U.S. Department of Labor

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

BRB No. 20-0254 BLA

HAROLD R. GOBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 04/29/2021
	)	
MAPCO/ALLIANCE COAL, LLC	)	
	)	
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 Granting Benefits in a Subsequent Claim and the Decision and Order Granting Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters PLLC), Pikeville, Kentucky, for Employer/Carrier.

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

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim and Decision and Order Granting Motion for Reconsideration (2018-BLA-05782) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim for benefits filed on November 6, 2016.[1] *See* Director's Exhibit 3.

In his initial November 26, 2019 Decision and Order, the administrative law judge accepted the parties' stipulation that Claimant had twenty years of qualifying coal mine employment. *See* Decision and Order at 4. The administrative law judge found Claimant established he is totally disabled based on the arterial blood gas study and medical opinion evidence, and thus invoked the Section 411(c)(4) presumption.[2] *See id.* at 9. He further found Employer did not rebut the presumption and awarded benefits commencing in December 2016. *See id.* at 17. The administrative law judge thereafter granted a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), modifying the onset date for benefits to November 2016, the month in which Claimant actually filed his claim.

On appeal, Employer challenges the administrative law judge's finding that Claimant is totally disabled and therefore invoked the Section 411(c)(4) presumption. It also contends the administrative law judge erred in finding it did not rebut the presumption and challenges his onset date determination. Claimant has not filed a response brief. The Director has filed a response in support of the award of benefits.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] Claimant filed his first claim for benefits on April 21, 1999, which the district director denied on August 6, 1999, because Claimant did not establish any of the elements of entitlement. Claimant took no further action until filing the present claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

evidence, and in accordance with applicable law.[3] 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).

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 "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(d); *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(d)(2). The district director denied Claimant's prior claim because he did not establish any element of entitlement. Consequently, to obtain review of the merits of his subsequent claim, Claimant had to establish an element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

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

A miner is totally disabled if he has complicated pneumoconiosis[4] or a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 6, 7.

[4] Complicated pneumoconiosis is defined as a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record

coal mine work and comparable gainful work. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 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).

Employer contends the administrative law judge erred in concluding the arterial blood gas study evidence of record, consisting of two qualifying studies and one non-qualifying study that the administrative law judge characterized as being "close to qualifying," supported a finding of total disability. *See* Decision and Order at 9; Director's Exhibits 13, 25, 28. We disagree. As the Director notes, Employer's argument is based on the administrative law judge incorrectly identifying the non-qualifying June 23, 2017 blood gas study as having been administered on "July" 23, 2017. *See* Director's Exhibit 25. Moreover, we see no error in the administrative law judge noting the study produced "close to qualifying" results. There is no support for a contention that the administrative law judge improperly substituted his judgment for that of a medical expert in this regard. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000, 1002 (1984). Indeed, Employer points to no evidence the administrative law judge's comment made any difference in his weighing of the blood gas study evidence. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Two studies, including the most recent blood gas study taken on July 18, 2017, produced

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did not establish complicated pneumoconiosis. *See* Decision and Order at 7; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge found the pulmonary function studies did not establish total disability because none of the tests in the record produced qualifying values. *See* Decision and Order at 8. He also accurately noted there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 7. We affirm these findings as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

qualifying values and the administrative law judge acknowledged as much in his decision. We therefore affirm, as supported by substantial evidence, the administrative law judge's conclusion that the blood gas studies support a finding of total disability. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350 (6th Cir. 2007).

The administrative law judge then weighed the medical opinions addressing total disability. Dr. Sikder, in his most recent supplemental opinion, concluded Claimant is totally disabled. Claimant's Exhibit 5; *see* Director's Exhibits 13, 31, 32. Dr. Rosenberg opined Claimant is "totally disabled from a pulmonary perspective." Director's Exhibit 28 at 3. Dr. Lafferty concluded Claimant is totally disabled due to a "chronic, debilitating lung disease." Claimant's Exhibit 6. In contrast, Dr. Dahhan opined that while Claimant has a "mild restrictive ventilatory impairment," he is not totally disabled based on the non-qualifying pulmonary function and blood gas studies he administered. Director's Exhibit 25. The administrative law judge noted Dr. Dahhan was the only physician who did not find Claimant totally disabled but discredited Dr. Dahhan's opinion because he did not review the other two blood gas studies of record, which were qualifying. *See* Decision and Order at 9. The administrative law judge therefore concluded the preponderance of the medical opinions supports a finding of total disability. *See id.*

Employer contends the administrative law judge failed to adequately explain why he discredited Dr. Dahhan's opinion and credited the opinions of Drs. Sikder, Rosenberg, and Lafferty. We disagree. The administrative law judge noted Dr. Dahhan did not review the other blood gas studies in reaching this conclusion. He therefore permissibly accorded diminished weight to Dr. Dahhan's opinion as unsupported by the weight of the blood gas testing, including the most recent test, which was qualifying. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1986) (en banc); *Carpeta v. Mathies Co.*, 7 BLR 1-145, 1-147 n.2 (1988); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1294 (1984). We also conclude that any failure by the administrative law judge to further explain his decision to credit the opinions of Drs. Sikder, Rosenberg, and Lafferty is harmless. As the Director points out, none of these medical opinions can be construed as evidence contrary to the weight of the blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171 (4th Cir. 1997) (fact-finder must determine whether "contrary probative evidence" defeats a finding of total disability if total disability is established under any particular category); *Clark*, 12 BLR at 1-154; Director's Brief at 3. Moreover, Employer fails to explain how any error is material, considering our affirmance of the administrative law judge's weighing of the pulmonary function study and blood gas study evidence and his decision to discount the only medical opinion contrary to a conclusion that Claimant is totally disabled.[7] *Shinseki*, 556 U.S. at

[7] We note that, while the administrative law judge summarized Dr. Dahhan's opinion as concluding Claimant is not totally disabled, this characterization is not

413; *Larioni*, 6 BLR at 1-1278. We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that Claimant established total disability considering the evidence as whole, and therefore invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither clinical nor legal pneumoconiosis,[8] or "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)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

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technically accurate. Dr. Dahhan opined Claimant is not totally disabled *from a coal mine dust-related impairment*. Director's Exhibit 25 at 2. In fact, Dr. Dahhan never directly addressed the relevant inquiry at Section 718.204(b) of the regulations: whether Claimant suffers from a respiratory or pulmonary impairment that prevents him from performing his usual coal mine work, setting aside the etiology of any such impairment.

[8] "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 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). "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 administrative law judge weighed the medical opinions of Drs. Dahhan, Rosenberg, Sikder, and Lafferty. Dr. Dahhan diagnosed Claimant with a mild restrictive ventilatory impairment due to Claimant's obesity, but he found no evidence of a coal dust-related pulmonary condition. *See* Director's Exhibit 25. Dr. Rosenberg stated Claimant has an extrinsic impairment to his lungs, i.e., one derived from his obesity, resulting in a mild restriction with hypoventilation and hypoxia. *See* Director's Exhibit 28. He testified in his deposition that Claimant's disability would resolve if Claimant lost weight and therefore his impairment is not permanent. *See* Employer's Exhibit 3 at 20. He concluded none of Claimant's impairment could be attributed to his coal dust exposure. *See id.* In contrast, Drs. Sikder and Lafferty both diagnosed Claimant with chronic obstructive pulmonary disease and chronic bronchitis due to his coal mine work. *See* Claimant's Exhibits 5 and 6; Director's Exhibit 32.

The administrative law judge discredited Dr. Dahhan's opinion because he did not review the other medical evidence in the record and did not explain how he reached his conclusion that coal dust did not contribute to Claimant's restrictive impairment. *See* Decision and Order at 15. The administrative law judge also discredited Dr. Rosenberg's opinion noting, *inter alia*, he did not explain how he ruled out Claimant's coal mine work as contributing to Claimant's impairment. *See id.* at 15-16. The administrative law judge further found the opinions of Drs. Sikder and Lafferty not supportive of Employer's burden on rebuttal. *See id.* at 16. He therefore concluded Employer did not rebut the presumption of legal pneumoconiosis. *See id.*

Employer contends the administrative law judge applied the wrong standard to find it did not rebut the presumption of legal pneumoconiosis. Employer's contention is without merit. The administrative law judge did not discredit either Dr. Dahhan's or Dr. Rosenberg's opinion for failing to rule out any contribution from coal mine dust. The administrative law judge accurately stated that Drs. Dahhan and Rosenberg agreed Claimant's coal mine dust exposure did not contribute to his impairment in any way. Dr. Dahhan specifically stated he found "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to, or aggravated by inhalation of coal dust." Director's Exhibit 25. Similarly, Dr. Rosenberg unequivocally confirmed Claimant's impairment is "nothing that's been caused or aggravated by past coal mine dust exposure." Employer's Exhibit 3 at 23. The administrative law judge permissibly accorded less weight to Dr. Dahhan's and Dr. Rosenberg's opinions because they did not explain how they concluded Claimant's coal mine work did not contribute to his impairment. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073-74 (6th Cir. 2013). The administrative law judge therefore reasonably concluded neither Dr. Dahhan's nor Dr. Rosenberg's opinion is sufficient to affirmatively disprove the existence of legal pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011). We thus affirm the administrative law judge's finding that Employer failed to rebut the presumption of legal

pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 492 (6th Cir. 2014). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing 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)(ii). He reasonably found that, because Drs. Dahhan and Rosenberg did not diagnose legal pneumoconiosis, their opinions are insufficient to establish Claimant's disabling respiratory or pulmonary impairment is unrelated to his pneumoconiosis. Decision and Order at 16-17, *citing Hobet Mining LLC v. Epling*, 783 F.3d 498, 595 (4th Cir. 2015). Because we have affirmed the administrative law judge's credibility findings on legal pneumoconiosis, we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory or pulmonary disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 16-17. We therefore affirm the administrative law judge's determination that Claimant is entitled to benefits. 30 U.S.C. §921(c)(4) (2018).

Onset Date

Having found Employer did not rebut the Section 411(c)(4) presumption, the administrative law judge awarded benefits to commence the month Claimant filed his claim. *See* Decision and Order at 17. The administrative law judge set the onset date for December 2016, which he mistakenly stated was when Claimant filed his claim. He later granted the Director's motion for reconsideration to modify the onset date as November 2016, the month in which Claimant actually filed his claim. *See* Order Granting Motion for Reconsideration at 2.

If a miner is found to be entitled to benefits, he is entitled to benefits from the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, an administrative law judge is

[9] The administrative law judge also found Employer did not disprove clinical pneumoconiosis. Decision and Order at 12-13. Because we have affirmed the administrative law judge's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

required to determine when medical evidence establishes a miner became totally disabled due to pneumoconiosis. If the medical evidence does not establish the date from which the miner became totally disabled due to pneumoconiosis, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled due to pneumoconiosis at some point subsequent to the filing date. *See Lykins*, 12 BLR at 1-182.

Employer contends the administrative law judge did not adequately explain how he concluded Claimant is entitled to benefits as of November 2016. We disagree. In his initial Decision and Order, the administrative law judge specifically stated the evidence in the record does not establish when Claimant became totally disabled due to pneumoconiosis. He therefore attempted to comply with 20 C.F.R. §725.503 by setting the onset date as the month in which he believed Claimant filed his claim, which he later correctly identified as November 2016. Employer has not identified a different month in which Claimant became totally disabled due to pneumoconiosis nor has it identified evidence in the record which would support a finding that Claimant was not totally disabled due to pneumoconiosis after the filing date. The administrative law judge adequately explained he set the onset date for the month in which Claimant filed his claim because the evidence did not establish another date on which Claimant became totally disabled due to pneumoconiosis. We therefore affirm the administrative law judge's finding that the onset date is November 2016.

Accordingly, we affirm the administrative law judge's Decision and Order Granting Benefits in a Subsequent Claim and his Decision and Order Granting Motion for Reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge