U.S. Department of Labor

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

BRB No. 17-0362 BLA

FRED C. JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHEEP FORK ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL c/o CHARTIS	)	DATE ISSUED: 05/23/2018
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC), Lexington, Kentucky, 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 Awarding Benefits (2015-BLA-05184) of Administrative Law Judge Peter B. Silvain, Jr., 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 miner's subsequent claim filed on January 13, 2014.[1]

The administrative law judge credited claimant with at least twenty-five years of underground coal mine employment, based on the parties' stipulation, and found that the new evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant 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) (2012),[2] and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] He further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinions establish a totally disabling respiratory or pulmonary impairment at

[1] This is claimant's third application for benefits. Director's Exhibit 4. Claimant's most recent prior claim, filed on March 9, 2011, was denied by the district director on March 14, 2012 because claimant failed to establish total respiratory disability. Director's Exhibit 2. Claimant took no further action on that claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the claimant establishes at least fifteen years of underground coal mine employment, or 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] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "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). Claimant's prior claim was denied because he did not establish total disability. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing that he is totally disabled. *See* 20 C.F.R. §725.309(c).

20 C.F.R. §718.204(b)(2)(iv), and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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, and in accordance with applicable law.[5] 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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

After finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii),[6] the administrative law judge considered the medical opinions of

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

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7.

[6] The record contains the results of six pulmonary function studies, conducted between January 8, 2013 and November 17, 2015. The administrative law judge found that the January 8, 2013 study is invalid, as it lacks the requisite tracings, but noted that the validity of the remaining five studies was not called into question by the administering or reviewing physicians. Decision and Order at 8-9. Of these, the February 5, 2014 study performed by Dr. Martin produced qualifying pre-bronchodilator values; post-bronchodilator values were not performed. Director's Exhibits 12-10, 12-17. The September 8, 2014 study, administered by Dr. Rosenberg, produced non-qualifying values both before and after administration of a bronchodilator. Employer's Exhibit 6. The studies dated April 17, 2015 and June 9, 2015 performed by Drs. Cordasco and Green, respectively, both produced qualifying pre-bronchodilator values, and non-qualifying post-bronchodilator values. Claimant's Exhibits 2, 3. Finally, the study performed on November 11, 2017, also by Dr. Rosenberg, produced non-qualifying values both before and after administration of a bronchodilator. Employer's Exhibit 7. Considering the mixed results, the administrative law judge found that the pulmonary function studies, standing alone, do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 18. The administrative law judge further found that the five blood gas studies

Drs. Green, Cordasco, and Broudy pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] Decision and Order at 18-20. Dr. Green examined claimant on June 9, 2015 and performed objective testing. Decision and Order at 14-15; Claimant's Exhibit 3. In concluding that claimant is totally disabled, Dr. Green explained that claimant's pulmonary function studies, which produced qualifying pre-bronchodilator values, demonstrated a significant chronic airflow obstruction with an FEV1 of 55% of predicted and an MVV of 54% of predicted. Decision and Order at 15; Claimant's Exhibit 3 at 4. He further stated that even though claimant's arterial blood gas studies were non-qualifying for total disability, they nonetheless demonstrated significant resting and exercise hypoxemia. Claimant's Exhibit 3 at 4. Dr. Green explained that "the combination of significant airflow obstruction as reflected on the spirometry and significant hypoxemia at rest and with exercise form the basis to conclude that this gentleman is not able to meet the exertional demands of his previous coal mine employment and is totally disabled from a pulmonary capacity standpoint." *Id.*

Dr. Cordasco examined claimant on April 17, 2015 and performed objective testing. Decision and Order at 13-14; Claimant's Exhibit 2. He also opined that claimant is totally disabled from a combined severe obstructive and mild restrictive impairment resulting in an overall severe pulmonary impairment. Decision and Order at 13-14; Claimant's Exhibit 2 at 3-4. Dr. Cordasco concluded that based on his "evaluation of [claimant's] pulmonary mechanical impairment via spirometry, lung volumes and diffusion capacity, and determination of resting and exercise gas exchange as well as activity tolerance via cycle ergometry . . . [claimant] would be deemed totally disabled from a pulmonary viewpoint. . . ."[8] Claimant's Exhibit 2 at 4.

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of record produced non-qualifying values, and that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 17-18; Director's Exhibit 12-44; Claimant's Exhibits 2, 3; Employer's Exhibits 6, 7. The administrative law judge, therefore, found that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 18.

[7] The administrative law judge also considered the opinions of Drs. Rosenberg and Martin. He found that Dr. Rosenberg did not clearly state whether or not claimant would be prevented from performing his usual coal mine employment. Decision and Order at 18. While he found that Dr. Martin opined that claimant is totally disabled by his pulmonary condition, the administrative law judge did not specifically accord any weight to Dr. Martin's opinion. *Id.* Employer raises no arguments regarding the administrative law judge's evaluation of these opinions.

[8] Dr. Cordasco noted that claimant exercised for a total of six minutes and seventeen seconds before he terminated exercise secondary to complaints of dyspnea. Claimant's

In contrast, in a report dated September 15, 2016,[9] Dr. Broudy opined that although claimant had evidence of obstruction, mild restriction, and some hypoxemia, most of his pulmonary function studies and arterial blood gas studies were above the federal regulatory guidelines, indicating that he retained the capacity to do his previous coal mine work.[10] Employer's Exhibit 9 (report) at 5-7. Dr. Broudy later testified that notwithstanding whether the objective test results are above or below the disability standards, claimant is capable, from a pulmonary standpoint, of performing his job as a working foreman. Decision and Order at 10-11; Employer's Exhibit 9 (deposition) at 14. He added that while three of claimant's five blood gas studies showed moderate hypoxemia, the most recent studies performed by Dr. Rosenberg were normal, indicating that claimant does not have a permanent impairment. Decision and Order at 10-11; Employer's Exhibit 9 (deposition) at 13-14.

In addressing the conflicting medical opinion evidence, the administrative law judge explained why he found the opinions of Drs. Green and Cordasco more persuasive than that of Dr. Broudy:

> Only Dr. Broudy clearly concluded Claimant is not totally disabled by his pulmonary condition. Dr. Broudy relied on the fact that Claimant's values on [pulmonary function testing] and [arterial blood gas testing] were above the regulatory guidelines. . . . Dr. Cordasco and Dr. Green both concluded Claimant was totally disabled and they noted that it was the combination of findings on all the pulmonary function tests, including in Dr. Cordasco's case, the intolerance Claimant demonstrated on exercise testing, that was the basis for finding Claimant would not be able to perform his usual coal mine employment.

Exhibit 2 at 3. He further noted that claimant was "wheezing audibly and vigorously coughing at the completion of the exercise." *Id*.

[9] Dr. Broudy examined claimant on December 13, 2011 and subsequently reviewed additional medical evidence, including the opinions and objective testing of Drs. Green, Cordasco, and Rosenberg. Employer's Exhibit 9 (report).

[10] During his September 20, 2016 deposition, Dr. Broudy testified that he was familiar with claimant's coal mine job as a working foreman, in which claimant "fairly regularly" would have to lift fifty to sixty pounds a few times a day. Employer's Exhibit 9 (deposition) at 13-14.

> I find the conclusions of Drs. Cordasco and Green on Claimant's pulmonary capacity to be more persuasive since they are supported by their consideration of the combination of test results, including the lung volume testing, diffusion capacity testing and the intolerance on exercise testing as well as the [pulmonary function testing] and [blood gas testing] results. Under these circumstances, I accord greater weight to the better-supported and more probative opinions of Drs. Cordasco and Green which considered more extensive data. Based on the above, I find that the preponderance of the medical opinion evidence supports a finding of total disability.

Decision and Order at 19.

Employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Green and Cordasco than to that of Dr. Broudy. Specifically, employer argues that, contrary to the administrative law judge's characterization, Drs. Green and Cordasco did not review more extensive data than Dr. Broudy. Employer's Brief at 17, 19, 21-23. Rather, they reviewed only their own objective test results while, in contrast, Dr. Broudy reviewed all of the relevant evidence of record, including the most recent testing by Dr. Rosenberg. *Id.* at 15, 17, 19, 24-25. Employer notes that Dr. Rosenberg's November 17, 2015 pulmonary function study and blood gas study demonstrated improved results over Dr. Green's June 9, 2015 studies and Dr. Cordasco's April 17, 2015 studies. *Id.* at 20-23. Because Drs. Green and Cordasco did not have the benefit of Dr. Rosenberg's objective test results, and therefore did not have a complete picture of the miner's health, employer contends that the administrative law judge erred in finding their opinions to be reasoned and documented. *Id.* at 23. We disagree.

The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii) . . . of this section . . . 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].

20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000). Here, the administrative law judge correctly noted that Drs. Green and Cordasco diagnosed a totally disabling respiratory impairment based on their respective physical examination findings, claimant's medical history, an understanding of claimant's work history, and the pulmonary function studies and blood

gas studies they conducted. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 21. Contrary to employer's argument, the administrative law judge was not required to discount the opinions of Drs. Green and Cordasco on the ground that they did not consider Dr. Rosenberg's testing, conducted five and seven months, respectively, after their examinations of claimant.[11] Rather, as he determined that Drs. Green and Cordasco set forth the rationale for their findings based on their interpretations of the medical evidence they considered, and persuasively explained why they concluded that claimant is disabled, the administrative law judge permissibly found their opinions to be well-reasoned and documented and entitled to probative weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 19-20; Claimant's Exhibit 2, 3.

There is also no merit to employer's contention that the administrative law judge erred in finding that the opinions of Drs. Green and Cordasco are based on more extensive data than Dr. Broudy's opinion. Employer's Brief at 23-24. Contrary to employer's characterization, the administrative law judge did not find that Drs. Green and Cordasco reviewed more evidence than Dr. Broudy. *Id.* at 19, 21, 22-23. Instead, as set forth above, the administrative law judge observed that Dr. Cordasco relied on a broader combination

[11] We reject employer's argument that because Dr. Rosenberg's more recent objective testing showed some improvement, the objective studies performed by Drs. Green and Cordasco are "unreliable" and render their opinions not credible. Employer's Brief at 23. First, as the administrative law judge found and employer concedes, no doctor questioned the validity of their objective testing, and even Dr. Rosenberg agreed that it was valid. Decision and Order at 8-9; Employer's Brief at 7. Second, an administrative law judge need not mechanically credit more recent, non-qualifying test results over earlier qualifying results merely because they are more recent, especially where the testing is not separated by a significant amount of time. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309, 1-312 (1984). Here, Dr. Rosenberg's objective testing was performed only seven months after Dr. Cordasco's, and only five months after Dr. Green's. Moreover, higher results are not necessarily more credible than lower results among valid objective tests. *See Keathley*, 773 F.3d at 740, 25 BLR at 2-687-88; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993); *see Greer v. Director, OWCP*, 940 F.2d 88, 90-91, 15 BLR 2-167, 2-170 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, on any given day, it is possible to do better than one's typical condition would permit).

of test results, including claimant's observed performance on exercise testing, lung volume testing, and diffusion capacity testing, in addition to the pulmonary function studies and blood gas studies he conducted. Decision and Order at 19; Claimant's Exhibit 2. The administrative law judge found that Dr. Green similarly "relied on all tests in combination in concluding that claimant is disabled." Decision and Order at 19; Claimant's Exhibit 3. Thus, the administrative law judge found that Drs. Green and Cordasco provided more extensive support for their opinions. Moreover, in asserting that the opinions of Drs. Green and Cordasco are not credible, employer is asking for a reweighing of the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988).

We further reject employer's contention that the administrative law judge erroneously discredited Dr. Broudy's opinion because he relied solely on the fact that claimant's pulmonary function studies and blood gas studies are non-qualifying. Employer's Brief at 15. Contrary to employer's assertion, the administrative law judge considered Dr. Broudy's opinion that while some of claimant's blood gas studies demonstrated hypoxemia, the fact that his most recent testing was normal indicated that claimant does not have a permanent impairment. Decision and Order at 10-11; Employer's Brief at 15-16. The administrative law judge nonetheless permissibly found that Dr. Broudy's opinion is less persuasive than those of Drs. Green and Cordasco because they relied on a broader combination of test results.[12] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; Decision and Order at 19.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). The determination of whether a medical opinion is documented and reasoned is for the administrative law judge. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985). Here, the administrative law judge explained his findings, and substantial evidence supports his permissible determination that Drs.

[12] There is no merit to employer's contentions that the administrative law judge selectively analyzed the evidence by discrediting only Dr. Broudy's opinion for relying on claimant's objective test results, and applied a more stringent standard in evaluating his opinion. Employer's Brief at 23-25. As set forth above, the administrative law judge found that Drs. Green and Cordasco relied not only on the results of claimant's pulmonary function studies and blood gas studies, but persuasively explained how other factors such as the combination of test results, and claimant's observed exercise intolerance, supported their conclusions that claimant is totally disabled. Decision and Order at 19.

Green and Cordasco provided well-reasoned opinions regarding total disability. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Therefore, we affirm the administrative law judge's finding that the opinions of Drs. Green and Cordasco are more persuasive than Dr. Broudy's opinion and that, therefore, the preponderance of the medical opinions establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Further, the administrative law judge found that when all of the relevant evidence is considered, the medical opinions of Drs. Green and Cordasco outweigh "the non-qualifying tests." Decision and Order at 19-20. Consequently, we affirm the administrative law judge's conclusion that the new evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 20.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of 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. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 20.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "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)(i), (ii). As employer raises no challenges to the administrative law judge's determinations that it failed to establish rebuttal by either method, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge