U.S. Department of Labor

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

BRB No. 18-0522 BLA

JESSEE D. COOKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUFF SPUR COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/CHARTIS	)	DATE ISSUED: 09/25/2019
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2015-BLA-05545) of Administrative Law Judge Drew A. Swank on a claim filed pursuant to 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 6, 2013,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with 34.04 years of underground coal mine employment[2] and found the new x-ray evidence established clinical pneumoconiosis, thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(1), 725.309. He further found claimant has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found employer did not rebut the presumption and awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding of 34.04 years of underground coal mine employment. *Cooke v. Bluff Spur Coal Corp.*, BRB No. 17-0200 BLA, slip op. at 3 n.5 (Jan. 31, 2018) (unpub.). However, the Board vacated the administrative law judge's total disability finding and his finding claimant invoked the Section 411(c)(4) presumption. *Id*. at 6-9. It further vacated his finding employer did not rebut the presumption.[4] *Id*. at 10-12. Consequently, the Board vacated the award of benefits and remanded the case for further consideration.

[1] Claimant filed three previous claims, all of which were denied. Director's Exhibits 1-3. The district director denied claimant's most recent previous claim on November 2, 2009, because he did not establish any element of entitlement. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 6, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The Board specifically held the administrative law judge failed to properly address whether employer disproved the existence of pneumoconiosis before determining whether employer disproved disability causation. *Cooke v. Bluff Spur Coal Corp.*, BRB No. 17-0200 BLA, slip op. at 10-12 (Jan. 31, 2018) (unpub.).

On remand, the administrative law judge found the evidence established a totally disabling pulmonary impairment, thereby invoking the Section 411(c)(4) presumption. He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding that claimant is totally disabled and invoked the presumption. It also argues the administrative law judge erred in finding the presumption unrebutted. Neither claimant nor the Director filed a response on the merits.[5]

The Board's scope of review is defined by statute. We must affirm the Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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

A miner is 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 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary 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).

On remand, the administrative law judge found claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as none of the pulmonary function studies or blood gas studies was qualifying[6] and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 4-9. He next

[5] By Order dated February 27, 2019, the Board agreed with the Director, Office of Workers' Compensation Programs, that employer forfeited its Appointments Clause argument by not raising the issue in its original appeal before the Board. *Cooke v. Bluff Spur Coal Corp.*, BRB No. 17-0200 BLA (Feb. 27, 2018) (unpub. Order); *see Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case").

[6] 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. 20 C.F.R. §718.204(b)(2)(i), (ii).

considered the medical opinions of Drs. Johnson, Green, and Fino. 20 C.F.R. §718.204(b)(2)(iv).

Dr. Johnson examined claimant on behalf of the Department of Labor on August 15, 2013. He interpreted claimant's pulmonary function study as reflecting a severe restrictive impairment and opined claimant "is totally disabled from this impairment to perform his last coal mine job . . . ." Director's Exhibit 22 at 4. He stated "this assessment is based on [claimant's] severely reduced total lung capacity which [is] below the Department of Labor standards for total disability." *Id*.

Dr. Green examined claimant on December 3, 2015. Claimant's Exhibit 3. Dr. Green interpreted claimant's pulmonary function study as reflecting a "moderate to severe degree of lung restriction" and opined claimant is "totally disabled from a pulmonary capacity standpoint. He could not meet the exertional demands of his previous coal mine employment on the basis of his ventilatory insufficiency . . . ." *Id.* at 4.

Dr. Green re-examined claimant on August 12, 2016. Employer's Exhibit 16. He interpreted claimant's pulmonary function study as reflecting a "moderate degree of lung restriction" and opined claimant "is not totally disabled from a pulmonary capacity standpoint on the basis of today's spirometric measurements." *Id*. at 4. He noted claimant has "significant" restriction but it "does not meet the [f]ederal guideline criteria for total pulmonary disability on today's study." *Id*.

Dr. Fino examined claimant on July 13, 2015, and reviewed selected medical records. Employer's Exhibit 1. He interpreted claimant's pulmonary function studies as showing "[r]educed FVC and FEV1 [values] secondary to myasthenia gravis."[7] *Id*. at 8. He diagnosed "a respiratory impairment due to myasthenia" and concluded "[f]rom a respiratory standpoint, [claimant] is disabled from returning to his last mining job or a job requiring similar effort." *Id*. at 9.

Initially, the administrative law judge found claimant's usual coal mine employment was that of a continuous miner operator, a position requiring heavy labor. Decision and

[7] "Myasthenia" is defined as "muscular weakness; any constitutional anomaly of muscle." Dorland's Illustrated Medical Dictionary 1214 (32d ed. 2012). "Myasthenia gravis" is "an autoimmune disease of neuromuscular function," the characteristics of which "include muscle fatigue and exhaustion that fluctuates in severity, without sensory disturbance or atrophy." *Id*.

Order on Remand at 4. We affirm this finding as unchallenged on appeal.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

After summarizing the physicians' qualifications,[9] the administrative law judge noted Dr. Johnson opined claimant has a totally disabling respiratory impairment, despite the fact the pulmonary function study he administered yielded non-qualifying values. Decision and Order on Remand at 11. He noted Dr. Johnson relied on objective evidence, "such as [c]laimant's reduced total lung capacity," to support his conclusion that claimant suffers from a restrictive impairment. *Id.* The administrative law judge therefore found Dr. Johnson's opinion "fairly well documented and reasoned" and entitled to "more weight." *Id.*

The administrative law judge noted Dr. Green gave differing opinions in 2015 and 2016, opining claimant had a totally disabling pulmonary impairment in 2015 but did not have such an impairment in 2016. Decision and Order on Remand at 12; *see* Claimant's Exhibit 3; Employer's Exhibit 16. After noting similar non-qualifying values from Dr. Green's 2015 and 2016 pulmonary function studies, the administrative law judge found Dr. Green failed to reconcile his conflicting assessments of claimant's disability. *Id.* He therefore accorded Dr. Green's 2016 opinion "little weight." *Id.* However, because Dr. Green's 2015 opinion is "consistent with and based on the objective evidence," he accorded it "substantial weight." *Id.* Specifically, the administrative law judge found Dr. Green's 2015 assessment of claimant's pulmonary impairment supported by Dr. Johnson's diagnosis of total disability, as well as Dr. Fino's opinion that reductions in claimant's FEV1 and FVC values and lung volumes evidenced a totally disabling respiratory impairment. Decision and Order on Remand at 10-12. He therefore found the preponderance of the evidence established claimant has a totally disabling respiratory impairment. *Id.* at 12.

[8] Drs. Johnson, Green, and Fino each noted that claimant's last coal mine employment was that of a continuous miner operator. Dr. Johnson noted that this position required claimant to lift fifty pounds "on any given day." Director's Exhibit 22 at 1. Dr. Green noted the job required him to lift fifty pounds "at any given time during the work day." Claimant's Exhibit 3 at 1. Finally Dr. Fino stated this job "involved heavy to very heavy labor." Employer's Exhibit 1 at 2.

[9] As the administrative law judge summarized, Dr. Johnson is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine; Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease; and Dr. Green's qualifications are not of record. Decision and Order on Remand at 9-10.

Employer argues the administrative law judge erred in crediting Dr. Johnson's opinion because Dr. Johnson failed to explain why claimant should be considered totally disabled in light of the non-qualifying pulmonary function study evidence. Employer's Brief at 8-9. Contrary to employer's contention, claimant's inability to establish total disability based on pulmonary function study evidence does not preclude a finding of total disability based on the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv).[10] A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000). Moreover, the determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge permissibly found Dr. Johnson adequately set forth his rationale for his findings, based on his interpretation of the medical evidence of record, we affirm the administrative law judge's finding that Dr. Johnson's opinion is well-reasoned and sufficient to support a finding of a totally disabling pulmonary impairment.[11]

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[10] The regulation at 20 C.F.R. §718.204(b)(2)(iv) specifically states:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

[11] We reject employer's assertion Dr. Johnson's opinion is flawed. Employer's Brief at 8-9. Dr. Johnson did not state that he considered claimant's pulmonary function testing to be qualifying; rather, he accurately identified claimant's FEV1 value as 2.10, FVC value as 2.62, and FEV1/FVC ratio as "normal." Director's Exhibit 22. He stated further that claimant's total lung capacity is "3.36 which is 49 percent predicted," his functional residual capacity is "1.91 which is 57 percent predicted," and his DLCO/VA is "134 [percent] predicted." *Id*. In several places in his report, he concluded that these findings from pulmonary function testing are consistent with a "severe restrictive defect" that is totally disabling, stating that he based this assessment on claimant's "severely

Employer also contends the administrative law judge erred in his consideration of Dr. Fino's opinion. Employer's Brief at 13. The administrative law judge credited Dr. Fino's opinion that "[c]laimant is totally disabled from a respiratory standpoint such that he cannot perform his last coal mining work." Decision and Order on Remand at 11. Employer submits, without further explanation, "that Dr. Fino's opinion is not so easily summarized." Employer's Brief at 9. The Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify any specific error with regard to the administrative law judge's determination that Dr. Fino's opinion supports a finding of a totally disabling respiratory impairment,[12] this finding is affirmed.

Employer finally contends the administrative law judge erred in his consideration of Dr. Green's August 2016 opinion that claimant is not totally disabled from a pulmonary standpoint. Employer's Brief at 10-13. We disagree. The administrative law judge accurately noted that, despite similar non-qualifying pulmonary function study results in 2015 and 2016, Dr. Green opined claimant was totally disabled in 2015 but not in 2016. Decision and Order on Remand at 12. Because Dr. Green failed to reconcile his conflicting assessments, the administrative law judge permissibly discredited Dr. Green's 2016 opinion.[13] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 438; *Clark*, 12 BLR at 1-155. Because it is supported by substantial evidence, the administrative law judge's finding that

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reduced total lung capacity." *Id*. Thus, the administrative law judge rationally found that Dr. Johnson "concluded claimant suffers from a totally disabling respiratory impairment, despite the non-qualifying values yielded from the pulmonary function study" and permissibly credited his opinion that claimant's "reduced total lung capacity [is] evidence of a [severe] restrictive impairment." Decision and Order at 11.

[12] The Board previously rejected employer's argument that Dr. Fino's opinion does not support a finding of total disability because he attributed claimant's disabling impairment to myasthenia gravis. *Cooke v. Bluff Spur Coal Corp.*, BRB No. 17-0200 BLA, slip op. at 8 n.16 (Jan. 31, 2018) (unpub.).

[13] In light of our affirmance of the administrative law judge's discrediting of Dr. Green's 2016 opinion that claimant is not disabled from a pulmonary standpoint and his crediting of the opinions of Drs. Johnson and Fino that claimant has a totally disabling pulmonary impairment, we need not address employer's contention the administrative law judge erred in crediting Dr. Green's 2015 opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

the medical opinion evidence established total disability is affirmed. 20 C.F.R. §718.204(b)(2)(iv).

Employer also contends the administrative law judge erred by not weighing the non-qualifying pulmonary function studies and blood gas studies against the medical opinion evidence. Employer's Brief at 14-15. Contrary to employer's contention, the administrative law judge weighed the pulmonary function and blood gas studies alongside the medical opinion evidence. As explained above, he permissibly found that although the pulmonary function and blood gas studies are non-qualifying, the opinions of Drs. Johnson and Fino nevertheless establish claimant is totally disabled based on the results of those studies. *Cornett*, 227 F.3d at 577 (holding that a physician may reasonably opine that a miner is totally disabled even if the objective studies are non-qualifying); Decision and Order on Remand at 12. We therefore affirm the administrative law judge's finding that all of the relevant evidence, when weighed together, supports the existence of a totally disabling respiratory impairment. *See Rafferty*, 9 BLR at 1-232.

In light of our affirmance of the administrative law judge's findings that claimant has over fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis[14] 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 employer failed to establish rebuttal by either method.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate he does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R.

[14] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

§§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered Dr. Fino's opinion[15] that claimant does not have legal pneumoconiosis but has a totally disabling restrictive respiratory impairment due to myasthenia gravis. Employer's Exhibit 1 at 8-9

The administrative law judge permissibly discredited Dr. Fino's opinion because he failed to adequately explain how he eliminated claimant's 34.04 years of coal mine dust exposure as a significant contributor to his restrictive pulmonary impairment.[16] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order on Remand at 11. As the administrative law judge permissibly discredited Dr. Fino's opinion, the only opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established 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). He rationally discounted Dr. Fino's opinion that claimant's disability is not due to pneumoconiosis because the doctor did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the

[15] The administrative law judge also considered the opinions of Drs. Johnson and Green. Dr. Johnson diagnosed legal pneumoconiosis in the form of severe restrictive lung disease caused by coal mine dust exposure and cigarette smoking, while Dr. Green diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Director's Exhibit 22; Claimant's Exhibit 3; Employer's Exhibit 16. The administrative law judge found neither doctor's opinion was sufficiently reasoned. Decision and Order on Remand at 23.

[16] Although the administrative law judge found Dr. Fino's reasons for attributing claimant's restrictive lung disease to myasthenia gravis compelling, he found the doctor "nonetheless failed to explain why [c]laimant's 30-plus years of underground coal mine employment did not contribute to or exacerbate any restriction that may be caused by his neurological disorder." Decision and Order on Remand at 23. The administrative law judge found therefore that employer failed to affirmatively establish the absence of legal pneumoconiosis. *Id.*

disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer failed to rebut legal pneumoconiosis as a cause of claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge