U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0445 BLA

PAUL RAY GARRETT Claimant-Respondent v. POWELL MOUNTAIN COAL COMPANY, INCORPORATED and PROGRESS FUELS CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/16/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05210) of Administrative Law Judge John P. Sellers, III, rendered on a miner's claim filed on July 9, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the parties' stipulation, the administrative law judge credited claimant with at least nineteen years of coal mine employment, with at least fifteen years underground, or in conditions substantially similar to an underground mine. The administrative law judge also found that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, invoked 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),[1] and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in concluding that it did not rebut the presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.[3]

[1] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had 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), as implemented by 20 C.F.R. §718.305(b).

[2] Claimant filed an initial claim for benefits on October 7, 1997, which was denied by the district director on June 16, 1998, for failure to establish any element of entitlement. Director's Exhibit 1 at 134. Claimant took no further action until filing a claim on February 19, 2008, which the district director denied for failure to establish any element of entitlement. 2008 Withdrawn Claim. The district director subsequently granted claimant's request to withdraw that claim. *Id*. Claimant then filed the claim at issue in the present appeal. Director's Exhibit 2.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least nineteen years of coal mine employment, with at least fifteen years at an underground coal mine, or in conditions substantially similar to an underground coal mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

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

When addressing the issue of whether claimant established that he is suffering from a totally disabling respiratory or pulmonary impairment, the administrative law judge first considered the pulmonary function study evidence under 20 C.F.R. §718.204(b)(2)(i). This evidence consists of a non-qualifying pulmonary function study obtained by Dr. Defore on November 19, 2010; a qualifying study obtained by Dr. Craven on February 9, 2011; a non-qualifying study obtained by Dr. Hippensteel on June 15, 2011; a qualifying study obtained by Dr. Habre on July 25, 2013; and a qualifying study obtained on March 5, 2014 by an unidentified physician.[5] Decision and Order at 6, 12; Director's Exhibits 13, 14, 18; Claimant's Exhibit 1; Employer's Exhibit 2.

In evaluating whether the qualifying pulmonary function studies support a finding of total respiratory or pulmonary disability, the administrative law judge observed that, with respect to the July 25, 2013 and March 5, 2014 studies, Dr. Hippensteel "suggested . . . that because spirometry is dependent upon effort[,] the tests were not reliable when it comes to assessing the level of restriction." Decision and Order at 12, *citing* Employer's Exhibit 4 at 14-15. The administrative law judge, however, declined to credit Dr. Hippensteel's opinion on the validity of the July 25, 2013 and March 5, 2014 studies, stating, "as it was reported on both tests that [c]laimant's understanding and cooperation were good, I find no evidence in the record to support a finding of suboptimal effort." *Id*. The administrative law judge concluded:

> As pneumoconiosis is a progressive disease, the most recent evidence is generally considered the most probative. Therefore, I find the 2013 and

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] 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" pulmonary function study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

> 2014 pulmonary function values more probative of the [c]laimant's current lung function than the 2010 and 2011 values. Accordingly, I find that [the] pulmonary function test evidence of record, when considered alone, is sufficient to establish total disability.

Decision and Order at 12.

The administrative law judge then considered whether the record contained "contrary probative evidence which would preclude the use of the pulmonary function test evidence to establish total disability." Decision and Order at 13. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge determined that, although all of the blood gas studies are non-qualifying, they do not preclude a finding of total disability, as blood gas studies measure a different form of impairment than pulmonary function studies.[6] *Id*.

Regarding the medical opinion evidence relevant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge credited the diagnoses of a totally disabling respiratory impairment made by Drs. Defore and Habre and stated that they "do not preclude the use of the pulmonary function studies to establish total disability." *Id*.; Director's Exhibit 13; Claimant's Exhibit 1. With respect to Dr. Hippensteel's opinion, the administrative law judge declined to accord it "persuasive weight" because Dr. Hippensteel indicated in his July 29, 2011 written report that claimant had the respiratory capacity to return to his usual coal mine work, but testified at his deposition on August 8, 2014 that, based on a review of additional pulmonary function studies, "it is not possible to state whether his restriction is enough now to make him unable to go [back to work at the mine]." Decision and Order at 13, *quoting* Employer's Exhibit 4 at 20-21. The administrative law judge concluded, "[i]n sum, I find that the qualifying values of the [c]laimant's two most recent pulmonary function tests, as well as the medical-opinion evidence, establish[] that the [c]laimant is totally disabled from a respiratory standpoint." Decision and Order at 13. Based on this determination, the administrative law judge further found that claimant established invocation of the Section 411(c)(4) presumption. *Id*.

[6] The record contains resting and exercise blood gas studies obtained on November 19, 2010, June 15, 2011, and July 25, 2013, that produced non-qualifying values in excess of the applicable table values set forth in Appendix C of Part 718. Director's Exhibits 13, 18; Claimant's Exhibit 1.

[7] Because there is no evidence in the record of cor pulmonale with right-sided congestive heart failure, claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Employer argues that the administrative law judge erred in finding total disability without considering the contrary probative evidence showing that claimant's pulmonary function study results were not the product of a respiratory or pulmonary impairment. According to employer, this contrary probative evidence consists of Dr. Hippensteel's opinion attributing the restrictive impairment seen on claimant's pulmonary function studies to scleroderma, obesity, and the chronic use of narcotic pain medication, and medical records establishing claimant's lengthy history of non-respiratory medical conditions. Further, employer contends that the administrative law judge erred in failing to render findings as to whether each physician's opinion is documented and reasoned, and did not identify which medical opinion is best supported by the evidence of record.

The bulk of employer's contentions are based on the premise that, because Dr. Hippensteel's opinion, as corroborated by other opinions in the record, establishes that claimant's respiratory impairment is due to conditions that are not respiratory in nature, claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer's premise is flawed, as 20 C.F.R. §718.204 separates the inquiry into the cause of the disabling respiratory or pulmonary impairment from the inquiry into the existence of such impairment. 20 C.F.R. §718.204(b), (c). The cause of claimant's respiratory or pulmonary impairment is properly addressed at 20 C.F.R. §718.204(c) or, under the circumstances of this case, in consideration of whether employer can rebut the presumed existence of legal pneumoconiosis[8] or the presumed fact of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1), (b)(2), (c); 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii). Accordingly, Dr. Hippensteel's opinion, that any impairment shown on claimant's qualifying pulmonary function studies is related to scleroderma, obesity, and the use of narcotic painkillers, is not pertinent to whether claimant has established that he is totally disabled under 20 C.F.R. §718.204(b)(2).

We further reject employer's contention that the administrative law judge did not render appropriate findings as to the weight of the contrary probative evidence. The administrative law judge rationally found that the non-qualifying blood gas study results do not conflict with the qualifying pulmonary function study results because they measure different forms of impairment. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 13. The administrative law judge's

[8] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "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." 20 C.F.R. §718.201(b).

finding that Dr. Hippensteel's opinion is entitled to little probative weight is supported by Dr. Hippensteel's deposition testimony that he cannot discern whether claimant's restrictive impairment has rendered him unable to perform his usual coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Employer's Exhibit 4 at 20-21. Furthermore, contrary to employer's allegations, the administrative law judge acted within his discretion as fact-finder in crediting the opinions of Drs. Defore and Habre, that claimant is totally disabled from a respiratory impairment, because their diagnoses are consistent with the pulmonary function study evidence.[9] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); Decision and Order at 13; Director's Exhibit 13; Claimant's Exhibit 1.

We affirm, therefore, the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[10] We further affirm the administrative law judge's determination that claimant established invocation of the Section 411(c)(4) presumption.

[9] Dr. Defore stated in the report of her examination of claimant on November 19, 2010, that the pulmonary function study performed on that date revealed a ventilatory defect that prevents claimant from performing his usual coal mine job. Director's Exhibit 13 at 7-8. Dr. Habre, who examined claimant on July 25, 2013, and obtained a qualifying pulmonary function study on that date, opined that claimant had "complete and total disabling lung disease," "significant decline in his spirometric parameter," and "will not be able to perform labor-intense occupations as required by coal mining." Claimant's Exhibit 1 at 3.

[10] 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(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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1 at 134. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(c)(3).

II. Rebuttal of the Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical[11] pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer rebutted the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge initially acknowledged Dr. Hippensteel's qualifications "as a [B]oard-certified internist and pulmonologist, as well as the fact that he reviewed additional materials." Decision and Order at 21; Director's Exhibit 18; Employer's Exhibit 4 at 13-15. He gave Dr. Hippensteel's opinion little weight, however, because the physician did not adequately explain why coal dust exposure is not "at least a partial or aggravating cause" of claimant's respiratory impairment, and he relied on discredited premises in rendering his opinion. Decision and Order at 21; Director's Exhibit 18; Employer's Exhibit 4 at 12, 16-17, 22. Further, the administrative law judge determined that Dr. Hippensteel's attribution of claimant's respiratory symptoms, in part, to beta-blocker medication is speculative, as Dr. Hippensteel did not provide any evidence to support his assertion. Decision and Order at 21; Employer's Exhibit 4 at 6-8. Next, the administrative law judge accorded little weight to Dr. Kathuria's treatment record,[12] and

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[11] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[12] The record reflects that claimant was examined by Dr. Kathuria at Mountain Home VA Medical Center on a single occasion. Employer's Exhibit 1. Dr. Kathuria noted a history of scleroderma and diagnosed "[chronic obstructive pulmonary disease]/interstitial fibrosis secondary to mixed collagenous vascular disease," and moderate obstructive disease. *Id*. The administrative law judge evaluated Dr. Kathuria's report pursuant to 20 C.F.R. §718.104(d) and found that it is not entitled to probative

noted that Drs. Defore and Habre diagnosed legal pneumoconiosis. Decision and Order at 22; Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 1. Based on his evaluation of the medical opinion evidence, the administrative law judge concluded that employer did not rebut the presumed existence of legal pneumoconiosis. Decision and Order at 22.

Employer asserts that the administrative law judge erred in discrediting Dr. Hippensteel's opinion, and that he improperly acted as a medical expert when he stated,"I am not persuaded that the mere existence of the [c]laimant's scleroderma is enough to rule out any causal relationship between the [c]laimant's respiratory impairment and his coal dust exposure." Employer's Brief at 15, *quoting* Decision and Order at 19. Employer also contends that, contrary to the administrative law judge's finding, Dr. Hippensteel considered whether coal dust played a role in claimant's impairment but dismissed it as a causal factor, stating that claimant would have developed the same medical conditions regardless of whether he ever worked in the mines. Further, employer argues that the administrative law judge again substituted his opinion for that of Dr. Hippensteel when he discredited, as speculative, Dr. Hippensteel's assertion that claimant's respiratory symptoms were attributable, in part, to the side effects of beta-blocker medication. Finally, employer alleges that the administrative law judge erred in failing to find that Dr. Defore's diagnosis of scleroderma supported Dr. Hippensteel's opinion.

Employer's contentions are without merit. The administrative law judge did not substitute his opinion for that of Dr. Hippensteel regarding whether coal dust exposure contributed to claimant's respiratory impairment, but rather performed his role as trier-of-fact by evaluating Dr. Hippensteel's opinion and determining its credibility. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). In so doing, the administrative law judge permissibly gave less weight to Dr. Hippensteel's opinion because he did not adequately explain, and "points to no specific evidence" to support, his assertion that the presence of scleroderma excluded any causal nexus between coal dust exposure and claimant's respiratory impairment.[13] Decision and Order at 19; *see Looney*, 678 F.3d at 316-17, 25

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weight because his qualifications are not of record; he did not treat claimant for respiratory or pulmonary issues; he did not record an employment history; and there is no indication of the frequency and duration of his treatment of claimant. Decision and Order at 21.

[13] In the July 29, 2011 report of his examination of claimant, Dr. Hippensteel stated that claimant "has variable minimal-mild restrictive impairment" that "appears to be secondary to his obesity and splinting from chronic pain." Director's Exhibit 18. Dr. Hippensteel subsequently testified that the claimant's restrictive impairment is

BLR at 2-133. The administrative law judge also permissibly determined that Dr. Hippensteel's statement that a restrictive impairment due to coal dust exposure would be accompanied by abnormalities on chest x-ray is inconsistent with the preamble to the 2001 regulations and precedent established by the United States Court of Appeals for the Fourth Circuit. Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("Decrements 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."); *Compton*, 211 F.3d at 210, 22 BLR at 2-173 ("Evidence that does not establish medical pneumoconiosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis."). Further, contrary to employer's contention, the administrative law judge acted within his discretion in finding that Dr. Hippensteel's opinion that claimant's respiratory symptoms were due to a beta-blocker medication is entitled to less weight, as he did not identify any specific evidence linking claimant's symptoms of coughing and dyspnea to the medication.[14] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 21; Employer's Exhibit 4 at 6.

We also reject employer's allegation that the administrative law judge should have credited Dr. Defore's opinion as being supportive of Dr. Hippensteel's opinion. Athough Dr. Defore observed that claimant has "scleroderma which could possibly have lung involvement and lead to pulmonary function abnormalities[,]" she specifically stated that coal dust significantly contributed to claimant's respiratory impairment. Director's Exhibit 13. Accordingly, we affirm the administrative law judge's discrediting of Dr. Hippensteel's opinion and his finding that employer failed to satisfy its burden to affirmatively establish that claimant does not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[15]

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attributable to scleroderma, the narcotic pain medication that he takes for this condition, and obesity. Employer's Exhibit 4 at 14.

[14] Dr. Hippensteel testified that claimant takes a beta-blocker that "is non-selective in regards to its effects on blood pressure and on lungs. And as a secondary side effect it has issues that make for increased cough in persons who take it as well as increased shortness of breath and sometimes even bronchospasm." Employer's Exhibit 4 at 6.

[15] Because employer has not rebutted the presumed existence of legal pneumoconiosis, we need not address employer's arguments concerning rebuttal of the presumed existence of clinical pneumoconiosis, as 20 C.F.R. §718.305(d)(1)(i) requires an employer to rebut the existence of both legal *and* clinical pneumoconiosis.

Finally, employer does not separately challenge the administrative law judge's finding that employer did not rebut the presumed causal relationship between legal pneumoconiosis and claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because the administrative law judge rationally determined that Dr. Hippensteel's opinion was not credible to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), his opinion as to whether claimant's total respiratory or pulmonary disability was caused by pneumoconiosis is not entitled to probative weight at 20 C.F.R. §718.305(d)(1)(ii). *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 25 BLR 2-444 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 22-23. We affirm, therefore, the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis under

20 C.F.R. §718.305(d)(1)(i) and (ii). *See Bender*, 782 F.3d at 137; *Minich*, 25 BLR at 1-159.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge