U.S. Department of Labor

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

BRB No. 20-0206 BLA

GARY OWSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY, LLC	)	
	)	
and	)	
	)	
AIG PROPERTY CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 04/19/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Gary Owsley, Vest, Kentucky.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

ROLFE, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Larry A. Temin's Decision and Order Denying Benefits (2018-BLA-06210) rendered on a claim[2] filed on September 13, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant does not have complicated pneumoconiosis and is therefore unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although he credited Claimant with at least fifteen years of qualifying coal mine employment, he found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4)(2018), or establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed and withdrew two prior claims. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4)(2018); *see* 20 C.F.R. §718.305.

accordance with applicable law.[4] 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).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). The administrative law judge found there is no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 10.

The administrative law judge considered eleven interpretations of five x-rays. Decision and Order at 4-5, 9-12. Dr. DePonte, dually-qualified as a B reader and Board-certified radiologist, read the August 24, 2017 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Colella, also dually qualified, read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 17, 20. The administrative law judge found the August 24, 2017 x-ray inconclusive for complicated pneumoconiosis based on the equal number of positive and negative readings by dually-qualified readers. Decision and Order at 10.

Dr. DePonte read the October 30, 2017 x-ray as positive for simple and complicated pneumoconiosis, Category A, but noted the x-ray should be compared to other imaging to exclude malignancy,[5] while Drs. Miller and Colella, each dually qualified, read it as

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 14; Director's Exhibit 4.

[5] The administrative law judge permissibly found Dr. DePonte's comments regarding ruling out malignancy and other etiologies do not detract from the probative value of her opinion on the existence of complicated pneumoconiosis. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (the refusal to express a diagnosis in categorical terms is candor, not equivocation).

positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 14, 19, 38. The administrative law judge found the October 30, 2017 x-ray negative for complicated pneumoconiosis based on the preponderance of the negative readings by dually-qualified readers. Decision and Order at 10-11.

Dr. DePonte read the April 18, 2018 and September 5, 2018 x-rays as positive for simple and complicated pneumoconiosis, Category A, but noted both x-rays should be compared to other imaging to exclude other etiologies, while Dr. Simone, also dually-qualified, read them as negative for simple and complicated pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4. Based on the equal number of positive and negative readings by dually-qualified readers, the administrative law judge found the April 18, 2018 and September 5, 2018 x-rays inconclusive for complicated pneumoconiosis. Decision and Order at 11.

Dr. Simone read the December 19, 2018 x-ray as negative for simple and complicated pneumoconiosis, while Dr. Ramakrishnan, a B reader, read it as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 3. Based on the uncontradicted negative interpretations, the administrative law judge found the December 19, 2018 x-ray negative for complicated pneumoconiosis. Decision and Order at 11.

Having found the interpretations of two x-rays negative for complicated pneumoconiosis and three x-rays inconclusive, the administrative law judge determined Claimant did not establish complicated pneumoconiosis based on the x-ray evidence. Decision and Order at 11-12. We see no error in the administrative law judge's determination, as he performed both a qualitative and quantitative review of the x-rays, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the readings.[6] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Thus, we affirm the administrative law judge's finding that the x-ray evidence does not

[6] The administrative law judge also considered a September 5, 2018 x-ray contained in Claimant's treatment records, which identified a "questionable 1cm right upper lobe nodule." Decision and Order at 11; Claimant's Exhibit 4. He permissibly found this x-ray interpretation does not contain sufficient information from which he could make a determination regarding the existence of complicated pneumoconiosis because it did not state the type or profusion of the nodules identified or reference the existence of a Category A, B, or C opacity. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 11.

establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); Decision and Order at 9.

The administrative law judge next addressed interpretations of two computed tomography (CT) scans, dated November 7, 2017 and September 21, 2018. Decision and Order at 12; Claimant's Exhibit 6. He noted the CT scans identified pleural-based nodules with some fibrotic changes and evidence of old granulomatous disease, Claimant's Exhibit 6, but neither scan "identified large opacities or diagnosed the Claimant with complicated pneumoconiosis or progressive massive fibrosis." Decision and Order at 12. He thus permissibly found the CT scan evidence did not support a finding of complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33.

Turning to the medical opinion evidence, the administrative law judge considered the opinions of Drs. Ajjarapu, Dahhan, and Fino, as well as a treatment note from Dr. Sikder. Decision and Order at 12-13. He accurately noted that in diagnosing complicated pneumoconiosis Dr. Ajjarapu relied on Dr. DePonte's positive complicated pneumoconiosis reading of the October 30, 2017 x-ray. *Id.* at 12; Director's Exhibit 14. Having found the October 30, 2017 x-ray negative for complicated pneumoconiosis and the x-ray evidence as a whole insufficient to establish complicated pneumoconiosis, he permissibly found Dr. Ajjarapu's opinion neither well-documented nor well-reasoned and gave it little weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 12-13.

Dr. Sikder diagnosed coal workers' pneumoconiosis and a single pulmonary nodule. Claimant's Exhibit 5 at 9. The administrative law judge accurately noted she relied on the September 21, 2018 CT scan, which did not identify a solitary nodule in Claimant's lungs, and she did not explain how she determined Claimant "presented with" complicated pneumoconiosis. Decision and Order at 13. Thus he permissibly determined her opinion is not well-documented and entitled to less weight. *See Rowe*, 710 F.2d at 255; Decision and Order at 13.

Dr. Dahhan did not diagnose complicated pneumoconiosis, instead stating that Claimant had an abnormal x-ray. Employer's Exhibit 3. The administrative law judge permissibly found his opinion too vague to be considered an opinion on the existence of complicated pneumoconiosis because he did not explain what types of abnormalities existed or attribute those abnormalities to any specific cause. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1988); Decision and Order at 13.

Dr. Fino opined Claimant does not have complicated pneumoconiosis. Employer's Exhibit 5. The administrative law judge noted Dr. Fino is well-qualified to offer an opinion on the existence of complicated pneumoconiosis, and that his opinion is consistent with the administrative law judge's findings that the x-ray and CT scan evidence does not establish complicated pneumoconiosis. He thus permissibly found Dr. Fino's opinion well-reasoned and well-documented, and gave it great probative weight. *See Rowe*, 710 F.2d at 255; Decision and Order at 13.

Weighing the medical opinion evidence together, the administrative law judge gave greater weight to Dr. Fino's opinion that Claimant does not have complicated pneumoconiosis than the contrary opinions of Drs. Ajjarapu and Sikder. Decision and Order at 13. Because he provided valid reasons for discrediting the opinions of Drs. Ajjarapu, Dahhan, and Sikder, and because he rationally gave greater weight to the opinion of Dr. Fino as well-documented and well-reasoned, we find no error in the administrative law judge's evaluation of the opinion evidence. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 13. We thus affirm the administrative law judge's finding the medical opinion evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant did not establish complicated pneumoconiosis and is unable to invoke the irrebuttable presumption. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 17.

Section 411(c)(4) Presumption—Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, 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). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *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 considered the results of four pulmonary function studies. Decision and Order at 14-15. The August 24, 2017 and October 30, 2017 studies yielded qualifying results, while the April 18, 2018, and December 19, 2018 studies did

not.[7] Director's Exhibits 14, 18, 21; Employer's Exhibit 3. He found the studies were all entitled to probative weight and permissibly found the overall results "inconclusive" based on there being the same number of qualifying and non-qualifying results in the record. Decision and Order at 15. The administrative law judge having performed a qualitative and quantitative analysis of the studies, we affirm his finding that the pulmonary function study evidence, when weighed together, is inconclusive and does not establish total disability.[8] *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); 20 C.F.R. §718.204(b)(2)(i).

There are no qualifying blood gas studies in the record.[9] The administrative law judge thus properly found Claimant did not establish total disability at 20 C.F.R. §278.204(b)(2)(ii).[10] Decision and Order at 15.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Dr. Ajjarapu, who opined Claimant is totally disabled, and Drs. Dahhan and Fino, who opined he is not. Director's Exhibit 21; Employer's Exhibits 3, 5. The administrative law judge accurately noted Dr. Ajjarapu opined Claimant is totally disabled based on the pulmonary function testing and her conclusion Claimant has complicated pneumoconiosis. Decision and Order at 16; Director's Exhibit 14 at 7. He permissibly found her opinion less probative because she did not review the later, non-qualifying pulmonary function testing, and her conclusions regarding complicated

[7] A "qualifying" pulmonary function study yields results that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] Because we affirm the administrative law judge's finding the pulmonary function studies do not establish total disability, we need not address his rejection of Dr. Dahhan's opinions regarding the validity of the August 24, 2017 and April 18, 2018 pulmonary function studies. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Decision and Order at 15 nn.36-37; Employer's Exhibit 3.

[9] A "qualifying" blood gas study yields results 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 results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[10] The administrative law judge did not make a finding regarding whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iii). However, the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. Therefore, Claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

pneumoconiosis are inconsistent with his finding that Claimant does not have the disease. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; *Campbell*, 11 BLR at 1-19; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (recognizing an administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of a miner's health); Decision and Order at 16. It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185. Because the administrative law judge provided a valid basis for according diminished weight to the opinion of Dr. Ajjarapu, the only opinion supportive of Claimant's burden, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[11] *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Martin*, 400 F.3d at 305; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 198; Decision and Order at 16. Consequently, we affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2).[12] As Claimant has failed to prove total disability, an essential element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[11] The administrative law judge also correctly found Claimant's treatment records do not assist him in establishing total disability because they do not address whether he has the pulmonary or respiratory capacity to perform his usual coal mine work. Decision and Order at 16.

[12] Because Claimant did not establish total disability, he is unable to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018). Therefore, we need not address the administrative law judge's length of coal mine employment determination as any error therein would be harmless. *See Larioni*, 6 BLR at 1278.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

I concur in the result only:

JUDITH S. BOGGS, Chief
Administrative Appeals Judge