U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0050 BLA

KENNETH CALDWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED c/o JAMES RIVER SERVICES COMPANY	)	
	)	
and	)	
	)	
SUN COAL COMPANY c/o WELLS FARGO	)	
	)	DATE ISSUED: 09/22/2016
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Asher, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05076) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits 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 July 21, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with eighteen years of underground coal mine employment, and found that the evidence established that claimant has 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 and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge also found

[1] Claimant filed two prior claims. Claimant's most recent prior claim filed on April 4, 2001, was denied by Administrative Law Judge Joseph E. Kane because claimant failed to establish any of the elements of entitlement. Decision and Order at 2; Director's Exhibits 1-251, 1-843. Following a series of appeals, in a decision dated January 31, 2007 the Board affirmed the administrative law judge's denial of benefits. Decision and Order at 2; Director's Exhibits 1-78, 1-84. Claimant took no further action until he filed the current subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] If 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 failed to establish any of the elements of entitlement. Thus, in order to obtain review of the merits of his claim, claimant had to establish at least one of the requisite elements. 20 C.F.R. §725.309(c)(3), (4).

that employer did not rebut the Section 411(c)(4) presumption.[4] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory or pulmonary impairment and, consequently, erred in finding that claimant invoked the Section 411(c)(4) presumption and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Employer also contends that the administrative law judge erred in finding that employer did not rebut the presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, filed a brief in this appeal.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer specifically argues that the administrative law judge erred in finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 7-18.

The administrative law judge initially found that claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(i) and (ii) as all of the new

[4] In determining whether claimant established total disability, the administrative law judge reasonably accorded greater weight to the evidence submitted with the current claim, as more indicative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Decision and Order at 19, 21.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established eighteen 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, 17-18; Hearing Tr. at 24.

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

pulmonary function studies, and two of the three new blood gas studies, including the two most recent studies, yielded non-qualifying results.[7] Decision and Order at 18; Director's Exhibit 11; Employer's Exhibits 4, 5. Turning to the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen, Jarboe, and Rosenberg. Decision and Order at 11-16, 19-20. After conducting a complete pulmonary evaluation of claimant on February 7, 2011, Dr. Rasmussen opined that claimant is unable to perform his usual coal mine employment from a respiratory standpoint due to his "marked loss of lung function as reflected principally by his impairment in oxygen transfer and gas exchange during light exercise." Decision and Order at 11; Director's Exhibit 11.

The administrative law judge noted that, in a report dated June 3, 2012, Dr. Jarboe similarly opined that claimant suffers from a totally and permanently disabling pulmonary impairment in the form of a gas exchange impairment. Decision and Order at 13; Employer's Exhibit 4. Dr. Jarboe based his opinion on the results of his physical examination and objective testing, which he noted demonstrated a "reduction in the diffusion capacity" and "impaired oxygen transfer with exercise." Employer's Exhibit 4.

Finally, the administrative law judge noted that, in a narrative report dated April 1, 2015, Dr. Rosenberg opined that claimant is not disabled from performing his previous coal mine job from a pulmonary standpoint. Decision and Order at 20; Employer's Exhibit 5. During his deposition on June 15, 2015, Dr. Rosenberg noted that, in addition to his own evaluation of claimant, he reviewed the reports and objective tests conducted by Drs. Rasmussen and Jarboe. Employer's Exhibit 10. While Dr. Rosenberg reiterated his opinion that his own objective testing, and that of Dr. Jarboe, reflected that claimant is not disabled from a pulmonary standpoint, he acknowledged that because Dr. Rasmussen "exercised [claimant] to a greater extent," and "his PO2 fell," claimant "[o]bviously . . . [has a] significant impairment with low diffusion capacity." Employer's Exhibit 10 at 13-14, 19. Thus, Dr. Rosenberg concluded that it is "conceivable" that claimant "may be disqualified from working based on [an] oxygenation abnormality." *Id.* at 14.

The administrative law judge found that, as Drs. Rasmussen and Jarboe opined that claimant is totally disabled, and even Dr. Rosenberg acknowledged that claimant has a "significant" respiratory impairment that "may" be disabling, the preponderance of the medical opinion evidence supports a finding of total disability. Decision and Order at 20.

[7] The administrative law judge further found that because the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

Employer initially contends that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Jarboe to find that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer asserts that both physicians' opinions are unsupported by the results of reliable,[8] qualifying[9] objective test results and, therefore, their opinions are not sufficiently reasoned and documented to support a finding of total disability. Employer's Brief at 9-15. We disagree.

The administrative law judge found that Drs. Rasmussen and Jarboe based their opinions that claimant is totally disabled on the results of their physical examinations and on the results of the pulmonary function studies and blood gas studies they performed. Decision and Order at 11-14, 19-20. Specifically Dr. Rasmussen opined that claimant's objective testing reflected "marked loss of lung function" as demonstrated by his "poor exercise tolerance and his increased oxygen consumption gradient with light to moderate exercise." Decision and Order at 11-12; Director's Exhibit 11. Similarly, Dr. Jarboe concluded that claimant's objective testing revealed reduced diffusion capacity and impaired oxygen transfer with exercise. Decision and Order at 12-13; Employer's Exhibit 4. Further, both physicians explained that the level of impairment revealed by the objective testing would prevent claimant from performing his usual coal mine work as a repairman and electrician. Director's Exhibit 11; Employer's Exhibits 4, 9. Contrary to employer's argument, the fact that claimant was unable to establish total respiratory disability based on pulmonary function or arterial blood gas study evidence does not

[8] Initially we reject employer's argument that the administrative law judge failed to properly evaluate Dr. Vuskovich's opinion that the February 7, 2011 qualifying blood gas study, upon which Dr. Rasmussen relied, was not a valid test. Employer's Brief at 11, 13-14. Employer contends the administrative law judge mischaracterized Dr. Vuskovich's opinion as containing no explanation for his conclusions. *Id.* Contrary to employer's argument, the administrative law judge correctly noted that on his one-page report dated August 15, 2012, Dr. Vuskovich "placed an X next to 'no' " in response to the inquiry whether the arterial blood gas studies were technically valid, but provided no discussion or reasoning as to why he found the test invalid. Decision and Order at 19; Employer's Exhibit 7. Because the copy of Dr. Vuskovich's report contained in the record contains no explanation for his opinion, we affirm the administrative law judge's permissible rejection of Dr. Vuskovich's invalidation. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); Decision and Order at 19.

[9] A "qualifying" pulmonary function or arterial blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

preclude a finding of total respiratory disability based on the medical opinion evidence. The regulations specifically state that:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, 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 as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005).

Because the administrative law judge permissibly found that Drs. Rasmussen and Jarboe set forth the rationales for their findings, based on their interpretations of the medical evidence of record, and explained why they concluded that claimant is unable to perform the duties of his usual coal mine work, we affirm the administrative law judge's permissible determination that the opinions of Drs. Rasmussen and Jarboe are sufficient to satisfy claimant's burden of proof. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe,* 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11-14.

There also is no merit to employer's contention that the administrative law judge mischaracterized Dr. Rosenberg's opinion as supportive of a finding of total respiratory disability. Employer's Brief at 15-17. Contrary to employer's argument, the administrative law judge recognized Dr. Rosenberg's opinion that his own testing did not reflect a disabling impairment. Decision and Order at 20. The administrative law judge permissibly concluded however, that Dr. Rosenberg's statement that "obviously he's got significant impairment with low diffusing capacity," supported, rather than contradicted, the conclusion that claimant is totally disabled. *See Crisp,* 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 20; Employer's Exhibit 10 at 19.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the preponderance of the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, as the administrative law judge properly considered the medical opinion evidence, in light of the pulmonary

function and arterial blood gas study evidence, we affirm the administrative law judge's finding that claimant has a pulmonary or respiratory impairment that is "sufficiently severe to prevent him from performing his last coal mine employment." *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (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 impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). We, therefore, also affirm the administrative law judge's finding that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c). 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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[10] The administrative law judge considered the opinions of Drs. Jarboe and Rosenberg[11] that claimant does not have legal pneumoconiosis, but suffers from a gas exchange impairment due to smoking-related emphysema, as well as chronic bronchitis and nonspecific interstitial pneumonitis,

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] The administrative law judge also considered the opinions of Dr. Rasmussen, who diagnosed legal pneumoconiosis, and Dr. Chaney, who diagnosed coal workers' pneumoconiosis. Decision and Order at 11-12, 27; Director's Exhibits 11, 12. The administrative law judge properly noted that their opinions do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. Decision and Order at 27.

which are unrelated to coal mine dust exposure.[12] Employer's Exhibits 4, 5, 8, 9, 10, 17. The administrative law judge found that their opinions were inadequately explained and, therefore, not sufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 24-27.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Jarboe and Rosenberg. Employer's Brief at 19-28. We disagree. The administrative law judge permissibly questioned their opinions regarding the cause of claimant's impairment because neither doctor adequately explained how he eliminated claimant's coal mine dust exposure as a source of the impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 24-27. Specifically, noting that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of both Drs. Jarboe and Rosenberg, in part, because they did not adequately explain why claimant's eighteen years of coal mine dust exposure was not a contributing or aggravating factor, along with his cigarette smoking, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483 (administrative law judge rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 25-26.

Moreover, to the extent Dr. Jarboe supported his opinion with studies indicating that "[s]mokers who quit after the age of 40 showed an increased rate of decline in lung function compared to non-smokers," the administrative law judge permissibly found that Dr. Jarboe did not persuasively explain why claimant's impairments from smoking would be latent and progressive, while the effects of coal mine dust inhalation would not be. *See* 20 C.F.R. §718.201(c); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 25; Employer's Exhibit 5.

The administrative law judge also considered Dr. Jarboe's opinion that claimant's impairment is not due to coal mine dust exposure because his objective testing reflected a significant reduction in diffusion capacity, which is not "typical" of coal mine dust-related disease. The administrative law judge permissibly discredited Dr. Jarboe's opinion as based on generalities, rather than on the specifics of the miner's case. *See*

[12] In light of the progressive nature of pneumoconiosis, the administrative law judge permissibly accorded greater weight to the evidence to that which was developed with the most recent claim. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 21, 22.

Rowe, 710 F.2d at 255, 5 BLR at 2-103; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 25. We, therefore, affirm the administrative law judge's discounting of Dr. Jarboe's opinion as supported by substantial evidence and in accordance with law. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge also considered Dr. Rosenberg's opinion that claimant's diffuse form of emphysema, the principal cause of his impairment, is not a form of emphysema that is caused by coal mine dust exposure, but is solely attributable to cigarette smoking. Decision and Order at 26; Employer's Exhibit 10 at 14-15. Noting that the preamble to the regulations recognizes that emphysema may be caused by coal mine dust, the administrative law judge permissibly discounted Dr. Rosenberg's opinion, in part, because Dr. Rosenberg did not point to any medical studies to support his opinion that it was possible to distinguish the etiology of emphysema based on the different size of the particles in cigarette smoke and coal mine dust. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 26; Employer's Exhibit 10 at 14-15.

Further, the administrative law judge permissibly found that Dr. Rosenberg's attribution of claimant's impairment entirely to cigarette smoking opinion was inadequately explained in light of the prevailing views of the medical community, as set forth in preamble to the revised regulations, that the risks of smoking and coal mine dust exposure are additive. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 26; 65 Fed. Reg. 79,940; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As the administrative law judge's bases for discrediting the opinions of Drs. Jarboe and Rosenberg are rational and supported by substantial evidence, these findings are affirmed.[13] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Because the opinions of Drs. Jarboe and Rosenberg are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[14] Employer's failure to rule out legal pneumoconiosis

[13] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Jarboe 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).

[14] Employer also asserts that the administrative law judge selectively analyzed the evidence by accepting, at face value, Dr. Rasmussen's opinion, that claimant suffers from legal pneumoconiosis, while applying greater scrutiny to its experts' opinions. Employer's Brief at 22-23. Employer bears the burden of rebutting the amended Section

precludes a rebuttal finding that claimant does not have pneumoconiosis. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Employer next argues that the administrative law judge erred in finding that employer failed to establish that that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Employer's argument lacks merit. The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Jarboe and Rosenberg that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 27. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

411(c)(4) presumption. Because the administrative law judge specifically found that the medical opinions of Dr. Jarboe and Rosenberg, the only opinions supportive of employer's burden, "are not sufficient to rebut the presumption that claimant ha[s] legal pneumoconiosis," Decision and Order at 27, error, if any, in the administrative law judge's weighing of Dr. Rasmussen's opinion, would be deemed harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 30 U.S.C. §902(b). Therefore, we therefore decline to address employer's allegation that the administrative law judge failed to adequately scrutinize Dr. Rasmussen's opinion.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge