U.S. Department of Labor

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

BRB No. 19-0298 BLA

ERNIE J. MEADE (o/b/o KESTER J. MEADE)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 06/25/2020
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05693) of Administrative Law Judge William S. Colwell rendered on a subsequent claim[1] filed on

[1] The miner previously filed a claim on June 3, 1987. Director's Exhibit 1. Administrative Law Judge Linda S. Chapman ultimately denied the claim because he did not establish total disability. *Id.* The miner died on September 12, 2012, while this

November 9, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found the miner had 40.08 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus found claimant established a change in an applicable condition of entitlement and invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309.[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established total disability necessary to invoke the Section 411(c)(4) presumption and it did not rebut the presumption.[4] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.

The 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

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subsequent claim was pending. Administrative Law Judge's Exhibit 8. Claimant, the miner's son, is pursuing the claim on behalf of his estate.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 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 administrative law judge must deny the subsequent claim unless he 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). Because the miner's prior claim was denied for failure to establish total disability, claimant was required to establish this element in order for the subsequent claim to be considered on the merits. Director's Exhibit 1.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of 40.08 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, 362 (1965).

Section 411(c)(4) Presumption: Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish the miner was totally disabled "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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.[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).

The administrative law judge considered four new pulmonary function studies conducted on July 10, 2007, June 12, 2008, May 18, 2011, and November 29, 2011. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16-20; Director's Exhibits 12, 14. He noted the studies listed varying heights for the miner, ranging from sixty-eight to seventy-two inches.[7] Decision and Order at 18-19. He found the miner's height was sixty-eight inches because the miner did not wear shoes for this measurement. *Id.*

He also considered the miner's age at the time the studies were conducted: seventy-eight at the time of the July 10, 2007 study; seventy-nine at the June 12, 2008 study; eighty-one at the May 18, 2011 study; and eighty-two at the November 29, 2011 study. Decision and Order at 16-20; Director's Exhibit 12, 14. Citing the Board's holding in *K.J.M.*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[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 21.

[7] The miner's height was listed as sixty-nine inches on the July 10, 2007 and June 12, 2008 studies, seventy-two inches on the May 18, 2011 study, and sixty-eight inches on the November 29, 2011 study. Director's Exhibits 12, 14.

[*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), he indicated pulmonary function studies performed on a miner who is over the age of seventy-one are qualifying[8] if the values the miner produced would be qualifying for a seventy-one year old, the oldest age accounted for in the Department of Labor's pulmonary function tables at 20 C.F.R. Part 718, Appendix B. Decision and Order at 19.

Using values for a seventy-one year old miner with an associated height of 68.1 inches,[9] the administrative law judge found the May 18, 2011 and November 29, 2011 studies produced qualifying pre-bronchodilator results, but the July 10, 2007 and June 12, 2008 studies produced non-qualifying pre-bronchodilator results. Decision and Order at 19-20. He found the May 18, 2011 study produced qualifying post-bronchodilator results, but the November 29, 2011, July 10, 2007, and June 12, 2008 studies produced non-qualifying post-bronchodilator results. *Id*. He determined the May 18, 2011 and November 29, 2011 studies are the most probative of the miner's condition because they were taken more recently by approximately three to four years. *Id*. Crediting the qualifying pre-bronchodilator results over the post-bronchodilator results, the administrative law judge concluded the pulmonary function studies establish total disability. *Id*.

Employer asserts the administrative law judge erred by failing to address Dr. Castle's opinion that the May 18, 2011 and November 29, 2011 pulmonary function studies are not qualifying for total disability when accounting for the miner's age and applying the Knudson Regression equations. Employer's Brief at 6-14. Employer's argument has no merit.

The party opposing entitlement may offer medical evidence to prove pulmonary function studies that yield qualifying values for a miner who is older than seventy-one are actually normal or otherwise do not represent a totally disabling pulmonary impairment for that age. *Meade*, 24 BLR at 1-47. The administrative law judge acknowledged Dr. Castle's testimony that the Knudson Regression equations can be used to extrapolate qualifying values for a specific age beyond seventy-one. Decision and Order at 32 n. 70; Director's Exhibit 14 at 13; Employer's Exhibit 1 at 10-11. Further, he noted Dr. Castle stated a

[8] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[9] When assessing whether the pulmonary function studies were qualifying, the administrative law judge applied the next closest height listed in the table at 20 C.F.R. Part 718, Appendix B, which is 68.1 inches. Decision and Order at 19.

March 23, 2005 test[10] he reviewed in 2009 is not qualifying when applying these equations for a miner who is seventy-five years old (the miner's age at the time 2005 testing was done). *Id*. The administrative law judge correctly found, however, that Dr. Castle did not apply these equations to the May 18, 2011 and November 29, 2011 studies which were taken when the miner was eighty-one and eighty-two years old, respectively.[11] *Id*. Thus the administrative law judge permissibly found Dr. Castle did not adequately explain why the May 18, 2011 and November 29, 2011 pre-bronchodilator test results are not qualifying. *See W.Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 698 (4th Cir. 2018); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Meade*, 24 BLR at 1-47; Decision and Order at 32 n. 70.

Employer does not otherwise challenge the administrative law judge's decision to credit the May 18, 2011 and November 29, 2011 pulmonary function studies over the July 10, 2007 and June 12, 2008 studies because the former studies are more recent. Decision and Order at 19-20. Nor does it challenge his decision to credit the pre-bronchodilator testing over post-bronchodilator testing. *Id*.; *see* 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"). Therefore, those findings are affirmed. *See Smith*, 880 F.3d at 698; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the administrative law judge's determination the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge next weighed the medical opinions of Drs. Habre and Castle. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21-33. Dr. Habre opined the miner had "severe obstruction" based on a "profound decline in spirometric parameters, underscoring the presence of disabling lung disease." Director's Exhibit 12 at 3. He noted the resting blood gas study done on May 18, 2011, revealed a pO2 of 62 and a pCO2 of 36. *Id*. at 2. He opined based on the objective testing that the miner was "not able to perform any strenuous activity or labor intensive job" and thus was totally disabled from his usual coal mine employment. *Id*. at 3. Contrary to employer's argument, the administrative law judge permissibly found Dr. Habre's opinion well-reasoned and documented because it is

[10] The March 23, 2005 study was admitted in the miner's previous claim. Director's Exhibit 1 (internally Employer's Exhibits 8, 9).

[11] To the extent Dr. Castle addressed the 2011 testing, he indicated "any disability [the miner] may have" in 2011 "would not be likely to be due to" coal workers' pneumoconiosis. Employer's Exhibit 1 at 11-12.

based on qualifying objective testing. *See Smith*, 880 F.3d at 698; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 30.

Dr. Castle opined pulmonary function testing evidenced "a mild reduction in both the [FVC] and FEV1 without large airway obstruction." Director's Exhibit 14 at 18. He stated this impairment was not disabling. Employer's Exhibit 1 at 27. The administrative law judge permissibly discredited Dr. Castle's opinion because it is "based on his erroneous characterization" that the November 29, 2011 pulmonary function study is not qualifying, contrary to the administrative law judge's finding that it is. Decision and Order at 32; *see Smith*, 880 F.3d at 698; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Castle also testified the May 18, 2011 blood gas test revealed a pCO2 value that "was low enough" to be "a qualifying value." Employer's Exhibit 1 at 27. He determined this result was likely due to "ventilation/profusion mismatching related to some intercurrent problem, rather than a permanent process like" coal workers' pneumoconiosis. *Id*. Thus he determined the miner did not have "a permanent and totally disabling abnormality of blood gas transfer mechanisms from any cause." Director's Exhibit 14 at 18. The administrative law judge permissibly found Dr. Castle's opinion not well-reasoned or documented because he dismissed the May 18, 2011 blood gas test "without any evidence that it was invalid and without explaining how a ventilation-perfusion mismatch could be detected . . . ." Decision and Order at 32-33; *see Smith*, 880 F.3d at 698; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We thus affirm the administrative law judge's finding the medical opinions establish total disability as supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(iv).

As employer has not raised any other allegation of error concerning the administrative law judge's finding under 20 C.F.R. §718.204(b)(2), we affirm his finding that claimant established total disability. Decision and Order at 33. In light of our affirmance of the administrative law judge's findings of at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, claimant invoked the presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 34.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[12] or "no part

[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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

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.[13]

To disprove legal pneumoconiosis, employer must demonstrate the miner did 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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

Dr. Castle diagnosed the miner with "at most a very mild degree of restrictive lung disease" evidenced by reduced FEV1 and FVC values on pulmonary function testing. Director's Exhibit 14 at 15-16. He opined this testing had not demonstrated any obstruction or diffusion impairments. *Id*. He noted the miner's treating physicians had diagnosed him with "myasthenia gravis" resulting in thoracic surgery in 1987.[14] *Id*. Based on a later x-ray he read, Dr. Castle observed this surgery "caused tissue [damage] in the anterior part of the chest and lungs," restricting lung movement. *Id*. at 3, 8, 15-16. He also stated the pulmonary function testing done before the procedure was "normal" and showed no evidence of restriction, but testing performed immediately after the surgery demonstrated mild restriction. *Id*. Because the miner first developed the mild restrictive impairment after his 1987 surgery and thereafter consistently had "varying degrees of mild restriction," Dr. Castle attributed his impairment to residual scar tissue resulting from his 1987 surgery, continued muscular weakness from myasthenia gravis, and the miner's advanced age. *Id*. at 15-16. He opined the miner's pulmonary impairment is unrelated to coal mine dust exposure. *Id*.

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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] The administrative law judge found employer disproved clinical pneumoconiosis. Decision and Order at 43.

[14] Dr. Castle testified myasthenia gravis is an autoimmune neurological condition that affects nerve transport. Employer's Exhibit 1 at 14. He explained it "results in paralysis of certain muscle groups, including the eyes, the head and neck, and the respiratory muscles." *Id*. To address this condition, the miner "underwent a median sternotomy for removal" of the thymus gland. *Id*. This surgery "involved a significant sternal splitting operation from the neck to the mid abdomen." Director's Exhibit 14 at 8.

The administrative law judge correctly recognized that, in excluding legal pneumoconiosis, Dr. Castle relied on the fact that the miner consistently had a mild restrictive impairment that first developed after his 1987 thoracic surgery. Decision and Order at 43; Director's Exhibit 14; Employer's Exhibit 1. Dr. Castle opined the impairment was mild "even up to his most recent opinion" and deposition. Decision and Order at 43. The administrative law judge permissibly discredited Dr. Castle's opinion because it is inconsistent with his finding, as discussed above, that the miner's "condition [so] declined to the point where" he had a totally disabling respiratory or pulmonary impairment. Decision and Order at 43; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668 (4th Cir. 2017) (because the administrative law judge is the trier-of-fact, reviewing court must "defer to [his] evaluation of the proper weight to accord conflicting medical opinions"); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Further, the administrative law judge permissibly found Dr. Castle's explanation that the miner's restrictive impairment can be explained by his prior thoracic surgery, myasthenia gravis, and advanced age insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 38-44; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He explained Dr. Castle "did not address whether [legal] pneumoconiosis, in conjunction with the thoracotomy surgery, could have been a factor in the [the miner's] pulmonary condition, which continued to decline, as the pulmonary function test data indicates."[15]

[15] To the extent employer argues the administrative law judge applied an improper rebuttal standard with respect to legal pneumoconiosis by requiring Dr. Castle to rule out the possibility that coal mine dust contributed to the miner's restrictive lung disease, employer's argument lacks merit. Employer's Brief at 20-25. As an initial matter, the administrative law judge did not require Dr. Castle to rule out coal mine dust exposure as a cause of the miner's impairment. Rather, he properly evaluated the physician's opinion based on his explanations as to why he excluded coal mine dust exposure as a cause. *W.Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 38-44. Further, the administrative law judge correctly stated employer "must disprove the existence of both clinical and legal pneumoconiosis in order to rebut the presumption." Decision and Order at 35. He accurately noted legal pneumoconiosis "is any chronic lung disease or impairment 'arising out of coal mine employment.'" *Id., quoting* 20 C.F.R. §718.201(a)(2), (b). He further accurately noted a "disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.*

Decision and Order at 44. Thus we affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis and therefore did not rebut the presumption by establishing the miner did not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i); *see Owens*, 724 F.3d at 558.

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 permissibly discredited Dr. Castle's opinion because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's determination that employer failed to disprove the miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); *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"); Decision and Order at 46-47. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

[16] The administrative law judge also considered Dr. Habre's diagnosis of legal pneumoconiosis in the form of chronic bronchitis caused by cigarette smoking and coal mine dust exposure. Director's Exhibit 12. He found Dr. Habre's opinion well-reasoned and documented. Decision and Order at 44-45. Because this credibility finding is unchallenged, it is affirmed. *Smith*, 880 F.3d at 698; *Skrack*, 6 BLR at 1-711.

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

DANIEL T. GRESH
Administrative Appeals Judge