined that the miner had a "significant impairment," which "may" interfere with doing arduous work. Employer's Exhibit 8 at 17, 19-20. Dr. Broudy further opined that the miner's ability to do sustained work as a coal miner was "kind of marginal," but it was not "a priority that [the miner] couldn't do that kind of work." *Id.* at 20. Additionally, Dr. Broudy stated that he would have considered the miner to be

found the physician's opinion to be equivocal on the issue of total disability. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence established 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 study and blood gas study evidence, and found that, when weighed together, the new 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 at 42. This finding is, therefore, affirmed.[11]

In light of our affirmance of the administrative law judge's findings that the miner had twenty-seven years of underground coal mine employment and a totally disabling respiratory impairment, we affirm the administrative law judge's finding that the miner invoked the Section 411(c)(4) presumption.

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

Because the miner 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,[12] or by

---

disabled if his pulmonary function study and blood gas study results had been lower, but also opined that the miner's severely reduced diffusion capacity "could be" evidence that the miner was totally disabled. *Id*. at 21, 24.

[11] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

[12] "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).

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.

In determining whether employer established that the miner did not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Broudy and Rosenberg, submitted by employer.[13] Dr. Broudy opined that the miner did not have legal pneumoconiosis, but suffered from a restrictive impairment that was likely caused by the removal of part of the miner's right lung in 2010 to treat cancer, and by previous cardiac surgery. Director's Exhibit 18 at 7; Employer's Exhibit 8 at 17-18. Dr. Rosenberg opined that the miner's restrictive impairment was related to his previous lung resection and cardiac surgery. Director's Exhibit 18 at 26; Employer's Exhibit 7 at 15. Additionally, Dr. Rosenberg opined that the miner's low diffusion capacity was caused by diffuse, panlobular emphysema that was not related to coal mine dust exposure but was due solely to smoking. Director's Exhibit 18 at 8-10; Employer's Exhibit 7 at 13-14, 16.

The administrative law judge found that, because Dr. Broudy did not address the etiology of the miner's "extensive emphysema, which [was] well-documented by x-ray, pathology, and CT scans," his opinion merited "little weight on the issue of legal pneumoconiosis." Decision and Order at 51. The administrative law judge further found that although Dr. Rosenberg opined that the miner's emphysema was a diffuse, panlobular type most commonly associated with smoking, the physician did not adequately explain why the miner's twenty-seven years of underground coal mine dust exposure did not contribute to his emphysema, along with smoking. Decision and Order at 50-51. Consequently, the administrative law judge found that employer failed to establish that the miner did not have legal pneumoconiosis. *Id.*

[13] The administrative law judge also considered the opinion of Dr. Alam, who examined the miner on behalf of the Department of Labor. Dr. Alam diagnosed the miner with emphysema due in large part to his history of cigarette smoking, and stated that it was "difficult" to diagnose legal pneumoconiosis due to the miner's prior lung cancer and lung resection. Director's Exhibit 17 at 2, 32. The administrative law judge found that Dr. Alam's "conclusory statements" did not explain why the miner's years of coal mine dust exposure did not contribute to his emphysema and, thus, did not meet employer's burden to disprove legal pneumoconiosis. Decision and Order at 50. This credibility determination is affirmed, as unchallenged. *See Skrack*, 6 BLR at 1-711.

Employer argues that it rebutted the Section 411(c)(4) presumption because "[c]laimant bears the burden of proof" and the evidence was insufficient to establish the existence of legal pneumoconiosis. Employer's Brief at 33-35. Contrary to employer's argument, claimant was not required to establish that the miner had legal pneumoconiosis. Because the miner invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner did not have the disease. 20 C.F.R. §718.305(d)(1)(i). Employer has not challenged the administrative law judge's specific credibility determinations regarding the opinions of Drs. Broudy and Rosenberg. We therefore affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i)(A);[15] *see Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[14] Even if we read employer's brief as alleging a specific error, we would affirm the administrative law judge's credibility determinations. Because employer must disprove legal pneumoconiosis, the administrative law judge reasonably discounted Dr. Broudy's opinion, as Dr. Broudy did not address the etiology of the miner's emphysema. *See* 20 C.F.R. §718.201(a)(2),(b). Further, the administrative law judge acted within his authority as the fact-finder when he determined that Dr. Rosenberg did not adequately explain why the miner's twenty-seven years of underground coal mine dust exposure did not contribute to, or aggravate, the miner's emphysema, along with his smoking. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); 20 C.F.R. §718.201(b).

[15] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's allegations of error regarding the administrative law judge's finding that employer also failed to establish that the miner did not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Additionally, we need not address employer's contention that the administrative law judge erred in finding that the miner had a fifty pack-year smoking history. Employer's Brief at 39. The record reflects that Drs. Broudy and Rosenberg relied upon a smoking history similar to that found by the administrative law judge, Employer's Exhibits 7 at 7; 8 at 10, and the administrative law judge did not credit or discredit any physician's opinion based upon his understanding of the miner's smoking history. Thus, employer has not shown how the administrative law judge's reliance on a fifty pack-year smoking history materially affected his evaluation of the medical opinion evidence. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the alleged "error to which [it] points could have made any difference"); *see Larioni*, 6 BLR at 1-1278.

The administrative law judge next addressed whether employer established rebuttal by proving 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 determined that Drs. Broudy and Rosenberg did not adequately explain why the miner's pneumoconiosis did not contribute to his disabling impairment, except to argue that the miner did not have pneumoconiosis, which conflicts with his finding that employer did not rebut that the miner had the disease. Decision and Order at 54. The administrative law judge therefore determined that employer failed to establish that no part of the miner's total disability was caused by pneumoconiosis. *Id*.

Employer summarizes Dr. Rosenberg's opinion, and "submits that the evidence of record overcame any presumption as to [disability] causation . . . ." Employer's Brief at 35-39. Employer's recitation of Dr. Rosenberg's opinion amounts to a request to reweigh the evidence, which the Board is not authorized to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because employer does not assert any specific error in the administrative law judge's analysis of the evidence, we affirm the administrative law judge's determination that employer failed to establish that no part of the miner's total disability was caused by pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the award of benefits.

[16] Moreover, the administrative law judge reasonably discounted the disability causation opinions of Drs. Broudy and Rosenberg, because neither physician diagnosed the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); Decision and Order at 54.

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

RYAN GILLIGAN
Administrative Appeals Judge