U.S. Department of Labor

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

BRB No. 19-0204 BLA

CLAYTON RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRC MINING CORPORATION	)	
	)	
and	)	
	)	
CHARTIS CASUALTY CORPORATION	)	DATE ISSUED: 05/22/2020
	)	
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 Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for claimant.

Cameron Blair (Fogle Keller Walker PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05034) of Administrative Law Judge Joseph E. Kane rendered 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 miner's claim filed on March 18, 2015.[1]

The administrative law judge credited claimant with thirty-three years of underground coal mine employment based on the parties' stipulation and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C.

[1] Claimant filed a prior claim, but subsequently withdrew it. Decision and Order at 2 n.5; Claimant's Brief at 6. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 22.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4; Employer's Exhibit 6 at 9.

§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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[5] evidence of 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 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).

After finding claimant's usual coal mine employment as a mine superintendent required periods of heavy work on a regular basis, the administrative law judge found claimant established total disability based on the blood gas studies, medical opinions,[6] and the weight of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 22-29.

Employer argues the administrative law judge erred in determining claimant's usual coal mine work as a mine superintendent involved heavy manual labor because employer

[5] 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).

[6] The administrative law judge found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (iii) as the record contains no qualifying pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24.

[7] The administrative law judge noted the non-qualifying pulmonary function studies do not preclude the blood gas studies from establishing total disability as they measure different forms of impairment. Decision and Order at 29.

asserts claimant performed "mostly" supervisory duties with "little to no regular heavy lifting requirements."[8] Employer's Brief at 19-23. We disagree.

The administrative law judge considered claimant's Department of Labor (DOL) Form CM-913 (Description of Coal Mine Work and Other Employment) and testimony at his May 8, 2013 deposition and the September 19, 2017 hearing.[9] Decision and Order at 23; Director's Exhibit 5; Employer's Exhibit 6; Hearing Transcript at 18-26. On claimant's DOL form, he reported he was "a working boss and co-owner." Director's Exhibit 5. He stated "I worked harder than an[y] of [the thirty-five] employees, keeping work going and coal running. . . . I was in the face the whole shift during the last year." *Id*. He reported that he crawled fifty to one hundred feet at a time for eight hours per day and had to lift fifty pounds eight to ten times per day. *Id*.

At the hearing, claimant testified he worked for his first two years with employer as a foreman, which required him to go underground every day and carry bags of rock dust weighing fifty pounds for sixty feet, spread rock dust, and perform pre-shift safety checks in the mine that was thirty to forty inches high. Hearing Transcript at 18-21. He later became a superintendent because he was not able to work like he used to and was "out of breath and stuff." *Id*. at 22. His job duties as a superintendent required him to work on equipment outside the mine including "fix[ing] sanders and put[ting] motors on." *Id*. at 31. He also had to go into the mine three or four days per month to "change a motor or something" or fill in when a foreman was absent. *Id*. at 22-23; Director's Exhibit 32 at 7. Further, every three months he went into the mine "all week" to take dust samples. Hearing

[8] Contrary to employer's contention, the administrative law judge did not rely on claimant's prior work as a cutting machine operator and working foreman to determine the exertional requirements of his last usual coal mine work. Employer's Brief at 20. While the administrative law judge reviewed claimant's work history, he specifically relied on "[c]laimant's testimony regarding his required duties as a superintendent during the last two years of his coal mine employment." Decision and Order at 23.

[9] The administrative law judge also considered a questionnaire that Heather Hammond, a claims administrator for employer, filled out and signed on March 29, 2013. Decision and Order at 4, 23; Director's Exhibit 32; Employer's Exhibit 7. In response to the question "[d]id [claimant] actually work in or around mining operations for at least 125 days while employed by TRC Mining," Ms. Hammond responded, "yes – surface only." Director's Exhibit 32; Employer's Exhibit 7. The administrative law judge noted claimant's testimony that Ms. Hammond worked at the Pikeville office but never spent any time at the mine site and did not know his job duties. Decision and Order at 4, 23; Hearing Transcript at 24-25.

Transcript at 30. His foreman duties were the same as during his first two years working for employer, *e.g.*, carrying fifty-pound bags of rock dust and performing pre-shift safety checks in thirty-to-forty inch high coal seams. *Id*. at 23. He described working underground as "a lot harder than what you think," stated he does not "have the breath" to do it anymore, and specifically identified the pre-shift safety checks as something he is incapable of doing because he "can't crawl and do stuff like that anymore." *Id*. at 26. Finally, he testified he did not do "paperwork" but "signed the pre-shift book." *Id*. at 31.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382 (6th Cir. 1999). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-31 (6th Cir. 1994); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge accurately noted claimant testified he had to substitute for missing foremen, crawl throughout the mine for pre-shift safety checks, assist the miners with bags of rock dust weighing fifty pounds, assist with repairs on machinery, and crawl to the face of the mine for several days each quarter to run dust samples. Decision and Order at 23-24. Taking this evidence into consideration, we find no error in the administrative law judge's finding that claimant's testimony established his job as a superintendent required "periods of heavy work" on a "regular basis."[10] Decision and Order at 23; *see Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387. We therefore affirm his finding that claimant's usual coal mine employment required heavy work. Decision and Order at 23-24.

The administrative law judge next considered four blood gas studies dated May 25, 2013, May 13, 2015, February 17, 2016, and May 26, 2017. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 7, 24-26. The May 25, 2013 study Dr. Betadpur conducted and the May 13, 2015 study Dr. Rasmussen conducted produced non-qualifying values at rest and qualifying values during exercise. Director's Exhibits 10, 25. The February 17, 2016 study Dr. Dahhan conducted and the May 26, 2017 study Dr. Jarboe conducted produced non-qualifying values at rest and during exercise. Director's Exhibit 23; Employer's Exhibit 3. The administrative law judge accorded little weight to the 2016 non-qualifying exercise study because Dr. Dahhan "agreed . . . the results of his test were handicapped" by the fact

[10] While employer asserts that "[h]eavy exertion is generally defined as an individual whose job has frequent lifting requirements of 50 to 100 [pounds]," it cites no authority for its position. Employer's Brief at 20. Nor does this assertion address the other requirements of claimant's superintendent duties such as crawling throughout the mine to perform pre-shift safety inspections.

that claimant was exercised for significantly less time than the other tests. Decision and Order at 25. He also gave less weight to the non-qualifying 2017 exercise test based on Dr. Go's opinion that the intensity of the workout was significantly less than the 2013 and 2015 qualifying tests and comparable to only light work. *Id*. According greater weight to the 2013 and 2015 qualifying exercise studies as "more accurate assessment[s] of Claimant's work requirements," the administrative law judge found claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

Employer asserts the administrative law judge should have accorded greater weight to the 2016 and 2017 non-qualifying exercise blood gas studies because they are "the two most recent of record." Employer's Brief at 25. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that it is irrational to credit evidence solely on the basis of recency. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992). The administrative law judge considered recency as a factor but noted Dr. Dahhan stated that "exercise was stopped" after two minutes on the 2016 study because claimant "became short of breath and fatigued." Decision and Order at 12, 25; Employer's Exhibit 4 at 12. The administrative law judge permissibly accorded less weight to that study because the time spent on exercise was significantly less than the time spent on exercise for the other tests[11] and Dr. Dahhan acknowledged the short duration of exercise "handicapped" the results. *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); *Frazio v. Consolidation Coal Co.*, 8 BLR 1-223, 1-224 (1985); Decision and Order at 25.

The administrative law judge also noted claimant testified he worked much harder on the earlier 2013 and 2015 exercise studies than the most recent 2017 exercise study.[12]

[11] The administrative law judge noted Dr. Dahhan's 2016 exercise blood gas study lasted two minutes, whereas Dr. Betadput's 2013 exercise study lasted six minutes and twenty-nine seconds and Dr. Rasmussen's 2015 exercise study lasted seven minutes and thirty seconds. Decision and Order at 24-25. He also determined the 2017 exercise blood gas study Dr. Jarboe conducted lasted six minutes and twenty seconds based on the staff technician's digital reading on an ergometer. *Id*. at 25.

[12] In an affidavit taken on August 17, 2017, claimant stated that the 2016 and 2017 exercise blood gas studies were "not as difficult" as the 2013 and 2015 exercise blood gas studies. Claimant's Exhibit 1. Describing his work in the mines, he stated "I had to crawl a lot underground in tight conditions and time constraints and this would get my heart rate up similar to what Dr. Rasmussen had me do [in the 2015 testing]." *Id*. He further stated that "the [2013] testing in Norton was also similar." *Id*.

Although Dr. Jarboe found "the heart rate increase in percentage" on the 2017 exercise study "was similar to that obtained by Dr. Rasmussen" in 2013, the administrative law judge noted Dr. Go observed the "50 watts of work" reached on the 2017 study is "comparable to light work" while the "78 watts of work" on the 2013 study is "markedly" greater. *Id*. The 2015 study did not indicate the watts of work reached on exercise, but the administrative law judge noted Dr. Go observed claimant reached a greater "peak oxygen uptake of 23.5 ml/min/kg . . . than the 10.5 ml/min/kg reached on the 2016 and 2017 studies." *Id*., *quoting* Claimant's Exhibit 4 at 12. The administrative law judge permissibly found Dr. Go's opinion that the 2013 and 2015 exercise studies were "significantly greater in intensity" than the 2017 exercise study persuasive.[13] *See Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387. Relying on Dr. Go's opinion, the administrative law judge permissibly found the 2013 and 2015 qualifying exercise studies reflect a more accurate assessment of claimant's work requirements than the 2017 non-qualifying exercise study. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25. Thus we reject employer's assertion the administrative law judge erred in failing to accord greater weight to the 2016 and 2017 non-qualifying exercise blood gas studies based on recency. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); Decision and Order at 25.

We also reject employer's assertion the administrative law judge erred in finding the 2016 and 2017 exercise blood gas studies invalid under the regulations. 20 C.F.R. §718.105; Employer's Brief at 24. Contrary to employer's assertion, the administrative law judge did not find the 2016 and 2017 exercise blood gas studies invalid. Rather, after considering the relevant evidence he reasonably exercised his discretion as fact-finder in determining the intensity of the 2016 and 2017 exercise blood gas studies affected their probative value. *See 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); *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 25. Thus he permissibly accorded greater weight to the 2013 and 2015 exercise studies than to the 2016 and 2017 exercise studies. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25. We therefore affirm his finding that the arterial blood gas study evidence overall established total disability at 20 C.F.R. §718.204(b)(2)(ii).

[13] Noting the far greater level of intensity reached on exercise during the 2013 and 2015 studies, Dr. Go stated "[t]hat oxygen desaturation was not observed during the 2016 and 2017 studies reflects the submaximal nature of these tests rather than lack of totally disabling pulmonary impairment." Claimant's Exhibit 4 at 12.

In considering the medical opinions, the administrative law judge noted Drs. Gaziano,[14] Betadpur,[15] and Go[16] diagnosed claimant as totally disabled, while Drs. Dahhan[17] and Jarboe[18] opined he is not. Decision and Order at 9-21; Director's Exhibits 10, 14, 21, 23; Claimant's Exhibits 2, 4; Employer's Exhibits 3, 4, 5, 8, 9. The administrative law judge determined Drs. Gaziano, Betadpur, and Go based their opinions on more persuasive evidence than Drs. Dahhan and Jarboe. Finding the opinions of Drs. Gaziano, Betadpur, and Go outweighed the opinions of Drs. Dahhan and Jarboe, he determined the medical opinion evidence established total disability.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe. We disagree. The administrative law judge permissibly discredited Drs. Dahhan's and Jarboe's opinions because they relied on the February 17, 2016 and May 26, 2017 non-qualifying exercise blood gas studies which he permissibly found less accurately reflected the physical requirements of claimant's work. *See Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387. He also permissibly found Dr. Dahhan's opinion that claimant's last job "required only mild to moderate exertion" and was sedentary "at odds" with the heavy labor claimant's underground job duties required. Decision and

[14] Dr. Rasmussen performed claimant's Department of Labor (DOL)-sponsored complete pulmonary evaluation on May 13, 2015. Director's Exhibit 10. Following Dr. Rasmussen's death, Dr. Gaziano reviewed his test results and prepared the DOL medical report. Decision and Order at 9; Director's Exhibit 14. Dr. Gaziano opined claimant is unable to do his usual coal mine employment. Director's Exhibit 14.

[15] Dr. Betadpur opined claimant is totally disabled and will not be able to return to his coal mine employment from a pulmonary standpoint. Director's Exhibits 23, 25; Claimant's Exhibit 2.

[16] Dr. Go opined claimant is totally disabled from any coal mine employment. Claimant's Exhibit 4.

[17] Dr. Dahhan opined claimant has a mild obstructive pulmonary impairment. Director's Exhibit 23. He further opined claimant is not disabled from a pulmonary standpoint and retains the respiratory ability to perform his last coal mine employment. Director's Exhibit 23; Employer's Exhibits 4, 8.

[18] Dr. Jarboe opined claimant has a purely restrictive pulmonary impairment. Employer's Exhibit 3. He also opined claimant's pulmonary impairment would not prevent him from performing arduous work in a dust free environment. *Id*. He concluded claimant retains the pulmonary capacity to perform his last coal mining job and is not totally disabled from a pulmonary perspective. Employer's Exhibit 9.

Order at 27; *see Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387. He further permissibly found Dr. Dahhan did not explain his conclusion claimant could "fill in for people for a period of time and . . . do physical demand in spurts," in light of the fact claimant was able to exercise for only two minutes on the blood gas study Dr. Dahhan conducted. Decision and Order at 27; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Similarly, the administrative law judge permissibly found Dr. Jarboe's characterization of claimant's superintendent job as mainly supervisory, performed above ground, spent in an office, and sedentary in nature "at odds" with the heavy labor claimant performed underground. Decision and Order at 27, 28; *see Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387. He also permissibly found Dr. Jarboe failed to explain how claimant was capable of performing occasional heavy labor when he was unable to exercise over fifty watts during his 2017 exercise blood gas study. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 28. Thus we reject employer's assertion the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe.

The administrative law judge found the opinions of Drs. Gaziano, Betadpur, and Go well-reasoned and documented because they are based on the more persuasive qualifying exercise blood gas studies and a more accurate characterization of the exertional requirements of claimant's last coal mine job. Decision and Order at 29. Employer does not challenge the administrative law judge's weighing of their opinions. We therefore affirm his finding that the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv).

We also affirm the administrative law judge's finding that all the relevant evidence weighed together established total disability at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 29. In light of this affirmance, in conjunction with the administrative law judge's finding of thirty-three years of qualifying coal mine employment, he properly found claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 29. We affirm his finding that employer failed to rebut the presumption, as it is unchallenged on appeal. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29-36. We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge