U.S. Department of Labor

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

BRB No. 18-0135 BLA

WILLIAM L. WILLIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED POCAHONTAS COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/28/2019
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-06205) of Administrative Law Judge Larry S. Merck rendered 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 January 10, 2011.[1] Director's Exhibit 4.

The administrative law judge found that claimant has thirty years of underground coal mine employment[2] and a totally disabling respiratory or pulmonary impairment, thus establishing a change in the applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant totally disabled and in finding the Section 411(c)(4) presumption unrebutted.[4] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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,

[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. The district director denied his most recent prior claim, filed on August 2, 1996, on November 6, 1996 because claimant failed to establish total disability. Director's Exhibit 2.

[2] Claimant's coal mine employment was in West Virginia and Virginia. Director's Exhibits 5, 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) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

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

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).

Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 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).

The administrative law judge considered four new pulmonary function studies dated August 29, 2011, December 8, 2011, March 20, 2012, and July 30, 2015. The August 29, 2011, December 8, 2011, and July 30, 2015 studies produced qualifying[5] values; the March 20, 2012 study was non-qualifying.[6] Decision and Order at 8; Director's Exhibits 13, 27; Claimant's Exhibits 6, 7. Noting that the majority of the pulmonary function studies were qualifying, and according "significant weight" to the most recent qualifying study of July 30, 2015, the administrative law judge found the preponderance of the evidence "supports a finding of total disability" at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge further found the new blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and there is no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8 & n.6.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] The August 29, 2011 and July 30, 2015 pulmonary function studies were qualifying both before and after the administration of a bronchodilator. Director's Exhibit 13; Claimant's Exhibit 7. The December 8, 2011 study was qualifying before the administration of a bronchodilator; no post-bronchodilator test was administered. Claimant's Exhibit 6.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Castle, and Hippensteel. Dr. Rasmussen examined claimant on behalf of the Department of Labor and administered a pulmonary function study and blood gas study. Based on those results, he opined that claimant does not retain the respiratory capacity to perform his usual coal mine work as an electrician and mechanic. Director's Exhibit 13.

Dr. Castle examined claimant on behalf of employer and diagnosed a "mild" restrictive defect based on a pulmonary function study and noted that the "data obtained at the time of my [March 20, 2012] examination are above federal disability levels." Director's Exhibit 27 at 18. Dr. Castle opined that cardiac disease, a sternectomy,[7] a chest wall resection, rheumatoid arthritis, and obesity disabled claimant "as a whole man." *Id*. When deposed, he testified claimant is not totally disabled from a pulmonary standpoint based on the non-qualifying pulmonary function and blood gas studies he performed. Employer's Exhibit 11 at 38. He added, however, that a later pulmonary function study he reviewed "showed some change . . . and . . . [claimant] may be disabled as a result of his disease due to his heart and the therapy thereof . . . but it is in no way related to coal mine dust exposure or coal workers' pneumoconiosis." *Id*.

Dr. Hippensteel reviewed the medical evidence and diagnosed a severe respiratory impairment due to factors extrinsic to claimant's lungs. Employer's Exhibit 7 at 6-7. He opined that claimant is not totally disabled from a pulmonary standpoint based on the results of Dr. Castle's March 20, 2012, non-qualifying pulmonary function study, but is disabled as a whole man due to age and diseases unrelated to coal mine dust exposure. Employer's Exhibit 7 at 7.

The administrative law judge found Dr. Rasmussen's opinion well-documented and reasoned and gave it "full probative weight on the issue of total disability." Decision and Order at 14. He found Dr. Castle did not clearly address whether claimant is totally disabled by his pulmonary or respiratory impairment, but "primarily discussed" the causes of his pulmonary condition. *Id*. The administrative law judge rejected Dr. Hippensteel's opinion as he relied on the results of the March 20, 2012, non-qualifying pulmonary function study which was outweighed by the preponderance of qualifying studies, including the more recent study of July 30, 2015. Decision and Order at 14. Finding Dr. Rasmussen's opinion to be supported by the qualifying pulmonary function studies of

[7] As summarized by the administrative law judge, claimant's sternum was removed in 2009 because it became infected after he had coronary artery bypass surgery. Decision and Order at 13; Director's Exhibit 24.

record, the administrative law judge found the medical opinion evidence weighs in favor of a finding of total disability.

Employer contends the administrative law judge mischaracterized Dr. Castle's opinion, arguing he clearly opined claimant is not totally disabled based on the testing he performed. Employer's Brief at 10. This contention lacks merit. The issue at this stage is whether claimant has a totally disabling respiratory or pulmonary impairment, not the cause of that impairment. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 698 (4th Cir. 2018); *see* 20 C.F.R. §718.204(a). The administrative law judge considered Dr. Castle's opinion that "based on his study results . . . [c]laimant is not totally disabled from a strictly pulmonary point of view. . . ." Decision and Order at 12. The administrative law judge, however, also appropriately took into account Dr. Castle's qualification that "more recent studies may show some change in that," but claimant is disabled due to heart disease and other conditions unrelated to coal mine employment. *Id.* Contrary to employer's contention, substantial evidence supports the administrative law judge's finding that Dr. Castle's opinion as a whole does not clearly assess whether a respiratory or pulmonary impairment, standing alone, prevents claimant from performing his usual coal mine work. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243-44 (4th Cir. 1994); 20 C.F.R. §718.204(b)(1).

Employer further argues the administrative law judge selectively analyzed and "dismissed" Dr. Hippensteel's opinion merely because the pulmonary function study evidence "favors total disability." Employer's Brief at 10. Contrary to employer's argument, the administrative law judge reasonably found Dr. Hippensteel's opinion undermined by his reliance on a non-qualifying pulmonary function study that was outweighed by the remaining three pulmonary function studies of record, including a qualifying study that was three years more recent. *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). Further, contrary to employer's contention, substantial evidence supports the administrative law judge's determination that Dr. Rasmussen provided a reasoned opinion of total disability supported by the pulmonary function studies of record. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 212 (4th Cir. 2000); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We therefore reject employer's allegations of error and affirm the administrative law judge's finding that the medical opinion evidence supports total disability at 20 C.F.R. §718.204(b)(2)(iv).

Weighing all of the evidence together, the administrative law judge found "the probative weight of the qualifying pulmonary function study results and the medical report of Dr. Rasmussen" establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 15. Employer contends the administrative law judge erred by failing to consider the blood gas studies and thus failed to weigh all relevant evidence. Employer's Brief at 9-10. We disagree.

The administrative law judge considered the evidence under each subsection at 20 C.F.R. §718.204(b)(2)(i)-(iv) and rationally determined the weight of the pulmonary function studies and medical opinions establish, "by a preponderance of the newly-submitted evidence," that claimant is totally disabled. Decision and Order at 15; *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. The administrative law judge's analysis is consistent with the requirement to consider all contrary probative evidence before finding total disability established. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). Moreover, pulmonary function studies and blood gas studies measure different types of impairment, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), and employer has not explained how the blood gas study results undermine the administrative law judge's unchallenged finding that claimant's pulmonary function studies are totally disabling. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016). We therefore affirm the administrative law judge's finding that claimant has a totally disabling respiratory impairment as supported by substantial evidence.[8]

Because claimant established at least fifteen years of underground coal mine employment and total disability, we affirm the administrative law judge's finding that he invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement at 20 C.F.R. §725.309(c).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[9] 20 C.F.R.

[8] The administrative law judge found the old evidence submitted with claimant's two prior claims less probative of claimant's current respiratory condition. Decision and Order at 15; Director's Exhibits 1, 2. We affirm that finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[9] "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 that is 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).

§718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[10] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *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 the medical opinions of Drs. Castle and Hippensteel who diagnosed a restrictive impairment due to cardiac disease, sternectomy and chest wall resection, rheumatoid arthritis, and obesity, all unrelated to coal dust exposure. Director's Exhibit 27; Employer's Exhibits 7, 11. Employer argues the administrative law judge erred in finding their opinions not well-reasoned. Decision and Order at 19-21. We disagree.

The administrative law judge accurately noted Dr. Castle's reasoning that coal mine dust exposure did not substantially aggravate claimant's restrictive impairment because the pulmonary function study results he obtained on March 20, 2012 were higher than those Dr. Rasmussen obtained on an earlier study. Decision and Order at 19; Director's Exhibit 27 at 17-18. The administrative law judge reasonably found that Dr. Castle did not reconcile his etiology opinion with the "results of the most recent pulmonary function study of July 30, 2015[,] which were lower and qualifying." Decision and Order at 19; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. The administrative law judge also permissibly

[10] We reject employer's argument that the administrative law judge applied an improper rebuttal standard when weighing the opinions of Drs. Castle and Hippensteel. Employer's Brief at 16. He properly evaluated the physicians' opinions based on their explanations for why they excluded coal mine dust exposure as a cause of claimant's respiratory impairment. Decision and Order at 19-21. Further, the administrative law judge correctly stated employer can rebut the Section 411(c)(4) presumption by establishing claimant does not have legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2). Decision and Order at 19. He stated legal pneumoconiosis includes any chronic respiratory or pulmonary disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(b). Because the administrative law judge set forth the correct rebuttal standard, and properly weighed the physicians' opinions according to it, we reject employer's argument. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

discredited his opinion because he failed to adequately explain how he eliminated claimant's thirty years of coal mine dust exposure "as a significant or aggravating [factor] of the restrictive pulmonary impairment present." Decision and Order at 20; *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).

The administrative law judge also permissibly found that although Dr. Hippensteel explained why cardiac surgery caused a severe respiratory impairment, he did not adequately explain why coal mine dust exposure did not also contribute to, or aggravate, claimant's impairment. *See Looney*, 678 F.3d at 313-14; *Kennard*, 790 F.3d at 668; 20 C.F.R. §718.201(b).

The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Castle and Hippensteel, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In addressing whether employer established that pneumoconiosis caused "no part" of claimant's disability, the administrative law judge permissibly accorded the opinions of Drs. Castle and Hippensteel little weight because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 22. We thus affirm the administrative law judge's determination that employer failed to prove that pneumoconiosis caused no part of claimant's disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

[11] Therefore, we need not address employer's allegations of error in the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-15.

Accordingly, we affirm the administrative law judge's Decision and Order awarding benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge