U.S. Department of Labor

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

BRB No. 17-0008 BLA

RICHARD F. ROSE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COAL RIVER MINING, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE	)	DATE ISSUED: 10/06/2017
	)	
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 and Order on Reconsideration of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order and Decision on Reconsideration (2014-BLA-5813) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits 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 a subsequent claim filed on September 12, 2013.[1]

The administrative law judge credited claimant with at least thirty years of underground coal mine employment,[2] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[3] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.[4] By Order on Reconsideration dated August 30, 2016, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The

[1] Claimant's two previous claims, filed in 2002 and 2009, were both denied as abandoned. Director's Exhibits 1, 2.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 23, 25. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Because claimant invoked the Section 411(c)(4) presumption, the administrative law judge found that claimant established a change in one of the applicable conditions of entitlement. 20 C.F.R. §725.309(c).

Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[5]

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. 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).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically challenges the administrative law judge's findings that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[6]

The record contains three new arterial blood gas studies conducted on May 25, 2011, October 29, 2013, and March 26, 2014. While the resting and exercise arterial blood gas studies conducted by Dr. Habre on May 25, 2011, and by Dr. Zaldivar on March 26, 2014, produced non-qualifying values, the studies conducted by Dr. Rasmussen on October 29, 2013 produced qualifying values.[7] Director's Exhibits 14, 34; Employer's Exhibits 4, 19. The administrative law judge found that Dr. Rasmussen's qualifying exercise arterial blood gas study was more probative than Dr. Zaldivar's non-qualifying exercise arterial blood gas study because Dr. Rasmussen's exercise study "represented heavier exertion, and . . . [therefore] better correlate[d] to the effects on [claimant] of the type of labor he experienced in his coal mining position." Decision and Order at 30. The administrative law judge further found that Dr. Habre's "more remote"

[5] Because employer does not challenge the administrative law judge's finding that claimant established at least thirty years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 28-29.

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

non-qualifying arterial blood gas study from May 25, 2011 was entitled to less weight than Dr. Rasmussen's more recent qualifying arterial blood gas study conducted on October 29, 2013. *Id.* at 31. Consequently, the administrative law judge found that the new arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Employer argues that the administrative law judge erred in finding that Dr. Rasmussen's qualifying exercise arterial blood gas study was more probative than Dr. Zaldivar's non-qualifying exercise arterial blood gas study. We disagree. The administrative law judge noted that Dr. Rasmussen's exercise arterial blood gas study was both lengthier and more rigorous than that conducted by Dr. Zaldivar. The administrative law explained that Dr. Rasmussen's blood gas study was, therefore, more probative:

> Dr. Rasmussen described [claimant's] arterial blood gas testing in detail and his explanation and rationale for the more lengthy and rigorous testing procedures are compelling. He differentiated the importance between the first sitting resting sample and the standing "baseline" measurement taken before exercise began, and credibly explained why the resting numbers are less insightful for evaluating lung function. After [claimant] began exercising on the treadmill, Dr. Rasmussen sampled blood at intervals through the 8th minute of exercise, and he stated that the samples were analyzed immediately. Dr. Rasmussen significantly noted that at the fourth minute of exercise in his study (which appears to be approximately the time Dr. Zaldivar drew his [exercise] sample), [claimant] had minimal impairment. But by the eighth minute, his pO2 had dropped to 56. In other words, he did not reach a disabling level until well after the time period that Dr. Zaldivar had already taken his sample. Dr. Rasmussen rationally explained that it was reasonable to conclude that his study yielded qualifying values because he exercised [claimant] long enough to see if he had a drop in oxygen transfer. Of note, based on the testimony and documentary evidence in the case, it is clear that . . .[c]laimant would be required to significantly exert himself in his former coal mining work for continuous periods of time far in excess of four to six minutes. This supports Dr. Rasmussen's assertion that the longer duration of the exercise testing he conducted is more relevant to the analysis of the [c]laimant's impairment to do his former job.

Decision and Order at 29.

The administrative law judge further found that Dr. Cohen's assessment of the two studies indicated that Dr. Rasmussen's exercise study represented heavier exertion:

> [R]egarding the level of exertion required in the exercise testing, I find Dr. Cohen's testimony regarding the relationship of more vigorous exercise to accurate [arterial blood gas] testing to be compelling. Dr. Cohen provided a credible and detailed comparison of the testing done by Drs. Rasmussen and Zaldivar. He stated that Dr. Rasmussen's test, which occurred with more exercise and at higher heart rates, was administering a heavier workload, and would be better for evaluating gas exchange for the type of strenuous exertion involved in heavy manual labor. He noted that Dr. Rasmussen exercised the [c]laimant to a heart rate of 138, whereas Dr. Zaldivar's testing achieved a heart rate of 129, indicating that [claimant] had more exercise during Dr. Rasmussen's test.

Decision and Order at 29-30.

The administrative law judge was persuaded by Dr. Cohen's opinion that the difference in claimant's exercise heart rates between the October 29, 2013 blood gas study, when Dr. Rasmussen exercised claimant for eight minutes, and the March 26, 2014 blood gas study, when Dr. Zaldivar exercised claimant for four minutes, indicated that Dr. Rasmussen's exercise study placed claimant under greater physical stress.[8] Decision and Order at 29-30. Substantial evidence supports the administrative law judge's credibility determination. Thus, the administrative law judge permissibly found that Dr. Rasmussen's October 29, 2013 exercise blood gas study better reflected claimant's capacity to perform heavy manual labor[9] and that, therefore, Dr. Rasmussen's qualifying

[8] Employer contends that, while Dr. Zaldivar's exercise testing was not as long as that of Dr. Rasmussen, it "reach[ed] work levels (measured by oxygen consumption) even greater than those on Dr. Rasmussen's testing." Employer's Brief at 15. The administrative law judge, however, rejected this argument, accurately noting that Dr. Cohen explained that, although oxygen consumption during Dr. Zaldivar's exercise testing was a bit higher than it was during Dr. Rasmussen's testing, "the best measurement of work capacity, and predictor of gas transfer or [red blood cell] transit time, was the heart rate." Decision and Order at 30; Claimant's Exhibit 3 at 32-33.

[9] The administrative law judge found that claimant's last job as a section foreman required him to lift more than 100 pounds on and off all day, including crib blocks, steel beams, miner cables, and water lines. Decision and Order at 4. The administrative law judge noted that claimant performed "all duties related to the mine, including work that involved heavy lifting." *Id.* Because employer does not challenge the administrative law

blood gas study outweighed Dr. Zaldivar's non-qualifying blood gas study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Although Dr. Habre's May 25, 2011 arterial blood gas study also produced non-qualifying values, the administrative law judge reasonably relied upon Dr. Rasmussen's more recent October 29, 2013 arterial blood gas study, which he found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 20-149 (6th Cir. 1988); Decision and Order at 31. Consequently, because it is supported by substantial evidence,[10] we affirm the administrative law judge's finding that the new blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer additionally asserts that, under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge erred in finding that the new medical opinions from Drs. Rasmussen and Cohen that claimant is totally disabled outweighed the contrary opinions of Drs. Zaldivar and Castle. Employer's Brief at 18-21. We disagree. The administrative law judge permissibly found that the opinions of Drs. Zaldivar and Castle merited less weight because the physicians relied on the less probative, March 26, 2014 arterial blood gas study to conclude that claimant is not totally disabled. *See Rowe*, 710 at 255, 5 BLR at 2-99; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Director's Exhibits 14, 16; Employer's Exhibits 5, 7. We therefore affirm the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that claimant established at least thirty years of underground coal mine employment, and the existence

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judge's findings regarding the exertional requirements of claimant's usual coal mine employment, they are affirmed. *Skrack*, 6 BLR at 1-711.

[10] Employer argues that the administrative law judge erred in crediting claimant's testimony that the exercise arterial blood gas studies conducted by Drs. Habre and Zaldivar were not performed properly. Employer's Brief at 7-15. We need not address this issue. Because the valid reasons that the administrative law judge provided for according less weight to the exercise studies conducted by Drs. Habre and Zaldivar are not dependent upon his findings regarding the validity of the studies, any error the administrative law judge may have made in questioning how the studies were conducted would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, because employer does not challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We, therefore, affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration awarding benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge