

U.S. Department of Labor

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



BRB No. 16-0025 BLA

RAYMOND DAVIS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ADVENT MINING, LLC)	
)	DATE ISSUED: 08/31/2016
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05162) of Administrative Law Judge Colleen A. Geraghty 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 a subsequent claim filed on October 14, 2010.¹

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),² the administrative law judge credited claimant with 27.24 years of underground coal mine employment, and found that the 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 rebuttable presumption of total disability due to pneumoconiosis and demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).³ The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding total respiratory disability established pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of

¹ Claimant filed two prior claims. His first claim, filed on February 24, 2000, was denied on May 8, 2000 because he failed to establish any element of entitlement. His second claim, filed on September 25, 2006, was denied on April 26, 2007 because he failed to establish total disability. Decision and Order at 5, 6; Director's Exhibits 1, 2. Claimant took no further action until he filed the current subsequent claim.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

³ If 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 failed to establish total disability. Director's Exhibit 2. Thus, in order to obtain review of the merits of his claim, claimant had to establish that he is totally disabled. 20 C.F.R. §725.309(c)(3), (4).

benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.⁴

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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment.

After finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁶ The administrative law judge considered the opinions of Drs. Chavda, Selby and Jarboe. Although Dr. Chavda initially opined that claimant does not suffer from a totally disabling respiratory impairment, following his review of additional evidence, Dr. Chavda opined that claimant is "definitely considered hypoxic" and is

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 27.24 years of underground coal mine employment, and that his usual coal mine work as a "car driver" required heavy labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3, 8-9, 14-15; Employer's Brief at 2, 12.

⁵ The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 5; 8 at 5. 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).

⁶ In determining whether claimant established total disability, the administrative law judge reasonably accorded greater weight to the evidence submitted with the current claim, as more indicative of claimant's current condition. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 6.

“totally disabled” as demonstrated by his blood gas studies.⁷ In contrast, Drs. Selby and Jarboe opined that claimant is not totally disabled from a respiratory standpoint.

The administrative law judge found that Dr. Chavda’s opinion that claimant has a totally disabling respiratory impairment is documented and reasoned and supported by the results of the objective studies. Decision and Order at 18. The administrative law judge accorded less weight to the opinions of Drs. Selby and Jarboe, as inadequately reasoned and documented, finding that neither doctor sufficiently explained why claimant’s hypoxemia does not prevent him from performing his usual coal mine employment, given the heavy labor required of that position. *Id.* at 18-19. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer asserts that the administrative law judge erred in finding the opinion of Dr. Chavda to be reasoned and documented. Employer’s Brief at 11. Employer contends that Dr. Chavda relied on an invalid qualifying⁸ blood gas study and mischaracterized the results of another blood gas study as qualifying and, therefore, his diagnosis of total disability is not credible. *Id.* We disagree.

The administrative law judge correctly noted that Dr. Chavda examined claimant, performed objective testing, and also reviewed the objective test results obtained by Dr. Selby. Further, the administrative law judge found that Dr. Chavda demonstrated an adequate understanding of the exertional requirements of claimant’s last coal mine work

⁷ Dr. Chavda examined claimant on behalf of the Department of Labor (DOL). In his report dated November 11, 2010, Dr. Chavda opined that, based on the results of the pulmonary function studies he conducted, claimant is not totally disabled. Director’s Exhibit 12-40. The district director asked Dr. Chavda to clarify his opinion, noting that Dr. Chavda did not address the significance of the exercise blood gas study he performed, which meets the DOL regulatory standards for establishing total disability. Director’s Exhibit 12-2. In a supplemental report, Dr. Chavda stated that, based on the exercise induced hypoxia reflected by the November 11, 2010 blood gas study, claimant is not able to perform his usual coal mine work. Director’s Exhibit 12-1. Subsequently Dr. Chavda reviewed additional evidence, and reiterated his opinion that claimant is totally disabled. Employer’s Exhibit 7.

⁸ 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).

as a car driver, which required heavy labor. Decision and Order at 15, 18. The administrative law judge also specifically considered that Dr. Chavda first determined that claimant is totally disabled based on the results of a November 11, 2010 blood gas study that was subsequently determined to be invalid. Decision and Order at 16, 18; Director's Exhibit 12-1; Employer's Exhibit 7 at 25-27. The administrative law judge correctly noted, however, that Dr. Chavda was later shown the results of Dr. Selby's July 21, 2011 blood gas study, which produced a PO₂ of 67 both at rest and during exercise. Decision and Order at 16; Employer's Exhibit 7 at 28. As summarized by the administrative law judge, Dr. Chavda testified that a PO₂ of 67 is "definitely considered hypoxic," and showed "disabling lung disease" that would prevent claimant from performing his usual coal mine work. Decision and Order at 16; Employer's Exhibit 7 at 28, 32. Further, Dr. Chavda explained that the fact that claimant's PO₂ did not increase with exercise reflected that he "definitely" has an underlying lung problem and that if he "has to exert himself, he is not able to perform the job." Decision and Order at 16; Employer's Exhibit 7 at 29, 34-35.

Contrary to employer's argument, after considering the totality of Dr. Chavda's opinion, the administrative law judge rationally concluded that while Dr. Chavda "initially based his conclusion that claimant is totally disabled on a blood gas study later determined to be invalid, Dr. Chavda ultimately relied on Dr. Selby's valid blood gas study." Decision and Order at 18; *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). Because substantial evidence supports the administrative law judge's finding that Dr. Chavda's opinion is "based on reliable objective testing," it is affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 18.

We further reject employer's contention that Dr. Chavda's mistaken belief that Dr. Selby's exercise blood gas study produced qualifying results rendered his opinion not credible. Employer's Brief at 11. As employer asserts, and the administrative law judge acknowledged, in concluding that Dr. Selby's exercise blood gas study results are qualifying, Dr. Chavda apparently "rounded down" claimant's PCO₂ at exercise from 33.3 to 33, which is not permitted by the regulations.⁹ Decision and Order at 13, *citing Tucker v. Director, OWCP*, 10 BLR 1-35, 1-39-41 (1987) (interpreting Appendix C of 20 C.F.R. Part 718 as precluding both "rounding up" and "rounding down"); Employer's Brief at 11; Employer's Exhibits 1; 7 at 34. The administrative law judge permissibly

⁹ As the administrative law judge correctly noted, Appendix C provides that, for a PO₂ of 67, the corresponding PCO₂ value is 33. 20 C.F.R. Part 718, Appendix C; Decision and Order at 13.

determined, however, that Dr. Chavda's mistake in characterizing Dr. Selby's exercise blood gas study result as qualifying "does not taint his opinion," as Dr. Chavda explicitly stated that even if Dr. Selby's blood gas study is non-qualifying, "if you look into a practical purpose, the guy, in my clinical opinion, is totally disabled."¹⁰ See *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 16, 18; Employer's Exhibit 7 at 32-33.

The determination of whether a physician's opinion is reasoned and documented is within the discretion of the administrative law judge, as trier of fact. See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103. Because the administrative law judge specifically found that Dr. Chavda set forth the rationale for his findings, based on his interpretation of the valid objective evidence of record, and explained why he concluded that claimant is unable to perform the duties of his usual coal mine work, we affirm the administrative law judge's finding that the opinion of Dr. Chavda is reasoned and documented and sufficient to satisfy claimant's burden of proof. See *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 19.

As employer raises no further challenge to the administrative law judge's determination to accord "greater weight" to the opinion of Dr. Chavda that claimant is totally disabled than to the contrary opinions of Drs. Selby and Jarboe, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, as the administrative law judge properly considered the medical opinion evidence in light of the pulmonary function and arterial blood gas study evidence, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 14-19.

¹⁰ Moreover, to the extent employer argues that Dr. Selby's non-qualifying exercise blood gas study results cannot support a finding of total disability, we reject that contention. The Sixth Circuit has held that a claimant may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section" 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the underlying objective studies are non-qualifying. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); see also *Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005).

As we have affirmed the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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 rebut the presumption by establishing that claimant has neither legal nor clinical 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).

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.¹¹ The administrative law judge considered the opinions of Drs. Selby¹² and Jarboe,¹³ who opined that claimant does not suffer from legal pneumoconiosis, but suffers from mild hypoxia, or hypoxemia, and possible bronchial asthma, which are not due to coal mine dust exposure. Employer's Exhibits 1, 6. The administrative law judge found that their opinions were inadequately explained and, therefore, not sufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 26-28.

¹¹ 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). This definition encompasses any chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. 718.201(b).

¹² Based on the results of his physical examination and objective testing, Dr. Selby opined that claimant's mild resting hypoxia is "most likely" due to obesity. Employer's Exhibit 1 (report) at 4. Dr. Selby added that claimant "may" also suffer from sleep apnea, which "can . . . be a serious cause of shortness of breath and hypoxia." *Id.*

¹³ Based on his review of medical records, Dr. Jarboe opined that claimant's mild hypoxemia is "likely" due to possible obstructive sleep apnea associated with obesity. Employer's Exhibit 6 at 10. Dr. Jarboe added that bronchial asthma may also contribute to claimant's hypoxemia. *Id.* at 11.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Selby and Jarboe. We disagree. The administrative law judge permissibly questioned their opinions regarding the cause of claimant's hypoxia, or hypoxemia, because neither doctor adequately explained how he eliminated claimant's coal mine dust exposure as a source of the impairment. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 26-27. Specifically, the administrative law judge permissibly found that Dr. Selby did not adequately explain why claimant's more than twenty-seven years of coal mine dust exposure did not contribute to, or aggravate, claimant's hypoxia, or hypoxemia, along with his other conditions.¹⁴ *Id.* The administrative law judge also considered Dr. Jarboe's opinion that claimant's mild hypoxemia, as reflected by Dr. Selby's blood gas study, is not due to coal mine dust exposure because claimant's pulmonary function studies "demonstrate[] no ventilatory impairment or impairment of diffusion capacity." Decision and Order at 26; Employer's Exhibit 6 at 10. Noting that pulmonary function studies and blood gas studies measure different types of impairment, see *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797 (1984), and that the results of these tests "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of impairment," the administrative law judge permissibly concluded that Dr. Jarboe's reasoning is flawed. Decision and Order at 26, quoting *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993).

Further the administrative law judge noted that Drs. Selby and Jarboe also diagnosed claimant with possible bronchial asthma, a condition which, if related to coal mine dust exposure, may fall under the regulatory definition of legal pneumoconiosis. Decision and Order at 27, see 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The administrative law judge permissibly discounted their opinions because neither physician adequately explained why claimant's asthma was not aggravated by his years of coal mine dust exposure. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 26-27.

¹⁴ The administrative law judge noted that, in his deposition, Dr. Selby appeared to state that claimant does not have legal pneumoconiosis because his objective test results reflected that he does not have any respiratory or pulmonary impairment at all. Decision and Order at 27. The administrative law judge permissibly discredited Dr. Selby's reasoning as internally inconsistent with his opinion that claimant's blood gas studies demonstrated mild hypoxia. See *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 27.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Selby and Jarboe, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.¹⁵ See 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id.*

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Selby and Jarboe that claimant's pulmonary impairment was not caused by pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease. See *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 29.

The administrative law judge also properly considered Dr. Jarboe's opinion that, even if claimant had legal pneumoconiosis, his opinion regarding the degree and cause of any respiratory impairment or disability would not change. The administrative law judge permissibly found that the same reasons for which she discredited Dr. Jarboe's opinion that claimant does not suffer from legal pneumoconiosis also undercut his opinion that claimant's disabling respiratory impairment would not be caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); see *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), citing *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting) (holding that a superficial, hypothetical assumption of pneumoconiosis made by a physician, is insufficient to reconcile his contrary opinion with the administrative law judge's finding of the disease).

¹⁵ Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12-14.

As the opinions of Drs. Selby and Jarboe are the only opinions supportive of employer's burden, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

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