U.S. Department of Labor

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

BRB No. 20-0304 BLA

JERRY ELLIS BREWSTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 04/29/2021
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Edward L. Pauley (Wallace and Graham, PA), Salisbury, North Carolina, for Claimant.

Cynthia Liao (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Monica Markley's Decision and Order Denying Benefits (2016-BLA-05533) rendered on a subsequent claim[1] filed on April 16, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with seven years of coal mine employment, and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[2] She also found he did not establish complicated pneumoconiosis, and thus could not 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. Considering entitlement under 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that Claimant has clinical pneumoconiosis arising out of coal mine employment and, therefore, established a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 718.203(b), 725.309(c). She found, however, Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Because he failed to establish an essential element of entitlement, she denied benefits.

On appeal, Claimant argues the administrative law judge erred in weighing the medical opinions and in failing to properly consider the findings of a vocational rehabilitation specialist on the issue total disability.[3] Employer has not filed a response

[1] Claimant filed an initial claim on April 18, 1997, and the district director denied it on August 22, 1997, because Claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action until filing this subsequent claim. Director's Exhibit 3.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established seven years of coal mine employment, clinical pneumoconiosis arising out of coal mine employment, and a change in an applicable condition of entitlement, but did not establish complicated pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.304, 725.309(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 7, 24, 29-31.

brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response arguing the administrative law judge properly considered and rejected the findings of the vocational rehabilitation specialist.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in 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).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 weigh all relevant supporting evidence against all relevant 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).

Claimant does not challenge the administrative law judge's findings that he did not establish total disability based on pulmonary function studies, arterial blood gas studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 31-32. Thus we affirm these findings. *Skrack*, 6 BLR at 1-711. Instead, Claimant argues the administrative law judge erred in weighing the medical opinion evidence on the issue of total disability. 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 15-27. Claimant's arguments have no merit.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

The administrative law judge first weighed the opinions of Drs. Fino, Rosenberg, and Forehand. Decision and Order at 33. All three doctors opined that Claimant is not totally disabled. Director's Exhibit 13; Employer's Exhibits 2, 3.

The administrative law judge permissibly found Dr. Fino's opinion reasoned and documented because it is "supported by the underlying medical data" and based on normal lung function testing that Dr. Fino indicated evidenced no impairment. Decision and Order at 33; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She also permissibly found Dr. Rosenberg's opinion reasoned and documented because it is "consistent with and supported by the medical records he reviewed," including normal pulmonary function and arterial blood gas testing. Decision and Order at 33; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Finally, she found Dr. Forehand's opinion reasoned and documented, and Claimant does not challenge this finding before the Board. Decision and Order at 33. Thus we affirm it. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge then weighed Dr. Ohar's medical opinion. Decision and Order at 33. Although Dr. Ohar diagnosed "pulmonary function abnormalities," Claimant's Exhibit 4, the administrative law judge correctly found her opinion does not establish total disability because she did not indicate if the "abnormalities" preclude Claimant from performing his usual coal mine employment. Decision and Order at 33; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; 20 C.F.R. §718.204(b)(1), (2)(iv); Claimant's Exhibit 4.

The administrative law judge also weighed Dr. Hennington's medical opinion. Decision and Order at 33-34. Dr. Hennington indicated he conducted a bronchoscopy and thoracoscopy of Claimant's lungs. Claimant's Exhibit 3. He stated he "was able to visualize [Claimant's] lungs" and concluded Claimant's "lungs have coal dust within them as all coal miners do." *Id*.

In a deposition, Dr. Hennington testified Claimant has coal workers' pneumoconiosis and it "can cause all [of Claimant's] symptoms." Claimant's Exhibit 11 at 9-10, 17. He stated the bronchoscopy and thoracoscopy revealed Claimant's lungs were "solid black," with severe anthracosis. *Id*. at 25, 31. He acknowledged Claimant's "pulmonary function tests were objectively normal," but stated that "subjectively," Claimant was "short of breath when he exerted himself," including climbing a flight of stairs. *Id*. at 11-12. He further stated the amount and location of dust pigment in Claimant's lungs does not necessarily indicate the level of his impairment. *Id*. at 24-25.

When specifically asked to address the level of Claimant's respiratory impairment, Dr. Hennington stated "everything looks pretty good" on objective testing. Claimant's

Exhibit 11 at 28, 39. He reiterated, however, that Claimant "appears to be short of breath" when he walks or climbs stairs. *Id*. Although Dr. Hennington stated the black pigment in Claimant's lungs could explain his shortness of breath, he conceded Claimant's deconditioning or heart condition could also be causing his shortness of breath. *Id*. at 29-30. Dr. Hennington emphasized that the amount of coal dust in Claimant's lungs was severe, but stated that "[b]ased on objective findings, [Claimant's] impairment was probably in the early stages" and "is not bad." *Id*. at 30-31.

The administrative law judge permissibly found Dr. Hennington's opinion equivocal and speculative, even as to whether Claimant's shortness of breath is due to a "lung condition" or "was due to other causes." Decision and Order at 35; *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Claimant argues the opinions of Drs. Fino and Rosenberg are not credible because they did not personally examine him and observe his shortness of breath firsthand. Claimant's Brief at 15-21. He contends Dr. Hennington's opinion is more credible because the doctor saw Claimant struggle with breathing when attempting to walk or climb a flight of stairs. *Id*. Contrary to Claimant's assertion, an administrative law judge "should not 'mechanistically credit, to the exclusion of all other testimony,' the testimony of an examining or treating physician solely because the doctor personally examined the claimant." *Hicks*, 138 F.3d at 544, *quoting Akers*, 131 F.3d at 441; *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (opinions of treating physicians get "the deference they deserve on their power to persuade"); 20 C.F.R. §718.104(d)(5). Because the administrative law judge discredited Dr. Hennington's opinion, she was not required to assign it more weight based on his status as Claimant's treating physician. *Hicks*, 138 F.3d at 544; *Akers*, 131 F.3d at 441; *Williams*, 338 F.3d at 513.

Claimant asserts that the objective bronchoscopy and thoracoscopy findings and Claimant's subjective symptoms better support Dr. Hennington's opinion and undermine the opinions of Drs. Fino and Rosenberg. Claimant's Brief at 15-21. This argument constitutes a request that the Board reweigh the evidence, which we are not empowered to do.[5] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[5] Claimant argues the administrative law judge erred in crediting Dr. Oesterling's opinion. Claimant's Brief at 15-21. The administrative law judge, however, did not weigh Dr. Oesterling's opinion on the issue of total disability. Because Dr. Oesterling opined Claimant is not totally disabled, Employer's Exhibit 4, his opinion does not support Claimant's burden of proof and the administrative law judge's failure to weigh it on this issue is therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Finally, we reject Claimant's argument that the administrative law judge did not properly consider the findings of Stephen Carpenter, a vocational rehabilitation specialist. Claimant's Brief at 21-27. Mr. Carpenter stated Claimant is "not employable in any occupation at any physical demand level." Claimant's Exhibit 7 at 16. Although he based his findings in part on Claimant's shortness of breath with exertion, he cited "medical and vocational factors"[6] unrelated to Claimant's respiratory or pulmonary impairment. *Id*. Specifically Mr. Carpenter relied on Claimant's "advanced age" of 75 years old, which results in "marked age-related vocational deficits that reduce his vocational competitiveness." *Id*. He also cited Claimant's "deficits in motor speed, especially with the upper extremities (which also demonstrated an inability to grip, grasp, and pinch completely)." *Id*. at 13-14.

The administrative law judge properly concluded Mr. Carpenter's findings cannot establish total disability because they are "not that of 'a physician exercising reasoned medical judgment,'" as the regulations require. Decision and Order at 35, *quoting* 20 C.F.R. §718.204(b)(2)(iv); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Further, to the extent Mr. Carpenter cited vocational and non-respiratory factors as a basis for his conclusion, we agree with Director's contention that the administrative law judge permissibly rejected his findings because he did not state if Claimant is totally disabled based on a respiratory or pulmonary impairment, standing alone.[7] *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994) (rejecting that total disability may be shown by combination of respiratory and nonrespiratory impairments); 20 C.F.R. §718.204(a) (any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall

[6] Mr. Carpenter cited the following vocational factors: Claimant's functional illiteracy, deficits in recall and concentration, and lack of clerical skills. Claimant's Exhibit 7.

[7] Claimant argues that claims of miners under the Act cannot be subjected to standards more restrictive than Social Security standards. Claimant's Brief at 26-27. Claimant cites no authority for his argument. Further, we agree with the Director that the plain language of the applicable regulation belies Claimant's assertion. Director's Brief at 1-2. Claimant may establish total disability based on "a pulmonary or respiratory condition which, standing alone, prevents or prevented" him from performing his usual coal mine work or engaging in comparable, gainful employment. 20 C.F.R. §718.204(b)(1); *see also Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994); 65 Fed. Reg. 79, 920, 79,947 (Dec. 20, 2000) (rejecting "whole person" definition of disability).

not be considered in determining whether a miner is totally disabled due to pneumoconiosis).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant failed to establish total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), or based on the evidence when weighed together. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

Because Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge