U.S. Department of Labor

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

BRB No. 20-0422 BLA

BOBBY SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION/ PITTSTON COMPANY	)	DATE ISSUED: 07/30/2021
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for Claimant.

Steven J. Winkelman (Seema Nanda, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2014-BLA-05042) rendered on a subsequent claim[1] filed on December 18, 2012, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 15.85 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively it contends the administrative law judge erred in finding Claimant is totally disabled, and therefore erred in determining Claimant invoked the presumption.[3] It also contends he erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional arguments.

The Benefit 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 two previous claims for benefits. The district director denied his most recent claim on January 30, 2009, because Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 2.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 that Claimant established 15.85 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-7.

evidence, and in accordance with applicable law.[4] 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).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 3-5. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, U.S. , 141 S. Ct. 2104, _____ (Jun. 17, 2021).

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.[5] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying

[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 Exhibits 4, 8.

[5] As it is unchallenged, we affirm the administrative law judge's finding that Claimant's usual coal mine employment was as a utility man and this position required heavy manual labor. *Skrack*, 6 BLR at 1-711; Decision and Order at 8.

evidence in any of the four categories establishes total disability when there is no "contrary probative evidence."[6] 20 C.F.R. §718.204(b)(2).

The administrative law judge found Claimant established total disability based on the pulmonary function studies and medical opinions. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 8-19. Employer challenges these findings.

Pulmonary Function Studies

The record contains four pulmonary function studies dated January 30, 2013, May 23, 2013, February 22, 2016, and October 19, 2016. Director's Exhibits 15, 16; Claimant's Exhibit 3, Employer's Exhibit 5. The January 30, 2013 study produced qualifying values[7] for total disability before the use of bronchodilators and non-qualifying values after bronchodilators. Director's Exhibit 15. The May 23, 2013 and February 22, 2016 studies produced qualifying values before and after the use of bronchodilators. Director's Exhibit 16; Claimant's Exhibit 3. The October 19, 2016 study produced non-qualifying values before and after bronchodilators. Employer's Exhibit 5.

The administrative law judge assigned greater weight to the pre-bronchodilator results over the post-bronchodilator results for all the studies. Decision and Order at 10-12. He also found the January 30, 2013, May 23, 2013, and February 22, 2016 studies that produced qualifying values pre-bronchodilator are all valid. *Id*. Although the October 19, 2016 study produced non-qualifying results pre-bronchodilator, the administrative law judge found the results questionable because the record indicates Claimant took his own bronchodilator medication before visiting Dr. Fino's office to undergo the study. *Id*. Based on this finding, the qualifying February 22, 2016 test which he found was conducted within the same time frame as the October 19 study, and that three out of the four pre-bronchodilator studies showed qualifying values for total disability, he found Claimant established total disability through pulmonary function testing. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 12.

We first reject Employer's argument the administrative law judge erred in finding the January 30, 2013 study valid. Employer's Brief at 5-9. When considering pulmonary

[6] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 9, 14.

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

function studies, an administrative law judge must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). Compliance with the quality standards at 20 C.F.R. Part 718, Appendix B, "shall be presumed" unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an administrative law judge's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Claimant performed the January 30, 2013 study as part of his Department of Labor (DOL)-sponsored pulmonary evaluation. Director's Exhibit 15. Dr. Ammisetty indicated Claimant's cooperation and ability to understand instructions for the study were good. *Id.* at 15. Dr. Gaziano reviewed the study for the DOL and concluded it produced valid results. *Id*. at 9. The technician who administered the study noted, "Base FVC: 6 attempted/6 accepted. Post FVC: 3 attempted/3 accepted." *Id*. at 17. In contrast, Dr. Vuskovich checked a box indicating the results for the study are not acceptable because Claimant did not "put forth the effort required to generate valid spirometry results." Director's Exhibit 17.

Contrary to Employer's argument, the administrative law judge did not mechanically credit the technician's first-hand observations over the opinions of medical experts. Rather, he permissibly found Dr. Vuskovich did not adequately explain his opinion that Claimant did not put forth adequate effort in light of the conflicting opinions by Drs. Ammisetty and Gaziano and the technician's recorded notations. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Siegel*, 8 BLR at 1-157; Decision and Order at 10-11. Thus we affirm the administrative law judge's finding the January 30, 2013 study is valid.

We also reject Employer's argument that the administrative law judge erred in finding the May 23, 2013 study valid. Employer's Brief at 7-8. Dr. Rosenberg conducted this study as part of his examination of Claimant. Director's Exhibit 16. The technician who administered the study noted "[p]atient understood test and cooperated well with good effort." *Id.* Although Dr. Rosenberg remarked Claimant's "[e]ffort could have been better," he relied on the study in making the disability conclusions in his initial report. *Id.*

Dr. Fino also reviewed the results of this study and, in an initial report, did not indicate that it is invalid or Claimant's effort was poor. Employer's Exhibit 4. He opined Claimant is totally disabled based on the study. *Id*. In a subsequent report, however, Dr. Fino stated the results of the May 23, 2013 did not reflect Claimant's best effort because his pulmonary function improved at the time of the October 19, 2016 study that produced

non-qualifying results. Employer's Exhibit 5 at 7. Contrary to Employer's argument, the administrative law judge did not mechanically credit the technician's first-hand observations over Dr. Fino's opinion; he permissibly found Dr. Fino's opinion conclusory because he "did not explain why he changed his mind" as to the reliability of this study or explain "how he concluded that the Claimant put forth poor effort" in light of Dr. Rosenberg's opinion and the technician's notations. Decision and Order at 11; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Siegel*, 8 BLR at 1-157. Thus we affirm the administrative law judge's finding the May 23, 2013 study valid.

We further reject Employer's argument that the administrative law judge erred in crediting pre-bronchodilator results over post-bronchodilator results. Employer's Brief at 10. He rationally found the pre-bronchodilator results are entitled to greater weight because the relevant inquiry "is whether Claimant has the baseline ability to perform his usual coal mine work, not [whether] he has the ability to perform his coal mine work with the aid of medication." Decision and Order at 13; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator [during pulmonary function testing] does not provide an adequate assessment of disability").

Employer next argues the administrative law judge erred in discrediting the October 19, 2016 pre-bronchodilator study results.[8] Employer's Brief at 9. We disagree. The administrative law judge rationally found the valid February 22, 2016 pulmonary function study, conducted less than eight months before, produced qualifying results and was close enough in time to be considered a comparable indicator of Claimant's current condition. Decision and Order at 14. Considering the February and October 2016 studies in conjunction with the past studies, which were all qualifying, the administrative law judge permissibly found the pre-bronchodilator results support finding Claimant totally disabled. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 13-14. Accordingly, substantial evidence supports his finding that the pulmonary function studies considered in isolation would establish total disability. 20 C.F.R. §718.204(b)(2)(i).

[8] The administrative law judge acknowledged Employer's argument that the October 19, 2016 non-qualifying study is the most probative of record because it was taken most recently. Decision and Order at 13 n. 11. He noted that crediting the non-qualifying study over the qualifying studies based solely on recency would reflect that Claimant's pulmonary condition has improved. *Id*. He rationally declined to credit the study on this basis and instead considered it in the context of all the studies. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1983); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 13 n.11.

Medical Opinions

We also reject Employer's argument that the administrative law judge erred in finding Claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19; Employer's Brief at 11-12.

Drs. Ammisetty and Sundaram opined Claimant is totally disabled, while Drs. Rosenberg and Fino opined he is not. Director's Exhibits 14-16; Employer's Exhibits 4-6. The administrative law judge found Dr. Ammisetty's opinion well-reasoned and documented and entitled to full probative weight.[9] Decision and Order at 15-16. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Drs. Fino and Rosenberg both initially opined Claimant is totally disabled based on the qualifying May 23, 2013 pulmonary function study. Director's Exhibit 16; Employer's Exhibit 4. After reviewing the October 19, 2016 study, however, they both opined Claimant is not totally disabled because this study is non-qualifying. Employer's Exhibits 5-6. The administrative law judge permissibly found their opinions unpersuasive because, as discussed above, he found the October 19, 2016 study outweighed by the qualifying pulmonary function testing of record. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 17-19. In addition, both doctors stated that Claimant has a mild obstructive impairment evidenced by the October 19, 2016 non-qualifying study. Employer's Exhibits 5-6. The administrative law judge permissibly found their opinions unpersuasive because they did not address whether Claimant is totally disabled from his usual coal mine employment by the mild impairment even if the objective test itself is non-qualifying. *See Napier*, 301 F.3d at 713-14; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); Decision and Order at 26.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions, considered in isolation, would establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-18. We also affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability and Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at

[9] The administrative law judge rejected Dr. Sundaram's opinion because he did not set forth the basis for his conclusion. Decision and Order at 16.

21. Further, we affirm the administrative law judge's determination that Employer failed to rebut the presumption. [10]

[10] The administrative law judge found Employer failed to establish rebuttal by either disproving pneumoconiosis or showing that no part of Claimant's disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i),(ii); Decision and Order at 23-29. Employer vaguely challenges the administrative law judge's findings regarding rebuttal of the 411(c)(4) presumption. *See* Employer's Brief at 12. As Employer identifies no specific errors with respect to rebuttal of the presumption, we decline to address these contentions. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Moreover, since we have already rejected Employer's argument that Dr. Fino's pulmonary function study was entitled to definitive weight on disability, we reject the same contention of error Employer makes regarding it in the context of rebuttal. Therefore, we affirm the administrative law judge's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i), (ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge