U.S. Department of Labor

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

BRB No. 20-0171 BLA

CARLOS COMBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 03/25/2021
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly, PLLC), Lexington, Kentucky, for Employer.

William M. Bush (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-05290) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 29, 2016. 20 C.F.R. §725.309(c).

The administrative law judge found Claimant established 31.96 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement[1] 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) (2018).[2] 20 C.F.R. §§718.305, 725.309. The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and therefore the constitutionality and applicability of the Section 411(c)(4) presumption enacted as part of the ACA. On the merits Employer argues that the administrative law judge erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption, and in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers'

---

[1] When a miner files a claim for benefits more than one year after the final denial of a previous claim, he must establish "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied Claimant's prior claim for reason of abandonment, which is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c); Director's Exhibit 1 at 5. Consequently, Claimant had to establish at least one element of entitlement in order to obtain a review of the merits of his claim. 20 C.F.R. §725.309(c)(3), (4).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled 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.

Compensation Programs (the Director), filed a response urging the Benefits Review Board to reject Employer's arguments concerning the constitutionality of the ACA.[3]

The 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.[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).

Constitutional Challenges

We reject Employer's contention that the ACA, Pub. L. No. 111-148, §1556 (2010), and its provisions reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 26-28, *citing Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal,* 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018). The United States Court of Appeals for the Fifth Circuit held one aspect of the ACA unconstitutional (the individual requirement to maintain health insurance), but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, 140 S.Ct. 1262 (2020). Further, the United States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

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 and comparable gainful work. 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 pneumoconiosis and

---

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 31.96 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

We affirm, as unchallenged, the administrative law judge's finding that the preponderance of the qualifying pulmonary function studies, when considered alone, support a finding that Claimant is totally disabled.[5] 20 C.F.R. §718.204(b)(2)(i); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-21. In finding the medical opinion evidence establishes total disability,[6] 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited Dr. Alam's and Dr. Go's opinions that Claimant is totally disabled because they "considered the results of objective testing and their clinical findings, as well as the description of the Claimant's duties, and concluded that from a respiratory standpoint, he could not return to his previous coal mine job." Decision and Order at 21. Conversely, he found Drs. Dahhan and Jarboe did not directly address whether Claimant has the respiratory capacity to return to his previous coal mine job. *Id.* Weighing all of the evidence together, the administrative law judge concluded that Claimant would establish total disability based on the medical opinion evidence considered alone and further found "there is no contrary probative evidence to rebut the presumption of total disability raised by the Claimant's qualifying pulmonary function studies." *Id.*; *see* 20 C.F.R. §718.204(b)(2) (qualifying pulmonary function studies "shall establish" total disability "in the absence of contrary probative evidence).

Employer asserts the administrative law judge failed to give proper consideration to the non-qualifying blood gas studies as contrary probative evidence. Employer's Brief at

---

[5] The administrative law judge considered three pulmonary function studies. The June 6, 2016 study produced non-qualifying values before and after administration of bronchodilators; the January 9, 2017 study produced qualifying values before and after administration of bronchodilators; and the April 27, 2017 study produced a qualifying value before, and a non-qualifying value after, the administration of bronchodilators. Director's Exhibit's 11, 13; Employer's Exhibit 1. The administrative law judge found Claimant established total disability based on the preponderance of the qualifying studies. Decision and Order at 13.

[6] The administrative law judge found none of the blood gas studies are qualifying for total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14.

6-7. We disagree. Because they measure different types of impairment, non-qualifying blood gas studies do not necessarily call into question valid and qualifying pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Thus, we affirm the administrative law judge's permissible finding that the qualifying pulmonary function studies are not contradicted by the non-qualifying blood gas studies and therefore establish Claimant is totally disabled. *See Tennessee 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); Decision and Order at 21.

Employer additionally contends the administrative law judge erred in crediting the medical opinions of Drs. Alam and Go that Claimant is totally disabled. Employer's Brief at 15-19. However, even if we were to agree with Employer, the qualifying pulmonary function studies still establish total disability and error, if any, in crediting Drs. Alam and Go would not alter his determination that Claimant invoked the Section 411(c)(4) presumption.[7] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Thus, we affirm the administrative law judge's overall finding that Claimant established a totally disabling respiratory or pulmonary impairment, invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 718.305(d), 718.309; Decision and Order at 21, 30-31.

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,[8] or that "no part of

---

[7] Employer raises no specific error regarding the administrative law judge's rejection of Dr. Dahhan's and Dr. Jarboe's total disability opinions on the basis that neither directly addressed whether Claimant has the respiratory capacity to return to his previous coal mining jobs. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21.

[8] "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

[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.[9]

Legal Pneumoconiosis

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 Corp*., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show 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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Drs. Alam and Go diagnosed legal pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 1. Dr. Jarboe also opined that "[Claimant] has legal pneumoconiosis," explaining he "cannot exclude the possibility that th[e] fibrotic reaction to coal mine dust [in Claimant's lung parenchyma] is contributing to his restrictive ventilatory defect." Employer's Exhibit 2 at 3. Dr. Dahhan opined Claimant has a moderate restrictive impairment related to his elevated right hemi-diaphragm only, and stated there is "no evidence of legal pneumoconiosis." Director's Exhibit 13 at 4-5. The administrative law judge found the opinions of Drs. Alam, Go, and Jarboe do not support Employer's burden at rebuttal, and that Dr. Dahhan's opinion is not well-reasoned. Decision and Order at 28. He therefore found Employer did not disprove the existence of legal pneumoconiosis. *Id*.

Employer contends the administrative law judge mischaracterized Dr. Jarboe's opinion as supporting a finding that Claimant has legal pneumoconiosis. It argues Dr. Jarboe mistakenly diagnosed "legal coal workers' pneumoconiosis" based on "an incorrectly heightened standard" than provided for under the regulations. Employer's Brief at 3. Employer asserts a correct interpretation of Dr. Jarboe's opinion is that Claimant has

---

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).

[9] The administrative law judge found Employer did not disprove clinical pneumoconiosis. Decision and Order at 25, 28.

clinical pneumoconiosis only and that coal mine dust exposure played no more than a de minimis role in Claimant's respiratory impairment. *Id*. at 3-4. Employer's arguments are without merit.

The administrative law judge permissibly relied on Dr. Jarboe's specific diagnosis of legal pneumoconiosis, which he supported with references not only to radiological evidence but also Claimant's FEV1/FVC ratio. Employer's Exhibit 2 at 3. Moreover, although Employer relies on a different interpretation of its own medical expert's opinion, it is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. Because Employer has the burden to affirmatively establish the absence of legal pneumoconiosis, it bears the risk of non-persuasion if its evidence is found insufficient. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Thus, we affirm the administrative law judge's finding that Dr. Jarboe's opinion does not aid Employer in satisfying its burden of proof. *See Crisp*, 866 F.2d at 185.

Employer also contends the administrative law judge applied the wrong legal standard in discrediting Dr. Dahhan's opinion by requiring him to "rule out" coal mine dust exposure as a causative factor for Claimant's impairment. Employer's Brief at 23-26. The administrative law judge, however, correctly observed Employer must prove Claimant's pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 27. Moreover, he discredited Dr. Dahhan's opinion because he found it not well-reasoned, not because it failed to meet a heightened legal standard. The administrative law judge permissibly found that while Dr. Dahhan opined Claimant's restrictive impairment was "consistent with" an elevated right hemi-diaphragm, he did not persuasively explain why he concluded Claimant's respiratory impairment is unrelated to his 31.96 years of coal mine dust exposure.[10] Director's Exhibit 13; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *See Crisp*, 866 F.2d at 185; Decision and Order 28.

We consider Employer's arguments regarding Dr. Jarboe's and Dr. Dahhan's opinions on legal pneumoconiosis to be a request to reweigh the evidence, which we are

---

[10] The administrative law judge noted Dr. Go's opinion that some of Claimant's symptoms and pulmonary function study abnormalities could not be accounted for by Claimant's unilateral diaphragm paralysis. Decision and Order at 26. He found that Dr. Dahhan did not fully rebut Claimant having a respiratory condition that is due to multiple causes, including a significant or substantial contribution or aggravation from coal dust exposure. *Id*.

not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Thus, we affirm the administrative law judge's finding that Employer failed to disprove Claimant has legal pneumoconiosis.[11] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Young*, 947 F.3d at 405; Decision and Order at 28.

Disability Causation

In order to disprove disability causation, Employer must establish "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). The administrative law judge found Dr. Jarboe's and Dr. Dahhan's opinions not adequately reasoned to satisfy Employer's burden of proof. Decision and Order at 30. Because Employer raises no specific allegations of error regarding the administrative law judge's findings on disability causation, we affirm his determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30.

---

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address Employer's allegations of error with regard to the administrative law judge's findings on clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-276, 1-1278 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge