U.S. Department of Labor

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

BRB No. 20-0358 BLA

WAYNE CALDWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 07/19/2021
	)	
	)	
Employer-Petitioner	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Larry A. Temin's[1] Decision and Order Awarding Benefits (2015-BLA-05648) rendered on a claim filed on June 23, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

[1] The administrative law judge noted this case was initially assigned to Administrative Law Judge John P. Sellers, III, who held a hearing and remanded the case to the district director for a complete Department of Labor (DOL) sponsored pulmonary

The administrative law judge found Claimant established 17.5 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and in invoking the presumption. It further asserts he erred in finding it failed to rebut the presumption.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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 evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

---

evaluation. Decision and Order at 2. Although Judge Sellers was available to issue a decision, the case was inadvertently assigned to Judge Temin (the administrative law judge). *Id.* at 2 n.6. We affirm, as unchallenged on appeal, the administrative law judge's finding that neither party objected to or raised an argument concerning the reassignment and neither party has been prejudiced because Judge Temin provided the parties with a second *de novo* hearing. *Id.*; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established 17.5 years of underground coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

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

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found Claimant established total disability based on the pulmonary function studies and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

The administrative law judge considered the results of four pulmonary function studies.[6] Decision and Order at 8-9, 15-17. He found the May 7, 2015 study invalid based on Dr. Jarboe's opinion that the two highest FEV1 values were not within 150 ml of each other.[7] Decision and Order at 15-16; Director's Exhibit 47 at 126; *see* 20 C.F.R. §718.103(c).

[5] The administrative law judge determined Claimant did not establish complicated pneumoconiosis or total disability based on the blood gas studies because they all had non-qualifying values. 20 C.F.R. §§718.204(b)(2)(ii), 718.304; Decision and Order at 15 n.31, 17. He did not determine whether there is evidence of cor pulmonale with right-sided congestive heart failure; however, no party alleges Claimant suffers from this condition.

[6] The administrative law judge noted the individual pulmonary function studies reported differing heights ranging from 69 to 71 inches. Decision and Order at 8-9. As no evidence in the record resolved the discrepancy, he permissibly averaged the recorded heights, finding Claimant is 70 inches tall. *Id.* at 9 n.24. Because this height falls between two heights in the table at 20 C.F.R. Part 718, Appendix B, he used the closest greater height of 70.1 inches. *Id.*; *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

[7] The regulations specify that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part." 20 C.F.R. §718.103(c). Appendix B to Part 718(2)(ii)(G)

The administrative law judge determined the remaining studies are valid. Decision and Order at 16-17. The January 6, 2016 study produced non-qualifying values and no bronchodilator was administered. Decision and Order at 9, 16; Director's Exhibit 47 at 285. The November 20, 2017 study produced qualifying values before and after administration of bronchodilators. Decision and Order at 9; Director's Exhibit 47-33. The June 28, 2018 study produced qualifying values and no bronchodilator was administered.[8] Decision and Order at 9; Claimant's Exhibit 4. The administrative law judge gave more weight to the most recent, qualifying studies as the most probative of record to find the pulmonary function study evidence established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17.

Employer argues the administrative law judge erred in finding the November 20, 2017 and June 28, 2018 qualifying studies valid and sufficient to establish total disability.[9] Employer's Brief at 14-19. We disagree.

Employer initially argues the administrative law judge erred in crediting Dr. Gaziano's opinion the November 20, 2017 study was valid over Dr. Vuskovich's opinion

---

provides that a patient's effort is considered unacceptable if he "[h]as excessive variability between the three acceptable curves" or when "[t]he variation between the two largest FEV1's of the three acceptable tracings . . . exceed[s] 5 percent of the largest FEV1 or 100 ml, whichever is greater."

[8] The June 28, 2018 study reports Claimant was sixty-four years old when it was conducted. Decision and Order at 9; Claimant's Exhibit 4. However, the administrative law judge noted Claimant was born in 1958 and therefore was only sixty years old at the time the test was administered. Decision and Order at 9; *see* Director's Exhibit 2. Thus, he used the table values for a sixty year old to determine if the study produced qualifying values. Decision and Order at 9 n.27. Employer has not challenged this finding, and we therefore affirm it. *See Skrack*, 6 BLR at 1-711.

[9] Employer also challenges the validity of the January 6, 2016 pulmonary function study. Employer's Brief at 15-17. The administrative law judge found the study non-qualifying, however, and thus did not rely on it to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17; Director's Exhibit 47 at 285. Consequently, Employer has not explained how a finding that this test is invalid, and thus not probative, would have altered his determination that the more recent valid, qualifying studies are entitled to greater weight. *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).

that it was not. Employer's Brief at 14-17. Dr. Ajjarapu conducted the study as part of Claimant's DOL-sponsored pulmonary evaluation. Director's Exhibit 47 at 33-44. The technician who administered the study observed Claimant gave good effort and cooperation, and Dr. Gaziano indicated the study is valid. *Id.* at 32, 35. Dr. Vuskovich opined the results were not acceptable because the flow-volume and time-volume loops showed Claimant did not put forth sufficient effort, his initial efforts were not maximal and artificially lowered his FEV1 results, his deep breath efforts were not complete and possibly lowered his FVC and FEV1 results, and his respiratory rate was insufficient to generate a valid post-bronchodilator MVV. Director's Exhibit 47 at 20.

In the absence of evidence to the contrary, compliance with the quality standards set forth in the regulations is presumed. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718. Thus, Employer has the burden to establish the results are invalid. *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable). As the administrative law judge permissibly determined, while Dr. Vuskovich stated that the "tracings showed" Claimant "did not put forth the effort to generate valid FVC-FEV1 results," he did not describe how the tracings support his assertions that Claimant gave poor effort. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); *Vivian*, 7 BLR at 1-361. Moreover, the administrative law judge rationally gave more weight to the administering technician's observation, as supported by Dr. Ajjarapu's signed report, that Claimant gave "good effort," and Dr. Gaziano's opinion validating the study. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (administrative law judge may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990) (administrative law judge must provide a rationale to credit consultant's opinion over physician or technician who observed the test); Decision and Order at 16. We therefore affirm his finding the November 20, 2017 pulmonary function study is valid.

Employer also argues the June 28, 2018 test, which Claimant performed at the St. Charles Respiratory Center, is invalid because it was not signed or interpreted by a physician and therefore does not meet the quality standard at 20 C.F.R. §718.103(b)(4).[10]

[10] Employer notes the report of the study does not appear to have been signed or interpreted by a physician and it specifically states "Unconfirmed Interpretation – MD Should Review." Claimant's Exhibit 4; *see* Employer's Brief at 18. However, the administrative law judge found the study in substantial compliance with the quality standards because the study reports that the American Thoracic Society "reproducibility

Employer's Brief at 18; *see* Claimant's Exhibit 4. Employer, however, did not dispute the validity of this study before the administrative law judge. We will not consider its challenge for the first time on appeal. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 586-88 (6th Cir. Feb. 4, 2021); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Moreover, we consider the administrative law judge's error, if any, harmless, as the November 20, 2017 study is valid, qualifying, and more recent than the only credited non-qualifying study by nearly two years, and Employer does not challenge the administrative law judge's decision to give the most weight to the more recent studies. *See Larioni*, 6 BLR at 1-1278; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17.

Medical Opinions

The administrative law judge considered three medical opinions. He credited Dr. Ajjarapu's opinion that Claimant is totally disabled because he found it well-reasoned and supported by the qualifying pulmonary function study evidence. He found the contrary opinions of Drs. Jarboe and Tuteur not well-reasoned and entitled to little weight.[11] Decision and Order at 17-18; Director's Exhibits 9, 47 at 1, 117, 208; Employer's Exhibits 1, 3, 6.

Employer argues that because the administrative law judge erred in finding the qualifying pulmonary function studies valid, he also erred in weighing the medical opinion evidence and in crediting Dr Ajjarapu's opinion. Employer's Brief at 18-19. Having affirmed the administrative law judge's determination that the pulmonary function study evidence supports a finding of total disability, we reject Employer's contention. Because Employer raises no other error with regard to the administrative law judge's credibility findings, we affirm his determination that Claimant established total disability based on Dr. Ajjarapu's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19. We further affirm his overall finding that Claimant established total disability and invoked the

criteria were met," it was "accompanied by three tracings, as required by the regulations," and no physician "call[ed] this test's validity into question." Decision and Order at 16.

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant's treatment records do not specifically address whether or not he was disabled or had the pulmonary or respiratory capacity to work. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17; Director's Exhibit 47 at 295, 313, 318.

Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232 §718.305(b)(1); Decision and Oder at 18-19.

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 legal nor clinical pneumoconiosis,[12] 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)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

Pneumoconiosis

We initially affirm, as unchallenged, the administrative law judge's finding that Employer failed to disprove the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); Decision and Order at 23.

We also affirm the administrative law judge's finding that Employer failed to disprove legal pneumoconiosis by establishing 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), (b)(2), 718.305(d)(1)(i)(A). The administrative law judge observed that Drs. Jarboe and Tuteur opined Claimant's restrictive impairment is unrelated to coal mine dust exposure in part because his simple clinical pneumoconiosis was not severe enough on x-ray to cause a restrictive impairment.[13] Decision and Order at 24. He permissibly found this rationale unpersuasive

[12] "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 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).

[13] Dr. Jarboe stated, "Were [Claimant's] restrictive disease due to the inhalation of coal mine dust . . . one would see a category 2 or 3 profusion of opacities." Director's

because the "general notion that a finding of impairment indicative of legal pneumoconiosis would be accompanied by significant abnormalities on a chest x-ray" is contrary to the DOL's position that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." Decision and Order at 24, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014).

Disability Causation

The administrative law judge also found that Employer failed to establish "no part of [Claimant'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); *see* Decision and Order at 25. Contrary to Employer's contention, the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Tuteur on the cause of Claimant's respiratory disability as neither physician opined Claimant has legal pneumoconiosis or a disabling respiratory or pulmonary impairment. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting the employer's argument that the administrative law judge "erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found"); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (absent a persuasive reason, an administrative law judge "may not credit a medical opinion" on disability causation where the physician incorrectly fails to diagnose "either or both of the predicates in the causal chain"); Decision and Order at 26; Employer's Brief at 22-23. Because the administrative law judge permissibly discredited the only opinions supportive of Employer's burden, we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Exhibit 47 at 6. Dr. Tuteur opined there is "no reason to believe" Claimant's restrictive impairment is related to his coal dust-induced clinical pneumoconiosis because "the majority of the chest radiographs is negative[.]" Employer's Exhibit 1 at 4.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge