U.S. Department of Labor

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

BRB No. 19-0549 BLA

RICKY LIN MULLINS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	
	)	DATE ISSUED: 03/25/2021
Employer-Respondent	)	
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05900) rendered on a claim filed on July 1, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with nineteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary

impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the administrative law judge's finding that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption.[2] It also argues he erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[4] *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

[1] 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 surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established nineteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 24; Director's Exhibits 5, 10.

[4] The administrative law judge found Claimant's usual coal mine employment as an electrician required "heavy exertion and heavy manual labor." Decision and Order at 5. We affirm this finding as it is not challenged. *See Skrack*, 6 BLR at 1-711.

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 relevant supporting evidence against all relevant 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer argues the administrative law judge erred in finding total disability based on the exercise arterial blood gas studies.[5] 20 C.F.R. §718.204(b)(2)(ii); Employer's Brief at 4-6. We reject Employer's arguments.

The administrative law judge considered five arterial blood gas studies from July 31, 2015, February 8, 2017, September 14, 2018, October 15, 2018, and November 19, 2018. Decision and Order at 12. The July 31, 2015 study produced qualifying[6] values at rest, but the February 8, 2017, September 14, 2018, October 15, 2018, and November 19, 2018 studies produced non-qualifying values at rest. Director's Exhibits 21, 31; Employer's Exhibit 3; Claimant's Exhibits 1, 3. The October 15, 2018 study was the only one Claimant also took after he exercised; this test produced qualifying values. Claimant's Exhibit 1. The administrative law judge assigned controlling weight to the October 15, 2018 study taken during exercise because he found exercise testing is more indicative of Claimant's ability to perform his usual coal mine employment. Decision and Order at 12.

Employer argues the administrative law judge erred in crediting the October 15, 2018 exercise blood gas study because it asserts the study is invalid.[7] Employer's Brief at 5. Employer, however, did not dispute the validity of this study before the administrative law judge. We will not consider such challenges for the first time on appeal. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], F.3d , No. 20-3329, 2021 WL 386555,

[5] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 6, 11.

[6] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

[7] Employer argues Dr. Vuskovich invalidated the October 15, 2018 exercise blood gas study for the "same reason" he invalidated a December 4, 2014 study. Employer's Brief at 5-6. The record does not include any statement from Dr. Vuskovich invalidating the October 15, 2018 exercise study, nor does it include a blood gas study taken on December 4, 2014.

slip. op. at 4-6 (6th Cir. Feb. 4, 2021); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (Levin, J., concurring). Further, contrary to Employer's argument, the administrative law judge permissibly assigned the most weight to the October 15, 2018 exercise blood gas testing because it is "more probative of Claimant's ability to perform his usual coal mine work requiring physical exertion."[8] Decision and Order at 12; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consol. Coal Co.*, 2 BLR 1-972, 1-977 (1980); Employer's Brief at 4-6. As the only exercise blood gas study of record, taken on October 15, 2018, is qualifying, we affirm as supported by substantial evidence the administrative law judge's finding the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12.

We also reject Employer's argument the administrative law judge erred in finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 6-8. The administrative law judge weighed the medical opinions of Drs. Everhart, Green, and Nader that Claimant is totally disabled by a respiratory impairment, and the opinions of Drs. Dahhan and Rosenberg that he is not. Director's Exhibits 21, 25, 27, 31; Claimant's Exhibits 1, 3; Employer's Exhibit 3. The administrative law judge determined the opinions of Drs. Everhart, Green, and Nader are well-reasoned and documented, and the opinions of Drs. Dahhan and Rosenberg are not. Decision and Order at 15.

In weighing Dr. Dahhan's opinion, the administrative law judge noted the doctor excluded total disability based on his assumption that the arterial blood gas testing is non-qualifying. Decision and Order at 15; *see* Employer's Exhibit 6. The administrative law judge permissibly found Dr. Dahhan's opinion not well-reasoned or documented because he failed to address the qualifying October 15, 2018 exercise blood gas study and because the "preponderant weight of the [blood gas] testing does not comport with Dr. Dahhan's opinion." Decision and Order at 15; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Similarly, when weighing Dr. Rosenberg's opinion, the administrative law judge noted the

[8] Employer argues the administrative law judge erred in finding total disability based on the exercise blood gas study evidence because Claimant was unable to undergo exercise testing as part Dr. Rosenberg's September 14, 2018 evaluation. Employer's Brief at 4-5. Employer does not explain how Claimant's inability to undergo exercise testing for Dr. Rosenberg establishes the administrative law judge erred in weighing the blood gas studies of record. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986). Further, Employer did not seek to compel Claimant to undergo such testing or otherwise raise the issue to the administrative law judge; thus it forfeited the issue. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], F.3d , No. 20-3329, 2021 WL 386555, slip. op. at 4-6 (6th Cir. Feb. 4, 2021).

doctor excluded total disability based in part on his position that the blood gas testing is non-qualifying. Decision and Order at 15; *see* Employer's Exhibit 3. Because the administrative law judge found the blood gas testing does establish total disability at 20 C.F.R. §718.204(b)(2)(ii), substantial evidence supports the administrative law judge's conclusion that Dr. Rosenberg's opinion is not well-reasoned or documented.[9] *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 15.

In contrast, Dr. Everhart diagnosed total disability based on Claimant's pulmonary function testing that showed a "[m]oderately severe airways obstruction with evidence of mild degree of airway reversibility with use of bronchodilator." Director's Exhibit 21. He also noted Claimant's blood gas testing is qualifying. *Id*. The administrative law judge found Dr. Everhart's opinion is "based upon relevant histories, physical examination, and objective testing." Decision and Order at 13. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Everhart's opinion well-reasoned and documented. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 13.

Dr. Green opined Claimant "is totally disabled from a pulmonary standpoint on the basis of the arterial blood gases drawn immediately after light exercise with ambulation in the hallway." Claimant's Exhibit 1. He also opined Claimant is totally disabled because his pulmonary function testing resulted in "an FEV1 of 1.84 which is 60% of predicted and a maximum voluntary ventilation of 31 L/minute which is 24% of predicted." *Id*. The administrative law judge found Dr. Green had an accurate understanding of Claimant's usual coal mine employment and his "opinion is consistent with the preponderant weight of the [blood gas] testing." Decision and Order at 14. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Green's opinion well-reasoned and documented. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 14.

Dr. Nader opined Claimant is totally disabled because the October 15, 2018 exercise blood gas testing is qualifying for total disability. Claimant's Exhibit 3. The administrative law judge also found Dr. Nader had an accurate understanding of Claimant's usual coal mine employment and his "medical opinion comports with the preponderant weight of the [blood gas] testing." Decision and Order at 15. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Nader's opinion well-reasoned and documented. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 15.

[9] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Rosenberg, we need not address Employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 7-8.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability and Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 15.

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[10] nor clinical pneumoconiosis,[11] 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.

Clinical Pneumoconiosis

We first reject Employer's argument that the administrative law judge erred in finding the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. Employer's Brief at 9-11.

The administrative law judge weighed nine interpretations of five x-rays taken on July 31, 2015, February 8, 2017, September 14, 2018, October 15, 2018, and November 19, 2018. Decision and Order at 16-17. All the physicians who read these x-rays are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 21, 33; Employer's Exhibits 2, 5; Claimant's Exhibits 1-3.

Dr. Miller read the July 31, 2015 x-ray as positive for clinical pneumoconiosis, but Drs. Crum and Kendall read it as negative for the disease. Director's Exhibits 21, 30. Dr. Crum read the February 8, 2017 x-ray as positive for clinical pneumoconiosis, but Dr.

[10] "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).

[11] "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).

Kendall read it as negative for the disease. Claimant's Exhibit 2; Employer's Exhibit 2. Dr. Kendall read the September 14, 2018 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Dr. Crum read the October 15, 2018 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Crum read the November 19, 2018 x-ray as positive for clinical pneumoconiosis, but Dr. Kendall read it as negative for the disease. Claimant's Exhibit 3; Employer's Exhibit 5.

Contrary to Employer's argument, the administrative law judge permissibly assigned greater weight to the x-ray readings from 2017 and 2018 because pneumoconiosis can be a progressive and irreversible disease and these x-rays were taken more recently. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 18. He rationally found the x-ray evidence from 2017 to 2018 is in equipoise because an equal number of dually-qualified radiologists read the respective x-rays as positive for pneumoconiosis in comparison to radiologists who read them as negative for the disease. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); Decision and Order at 12. Because it is supported by substantial evidence, we affirm his finding that the x-ray evidence does not rebut the presumption of clinical pneumoconiosis.

With respect to the medical opinions, the administrative law judge correctly found Dr. Dahhan did not address whether Claimant has clinical pneumoconiosis, and thus his opinion does not aid Employer in rebutting the presumption of clinical pneumoconiosis. Decision and Order at 19; Employer's Exhibit 2. Moreover, he found Dr. Rosenberg excluded clinical pneumoconiosis because he opined Claimant has no x-ray evidence of the disease. Decision and Order at 20; Employer's Exhibit 3. The administrative law judge permissibly rejected Dr. Rosenberg's opinion as conflicting with his determination that the x-ray evidence is in equipoise and insufficient to rebut the presumption that Claimant has the disease. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); Decision and Order at 20. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis based on the medical opinion evidence. Moreover, we affirm his finding that all the relevant evidence is insufficient to rebut the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nonetheless, we address Employer's arguments on legal pneumoconiosis as they are relevant to disability causation.

Legal Pneumoconiosis

There is also no merit to Employer's arguments on the issue of legal pneumoconiosis. Employer's Brief at 11-13. To disprove legal pneumoconiosis, Employer must establish Claimant 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. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

We first reject Employer's assertion that the administrative law judge applied an incorrect legal standard when weighing the opinions of Drs. Dahhan and Rosenberg on the issue of legal pneumoconiosis. Employer's Brief at 11-13. The administrative law judge correctly stated Employer has the burden of establishing Claimant does not have a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 15-16. Moreover, he properly evaluated whether Employer's experts credibly explained why coal mine dust exposure did not contribute "in part" to Claimant's impairment. Decision and Order at 19-20. The United States Court of Appeals for the Sixth Circuit has explained an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

We also discern no error in the administrative law judge's credibility findings. Dr. Dahhan diagnosed Claimant with an obstructive ventilatory impairment based on the reduced FEV1 values on pulmonary function testing. Director's Exhibit 31 at 4-5. Although he acknowledged coal mine dust exposure can result in a loss of FEV1, he explained the "degree of loss is estimated to be 5-9 cc loss in FEV1 per year of coal dust exposure." *Id*. Because Claimant's loss of FEV1 was "much higher," he addressed whether other causes explained Claimant's obstructive impairment. *Id*. Because the loss of FEV1 associated with cigarette smoking is "up to 90cc" for each pack-year, he opined Claimant's impairment is due to cigarette smoking. *Id*. The administrative law judge permissibly found this reasoning unpersuasive because the regulations allow miners to "establish total disability due to pneumoconiosis by showing a reduced FEV1 and FEV1/FVC ratios." Decision and Order at 19; *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *Napier*, 301 F.3d at 713-14; *Stephens*, 298 F.3d at 522; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal miners have an increased risk of developing [chronic obstructive pulmonary disease that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC").

Dr. Dahhan also excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's impairment in response to bronchodilators seen on his pulmonary function testing. Employer's Exhibit 6 at 5. The administrative law judge permissibly found this reasoning unpersuasive because the doctor failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, his coal mine dust exposure. *See Young*, 947 F.3d at 405; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 19-20.

Dr. Rosenberg opined Claimant has a mildly reduced p02 on arterial blood gas testing. Employer's Exhibit 3 at 5-6. He also opined obesity caused any reduction seen on pulmonary function testing. *Id*. He then summarily concluded Claimant does not have legal pneumoconiosis. *Id*. The administrative law judge rationally found Dr. Rosenberg's opinion is insufficient to rebut the presumption of legal pneumoconiosis because he "failed to offer any creditable explanation why he excluded coal mine dust as a contributing factor to Claimant's impairment." Decision and Order at 21-22; *Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-714; *Stephens*, 298 F.3d at 522.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Employer did not disprove the existence of legal pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

The administrative law judge next considered whether Employer established "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). He permissibly discredited the disability causation opinions of Drs. Dahhan and Rosenberg because neither diagnosed pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease.[13] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21-22. We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

[12] The administrative law judge correctly found the opinions of Drs. Everhart, Green, and Nader that Claimant has clinical and legal pneumoconiosis do not aid Employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 21.

[13] In addressing whether pneumoconiosis caused Claimant's disability, neither Dr. Dahhan nor Dr. Rosenberg set forth an explanation independent of their conclusions that Claimant does not have pneumoconiosis. Director's Exhibit 31; Employer's Exhibit 3.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge