U.S. Department of Labor

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

BRB No. 17-0078 BLA

CORBIN BURKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER UNDERGROUND CORPORATION	)	
	)	
and	)	
	)	
(Self-insured through) QUAKER COAL COMPANY	)	DATE ISSUED: 11/14/2017
	)	
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 on Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2014-BLA-5708) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's third request for modification of the denial of a miner's claim filed on June 14, 2004.[1]

In the initial Decision and Order dated March 26, 2007, Administrative Law Judge Janice K. Bullard credited claimant with forty years of coal mine employment, based on the parties' stipulation. Judge Bullard found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Bullard denied benefits. Director's Exhibit 59. Claimant filed a timely request for modification on August 13, 2007, alleging a mistake in a determination of fact. Director's Exhibits 60, 107-9. The district director forwarded the case to the Office of Administrative Law Judges (OALJ) for a hearing, which was held on October 27, 2009 before Administrative Law Judge Richard Stansell-Gamm. Director's Exhibits 85-87, 107.

In an April 27, 2010 Decision and Order, Judge Stansell-Gamm found that claimant did not establish a mistake in a determination of fact in Judge Bullard's finding that claimant failed to prove the presence of pneumoconiosis at Section 718.202(a).[2] Accordingly, Judge Stansell-Gamm denied benefits. *See* 20 C.F.R. §725.310; Director's Exhibit 111. Claimant filed a second request for modification on July 6, 2010. Director's Exhibit 112. The case was subsequently forwarded to the OALJ for a hearing, which was held on November 9, 2011 before Administrative Law Judge Peter B. Silvain, Jr.

[1] Claimant's first claim, filed on July 3, 2002, was withdrawn by claimant and, therefore, is considered not to have been filed. 20 C.F.R. §725.306(b); Decision and Order at 2.

[2] Congress amended the Act in 2010, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Judge Stansell-Gamm determined that the amendments did not apply to this claim because it was filed before January 1, 2005.

In a Decision and Order dated November 30, 2012, Judge Silvain found that claimant did not establish either a change in conditions or a mistake in the determination of the ultimate fact of entitlement pursuant to 20 C.F.R. §725.310. Director's Exhibit 142. Accordingly, Judge Silvain denied claimant's modification request, and denied benefits. Claimant filed his third and current request for modification on August 28, 2013. Director's Exhibit 143. Because claimant did not submit additional evidence in support of his request before the district director, the district director forwarded the case to the OALJ for a hearing, which was held on May 4, 2016 before Administrative Law Judge John P. Sellers, III (the administrative law judge). Director's Exhibit 146. Both claimant and employer submitted new evidence at the formal hearing.[3] Claimant's Exhibits 1-5; Employer's Exhibits 1, 2.

In the Decision and Order that is the subject of the current appeal, the administrative law judge credited claimant with forty years of coal mine employment based on employer's concession. Decision and Order at 3; Hearing Transcript at 8-9. Considering all of the evidence submitted in the claim, including new evidence submitted in support of modification, the administrative law judge found that claimant has clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). After determining that modification would render justice under the Act, the administrative law judge found that claimant demonstrated a change in conditions. Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310, and awarded benefits commencing August 2013, the month in which claimant filed his third modification request.

On appeal, employer challenges the administrative law judge's findings of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and disability causation pursuant to 20 C.F.R. §718.204(c). Alternatively, employer contends that the administrative law judge erred in his determination of the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.[4]

[3] The administrative law judge noted that claimant had not previously submitted the full complement of evidence permitted under the regulations. He therefore allowed claimant to submit both Dr. Rasmussen's medical report and Dr. Habre's medical report. Decision and Order at 6, *citing* 20 C.F.R. §§725.414, 725.310; *see Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007); Claimant's Exhibits 1, 3.

[4] Employer additionally asserts that the administrative law judge erred in finding a change in conditions established because "the evidence does not support a finding of pneumoconiosis, either clinical or legal." Employer's Brief at 5. Employer, however, has not identified any error of law or fact in the administrative law judge's findings that

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.[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).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Total Disability

Employer challenges the administrative law judge's determination that the blood gas study evidence and medical opinion evidence support a finding of total respiratory disability, and his finding that the evidence overall establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[6]

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claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310. Decision and Order at 8-19. Consequently, we affirm the administrative law judge's findings thereunder. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 13.

[6] The administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), Decision and Order at 9-10, 30, and that 20 C.F.R. §718.204(b)(2)(iii) was inapplicable, as the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 29.

A. Exertional Requirements

Initially, the administrative law judge found that claimant's usual coal mine work as an underground electrician required moderately heavy and sometimes heavy manual labor. Decision and Order at 29.

B. Blood Gas Studies at 20 C.F.R. §718.204(b)(2)(ii)

The administrative law judge considered blood gas studies conducted on July 2, 2014, June 25, 2015, and March 24, 2016. The administrative law judge determined that the blood gas study conducted by Dr. Rasmussen in 2014 produced non-qualifying values at rest and qualifying values during exercise.[7] Claimant's Exhibit 1. The June 25, 2015 blood gas study conducted by Dr. Jarboe produced non-qualifying results both at rest and after exercise. Employer's Exhibit 2. The administrative law judge further determined that the blood gas study conducted by Dr. Habre on March 24, 2016 produced non-qualifying values at rest and qualifying values during exercise. Claimant's Exhibit 3; Decision and Order at 11, 30. According the greatest weight to the exercise study results, the administrative law judge found that the blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).[8]

Employer argues that the administrative law judge erred in finding that the exercise blood gas studies support a finding of total disability. Employer's Brief at 5. We disagree.

Contrary to employer's assertion, the administrative law judge reasonably accorded the most weight to the exercise study results, finding that they were more indicative of claimant's respiratory ability to perform his usual coal mining work, which involved "moderately heavy and sometimes heavy manual labor." Decision and Order at 29, 31. Noting that the July 2, 2014 and the March 24, 2016 exercise studies produced qualifying results, and that the June 25, 2015 exercise study, which was stopped due to

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[8] The administrative law judge also considered the blood gas study evidence from 2004, 2005, 2008, and 2011, but determined that it was not as indicative of claimant's current physical condition. Accordingly, the administrative law judge accorded the most weight to the newly submitted studies. Decision and Order 30-31.

shortness of breath, produced a mild drop in oxygen tension,[9] the administrative law judge permissibly found that the most recent qualifying blood gas study on exercise was the most probative of claimant's condition and indicative of whether he had the respiratory capacity to perform his usual coal mine work. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993); Decision and Order at 31. Because employer raises no specific allegations of error in the administrative law judge's consideration of the blood gas study evidence, and because it is supported by substantial evidence, we affirm the administrative law judge's finding that the blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

C. Medical Opinions at 20 C.F.R. §718.204(b)(2)(iv)

The administrative law judge considered the newly submitted opinions of Drs. Rasmussen, Habre, and Jarboe.[10] Decision and Order at 11-16, 31-34; Claimant's Exhibits 1, 3; Employer's Exhibit 2. Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his usual coal mine work due to his reduced diffusing capacity and his marked impairment in oxygen transfer during very light exercise. Claimant's Exhibit 1. Similarly, Dr. Habre diagnosed claimant with exertional hypoxemia, and determined that claimant would not be able to perform his last coal mine job or strenuous activity related to coal mining. Claimant's Exhibit 3. Dr. Jarboe opined that claimant's moderate reduction in diffusion capacity is not disabling and that claimant retains the functional pulmonary capacity to perform his usual coal mine work or work of similar physical demand in a dust-free environment. Employer's Exhibit 2.

The administrative law judge found that the opinions of Drs. Rasmussen and Habre were reasoned and supported by the results of the objective studies, their findings on examination, and claimant's work history. Decision and Order at 32. The

[9] Dr. Jarboe, who administered the 2015 study, determined that claimant's mild drop in oxygen tension indicated a mild impairment of gas transfer. Employer's Exhibit 2-14.

[10] The administrative law judge also considered the 2004, 2005, 2008, and 2011 medical opinions of Drs. Rasmussen, Jarboe, Broudy, and Dahhan. Noting that the issue of total respiratory disability is determined at the time of the hearing, the administrative law judge permissibly accorded these opinions little weight, finding that the most recent evidence submitted is more probative of claimant's current level of disability. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 31, 34.

administrative law judge discounted Dr. Jarboe's opinion as inadequately explained, *id*. at 32-34, and found that the weight of the medical opinion evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 34.

Employer contends that the administrative law judge erred in relying on Dr. Habre's opinion because even though the doctor acknowledged that claimant worked as an electrician in the coal mines, "this does not indicate whether or not [claimant] was required to exert himself in performing this job." Employer's Brief at 6. We disagree. Dr. Habre stated not only that claimant's exertional hypoxemia prevented him from performing his job as an electrician, but that it would prevent claimant from performing any "strenuous activity related to coal mining." Claimant's Exhibit 3 at 3. Because the administrative law judge determined that claimant's work as an underground electrician involved "moderately heavy and sometimes heavy manual labor," he reasonably concluded that an inability to perform physically demanding work prevents claimant from working as a coal miner. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002). Employer does not otherwise challenge the administrative law judge's finding that Dr. Habre's opinion supports a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 34. Because it is supported by substantial evidence, we affirm the administrative law judge's weighing of Dr. Habre's opinion.

Employer next challenges the administrative law judge's discrediting of Dr. Jarboe's opinion. Employer argues that it is "irrelevant" that "Dr. Jarboe did not address how [claimant] would be able to return to his previous coal mine employment when he became short of breath after only [three] and a half minutes of exercise," as Dr. Jarboe based his medical opinion on the available information.[11] Employer's Brief at 6-7. We disagree.

In discounting Dr. Jarboe's opinion, the administrative law judge noted that Dr. Jarboe stopped claimant's 2015 exercise blood gas study after three minutes and twenty-nine seconds because claimant was experiencing shortness of breath. Decision and Order at 33; Employer's Exhibit 2 at 13-14. Dr. Jarboe interpreted the results as showing a "mild impairment of gas transfer" at peak exercise, but stated that "regardless, both the resting and peak exercise gases were non-qualifying under Federal guidelines." He ultimately concluded that claimant is not totally disabled from a pulmonary standpoint. Employer's Exhibit 2 at 14. Contrary to employer's argument, the administrative law judge permissibly discounted Dr. Jarboe's opinion for failure to adequately explain his

[11] Because employer raises no allegation of error with respect to the administrative law judge's crediting of Dr. Rasmussen's opinion, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

determination that claimant retains the pulmonary capacity to perform his coal mining job as an underground electrician, in light of the qualifying exercise blood gas studies conducted by Dr. Rasmussen[12] and Dr. Jarboe's acknowledgment that his own blood gas study was discontinued due to claimant's shortness of breath.[13] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 33-34. Moreover, the administrative law judge noted that Dr. Jarboe did not have the benefit of reviewing claimant's most recent medical evaluation performed by Dr. Habre, which contained a qualifying exercise blood gas study. Decision and Order at 34; Claimant's Exhibit 3. Thus, the administrative law judge permissibly concluded that despite his "notable qualifications," Dr. Jarboe's opinion was inadequately reasoned and merited little weight. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 34. It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because it is supported by substantial evidence, we affirm the administrative law judge's weighing of Dr. Jarboe's opinion.

We further reject employer's contention that the administrative law judge failed to adequately weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 5-6. The administrative law judge acknowledged the non-qualifying nature of claimant's pulmonary function studies, but permissibly found that the new exercise blood gas studies and medical opinions, taken together, establish "by a preponderance of the evidence" that claimant is totally disabled by a respiratory or pulmonary impairment. *See Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying blood gas study are not called into question by a contemporaneous normal pulmonary function study); Decision and Order at 34. As the administrative law judge adequately considered all of the contrary probative evidence, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195

[12] The administrative law judge noted that Dr. Jarboe reviewed the exercise blood gas studies administered by Dr. Rasmussen on September 21, 2004, August 17, 2005, and July 2, 2014, which produced qualifying results. Decision and Order at 33; Director's Exhibits 9, 40; Claimant's Exhibit 1; Employer's Exhibit 2.

[13] The administrative law judge correctly noted that blood gas studies and pulmonary function studies need not be qualifying to support a finding of total disability, as even a mild impairment can prevent a miner from performing his usual coal mine employment. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Decision and Order at 33-34.

(1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), we affirm his finding that the new evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2).

Disability Causation

Employer argues that the administrative law judge erred in finding that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Relying on his findings at 20 C.F.R. §718.202(a)(1), (4) that the most recent radiographic evidence establishes clinical pneumoconiosis, the administrative law judge accorded little weight to the 2005 opinions of Drs. Dahhan and Broudy because they did not diagnose clinical pneumoconiosis, contrary to his finding. Decision and Order at 36. Similarly, the administrative law judge found that Dr. Jarboe did not address the issue of disability causation. *Id*. at 35. The administrative law judge credited the opinions of Drs. Rasmussen and Habre that claimant's disabling oxygen-transfer impairment was caused by clinical pneumoconiosis. Thus, the administrative law judge determined that claimant established that he is totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*. at 35-36.

Employer argues that substantial evidence does not support the administrative law judge's determination that the opinions of Drs. Rasmussen and Habre met claimant's burden to establish that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability. We disagree.

Initially, the administrative law judge permissibly accorded less weight to the opinions of Drs. Dahhan and Broudy because they did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge also reasonably declined to accord weight to Dr. Jarboe's opinion at 20 C.F.R. §718.204(c) because the physician determined, contrary to the administrative law judge's finding, that claimant's impairment of gas transfer was not totally disabling. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). By contrast, the administrative law judge determined that Dr. Rasmussen's opinion met claimant's burden at Section 718.204(c), as Dr. Rasmussen diagnosed clinical pneumoconiosis and opined that claimant's interstitial-type lung disease is a substantial contributing cause of claimant's disability. Claimant's Exhibit 1. Similarly, Dr. Habre diagnosed clinical pneumoconiosis and opined that the presence of irregular opacities seen on x-ray has been correlated with abnormal blood gas transfer and the presence of exertional hypoxemia, the conditions that form the basis of claimant's disability. Claimant's Exhibit 3. Thus, contrary to employer's allegation, the administrative law judge's crediting of the opinions of Drs. Rasmussen and Habre was rational and supported by

substantial evidence. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 835, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). As employer asserts no other allegation of error, we affirm the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c), and affirm the award of benefits.[14]

Commencement Date for Benefits

Employer challenges the administrative law judge's commencement date of August 2013, asserting that benefits should not begin until at least July 2014, the date claimant submitted new evidence of disability. Employer's Brief at 8. We disagree.

If a claim is awarded pursuant to a request for modification based on a change in conditions, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §725.503(d)(2). However, if the evidence does not establish the month of onset, benefits are payable from the month in which claimant requested modification. *Id.*

In this case, the administrative law judge considered the relevant evidence, and found that the record did not establish the onset date of claimant's disability due to pneumoconiosis. Decision and Order at 38. Therefore, contrary to employer's assertion, the administrative law judge correctly awarded benefits beginning in the month in which claimant filed his third request for modification. 20 C.F.R. §725.503(d)(2).

[14] We affirm, as unchallenged on appeal, the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge