U.S. Department of Labor

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

BRB No. 18-0201 BLA

QUENTON L. CHILDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY, LLC	)	DATE ISSUED: 04/29/2019
	)	
and	)	
	)	
AIG CASUALTY COMPANY c/o CHARTIS	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

H. Brett Stonecipher (Fogle Keller Walker PLLC), Lexington, Kentucky, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judge.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05345) of Administrative Law Judge Larry A. Temin, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on January 28, 2015.[1]

The administrative law judge credited claimant with thirty-three years of surface coal mine employment, in conditions substantially similar to those in an underground mine. He further found the new evidence sufficient to establish claimant is totally disabled, thereby establishing a change in an applicable condition of entitlement[2] and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He then determined that employer failed to rebut the presumption and awarded benefits.

On appeal, employer asserts the administrative law judge erred in finding that claimant established total respiratory disability and invocation of the Section 411(c)(4) presumption. Employer also asserts the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of

[1] Claimant filed his first claim on July 23, 2012. Director's Exhibit 1 at 133. In a Proposed Decision and Order issued on April 4, 2013, the district director denied the claim for failure to establish any element of entitlement. *Id*. at 3. Claimant took no further action until filing the present subsequent claim.

[2] When 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(d); *see 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). As claimant's previous claim was denied for failure to establish any element of entitlement, he had to establish at least one element of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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 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 (1965).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying[6] pulmonary function studies or 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). If the administrative law judge finds disability established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 at 20 C.F.R. §718.204(b)(2)(i), (iv) and total disability at 20 C.F.R. §718.204(b)(2) when weighing the evidence as a

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-three years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 15-17.

[5] We will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 19; Director's Exhibit 4.

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

whole.[7] Decision and Order at 17-20. Employer's challenges to these determinations are without merit. Employer's Brief at 24-32.

We initially reject employer's argument that the administrative law judge erred in resolving the discrepancy in the heights reported on claimant's pulmonary function studies. The studies dated August 27, 2013, May 14, 2015, August 5, 2015, and July 26, 2016 list claimant's height as 68 inches, 69.25 inches, 68 inches, and 71 inches, respectively. Decision and Order at 5-6 n.13. The administrative law judge agreed with employer that the height of 71 inches is an outlier and therefore omitted it from his calculation. *Id*. He then averaged the remaining heights to find that claimant's correct height is 68.42 inches. Decision and Order at 5-6 n. 13.

Based on the applicable values in Appendix B for a man of 68.50 inches, the closest to claimant's height, he found the pulmonary function studies dated August 27, 2013 and May 14, 2015 non-qualifying and the studies dated August 5, 2015 and July 26, 2016 qualifying. Decision and Order at 5-6, 17-18; Employer's Exhibit 3, 11; Claimant's Exhibit 7. Although he determined that the qualifying study from July 26, 2016 is invalid and thus not probative of claimant's level of impairment, the administrative law judge concluded that the August 5, 2015 qualifying study establishes total disability because it is the most recent, reliable study. Decision and Order at 18.

An administrative law judge must resolve discrepancies in height measurements on pulmonary function study reports and use one "actual height" when assessing the table values in Appendix B. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). He may accomplish this by averaging the recorded heights and using the table values for the closest height, as the administrative law judge did in this case. *See Meade*, 24 BLR at 1-44; *see also Toler v. E. Associated Coal Corp*., 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84 n.6 (4th Cir. 1995). We thus affirm his finding that the August 15, 2015 pulmonary function study produced qualifying values for a sixty-six year old man measuring 68.50 inches in height.[8] As

[7] The administrative law judge found that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii), because the two new blood gas studies are non-qualifying. Decision and Order at 18; Director's Exhibit 10; Employer's Exhibits 3, 11. As the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

[8] Contrary to employer's argument, the administrative law judge was not required to give determinative weight to Dr. Dahhan's measurement of 68 inches or his description of the "meticulous procedures" his office staff uses to measure height; his description amounts to no more than a recitation of the steps one takes when using a measuring tool

employer makes no other allegations of error, we affirm the administrative law judge's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(1).

We also reject employer's contentions that the administrative law judge erred in finding that claimant's usual coal mine work required moderate to heavy labor, and in discrediting Drs. Broudy and Dahhan for having an inaccurate understanding of his work. Employer's Brief at 29-32. The administrative law judge found that claimant last worked as a rock truck driver. Decision and Order at 17; Director's Exhibit 5; Employer's Exhibit 9 at 11; Hearing Transcript at 26. Claimant testified that this work involved climbing fifteen to sixteen steps to get into the cab, and that he climbed up and down the steps two or more times a day. Employer's Exhibit 9 at 13. He further testified that the job was hard on his body because "you get beat to death [driving on the roads]" and some loaders "didn't know how to load a rock truck. They tried to kill you. And I've been throw[n] out of the seat." Employer's Exhibits 9 at 12; Hearing Transcript at 28. On his Description of Coal Mine Work and Other Employment (CM-913) form, he described this job as requiring siting for 11.5 hours a day, standing for .5 hours a day, lifting 75-100 pounds a variable number of times per day, lifting 150-200 pounds a variable number of times per day, and carrying 75 to 100 pounds for 50 feet a variable number of times per day.[9] Director's Exhibit 5. Based on this evidence, and relying on the *Dictionary of Occupational Titles* (DOT), the administrative law judge determined that claimant's usual coal mine employment involved "moderate to heavy labor." Decision and Order at 17.

Contrary to employer's argument, the administrative law judge's finding is supported by substantial evidence. Although claimant did not testify to any specific lifting

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attached to a scale. Employer's Brief at 27; Employer's Exhibit 6 at 10. In addition, Dr. Dahhan acknowledged claimant's medical records reflected his height without shoes as between 68 and 69 inches, further supporting the reasonableness of the administrative law judge's finding that claimant's height as 68.42 inches and his use of the closest greater table height of 68.50 inches. Employer's Exhibits 6 at 10, 15; 11.

[9] Claimant stated on his CM-913 form that from 2006 to 2009 his job was a "heavy equipment operator" which included running a drill and driving a truck hauling rock. Director's Exhibit 5. Claimant later clarified that he ran a drill for more than thirty years, and then drove a truck for the last 1-2 years of his employment. Employer's Exhibit 9 at 11; Hearing Transcript at 26. In listing the physical requirements of his job as a heavy equipment operator, claimant did not draw a distinction between his duties as a drill operator, and his duties as a rock truck driver. Director's Exhibit 5.

requirements, the lifting requirements he listed on his CM-913 form constitute relevant evidence permissibly relied upon by the administrative law judge.

Moreover, claimant's hearing testimony does not, as employer suggests, contradict the information listed on the form. At the hearing and during his deposition, claimant was asked to describe the part of his job that was "hardest" on his body; he was not asked about his lifting requirements and he did not testify that his job involved no lifting. Hearing Transcript at 27-28; Employer's Exhibit 9 at 11-13. Thus, the administrative law judge permissibly relied upon claimant's CM-913 form, in conjunction with his testimony, in determining claimant's exertional requirements. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

We further reject employer's contentions that the CM-913 form contains conflicting statements regarding the degree of lifting required and that the administrative law judge failed to adequately explain his basis for crediting the form. Employer's Brief at 32. Claimant's statements that he lifted 75-100 pounds and 150-200 pounds, and carried 75-100 pounds for 50 feet, are not necessarily in conflict. Claimant reported, as instructed, the different amounts of weights he had to lift or carry in his job, and estimated that his lifting or carrying of those weights "varied." The administrative law judge thus did not simply "pick and choose" among contradictory exertional requirements; he permissibly took judicial notice of the definitions of medium and heavy work in the DOT, and compared those definitions to the lifting and carrying requirements claimant reported. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990); Decision and Order at 17 n.23. Moreover, employer does not contest the administrative law judge's authority to take judicial notice of the DOT or his finding that the lifting and carrying requirements reported by claimant meet the DOT definitions for medium and heavy work. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We thus affirm the determination that claimant's work as a rock truck driver required medium to heavy exertion as rational and supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08 (6th Cir. 2005).

Finally, we reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Dahhan on the issue of total disability. The administrative law judge permissibly found that both physicians based their opinions on an inaccurate understanding of claimant's usual coal mine work: while Dr. Broudy acknowledged that claimant had to climb steps, and Dr. Dahhan acknowledged that he had to do moderate work of carrying up to 50 pounds, neither physician accurately assessed

that his job "also required him to perform heavy labor" of lifting up to 100 pounds.[10] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 19.

The administrative law judge also discredited their opinions because they relied on the non-qualifying August 5, 2015 pulmonary function study to find claimant not totally disabled, contrary to his own finding that the study establishes disability. *See Rowe*, 710 F.2d at 255; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 19-20; Director's Exhibit 11, Employer's Exhibits 4, 5 (at 19), 6 (at 15). We affirm this finding both as supported by substantial evidence and as unchallenged on appeal. *See Martin*, 400 F.3d at 306-08; *Skrack*, 6 BLR at 1-711.

Based on the foregoing, we affirm the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and total respiratory disability overall at 20 C.F.R. §718.204(b)(2). Decision and Order at 20. We therefore further affirm his determinations that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *Id.*

II. 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 establish that the miner had neither legal nor clinical pneumoconiosis,[11] or that "no part of the miner's respiratory or pulmonary

[10] The administrative law judge accurately summarized Dr. Broudy's report that claimant's job as a rock truck driver required climbing twelve steps, twice a day, and Dr. Dahhan's report that driving a rock truck required moderate labor. Decision and Order at 11-15, 19; Employer's Exhibits 5 (at 19), 6 (at 24-25). In contrast, Dr. Forehand, who diagnosed a totally disabling respiratory impairment, stated claimant reported that between his work as a drill operator and a truck driver, "the most difficult job for him was being the truck driver, climbing in and out of the cab." Decision and Order at 19; Claimant's Exhibit 5 at 8. As employer does not challenge the administrative law judge's finding that Dr. Forehand "had a reasonable understanding of the exertional requirements of claimant's las job" it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

[11] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the

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 that employer failed to establish rebuttal by either method.[12]

To disprove legal pneumoconiosis, employer must demonstrate that claimant's pulmonary or respiratory impairment is not "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 Corp*., 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge discredited the opinions of Drs. Broudy and Dahhan that claimant does not have legal pneumoconiosis but has a restrictive impairment due to obesity and his cardiac condition as poorly reasoned and inadequately explained and thus insufficient rebut the presumption.[13] *Id*. at 25.

Contrary to employer's argument, the administrative law judge permissibly found that in attributing claimant's restrictive impairment to the effects of obesity and cardiac disease, neither physician adequately explained why claimant's thirty-three years of coal mine dust exposure was not a significant contributing or aggravating factor, along with these other conditions, to his impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 25. Employer does not challenge this determination on appeal. *See Skrack*, 6 BLR at 1-711. Because the administrative law judge provided a valid and unchallenged basis for discrediting the opinions of Drs. Broudy and Dahhan, we affirm his finding that employer failed to disprove that claimant has legal pneumoconiosis.[14] *See* 20 C.F.R. §718.305(d)(1)(i). We therefore affirm his finding that

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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).

[12] Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined that employer rebutted clinical pneumoconiosis, but did not rebut legal pneumoconiosis. Decision and Order at 24-25.

[13] The administrative law judge also considered the opinion of Dr. Forehand that claimant has legal pneumoconiosis, and correctly noted that it does not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 25.

[14] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Broudy and Dahhan, the only opinions supportive of employer's burden, we need not address employer's remaining arguments regarding the weight he accorded their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v.*

employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). *See Minich*, 25 BLR at 1-154-56.

We further affirm his finding that Drs. Broudy and Dahhan do not satisfy employer's burden to disprove disability causation because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease.[15] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); Decision and Order at 26. We therefore affirm his finding that employer failed to establish that no part of claimant's respiratory disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27.

Because claimant invoked the Section 411(c)(4) presumption, and employer did not rebut it, he is entitled to benefits.

Rochester & Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 35-37.

[15] Nor did they offer an explanation for the disability, which ruled out causation by legal pneumoconiosis, assuming its existence.

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