

U.S. Department of Labor

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



BRB No. 22-0321 BLA

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| JAMES D. SHEPHERD |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | DATE ISSUED: 04/28/2023 |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

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

James D. Shepherd, Richmond, Kentucky.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2020-BLA-05484) rendered on a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 26, 2018.²

The ALJ found no evidence of complicated pneumoconiosis and determined Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202, 718.204(b), 718.304. Therefore, the ALJ found Claimant could not establish entitlement under 20 C.F.R. Part 718 or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.³ Accordingly, he denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the denial of benefits.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C.

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

² Claimant filed three prior claims. Director's Exhibits 1-3. He filed his most recent prior claim on April 3, 2013, which the district director denied because the evidence did not establish total disability. Director's Exhibit 3.

³ When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he 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). Because the district director denied Claimant's prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing that element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See*

§921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.⁵ *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, 1-2 (1986) (en banc).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, 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 qualifying pulmonary function studies or arterial blood gas studies,⁶ 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 ALJ 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). The ALJ found Claimant failed to establish total disability and thus denied benefits. Decision and Order at 8.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10; Director’s Exhibit 6.

⁵ The ALJ accurately found there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 4. Therefore, Claimant is 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) (2018); 20 C.F.R. §718.304.

⁶ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A “non-qualifying” study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ correctly found the only pulmonary function study and only blood gas study submitted with the current claim had non-qualifying results.⁷ See 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 4-5; Director’s Exhibit 16. We therefore affirm the ALJ’s findings that Claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).⁸ In addition, because the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 4.

In addressing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ initially noted Claimant’s testimony that his last coal mine work was driving a rock hauling truck for two to three years, which required “sit[ing] in the cab there and just physically driving over the terrain” and did not involve any heavy lifting. Hearing Transcript at 13-14. He also noted Claimant’s statement that he had to climb twenty feet off the ground to get into the truck. *Id.* at 14. Based on this testimony, the ALJ permissibly concluded that Claimant’s usual coal mine work as a haul truck operator at a surface mine was sedentary and did not require lifting or crawling. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his findings unless they are inherently unreasonable); Decision and Order at 5-6.

The ALJ next considered the medical opinions of Drs. Ajjarapu and Mahboob and Claimant’s treatment records. Decision and Order at 7-8. Dr. Ajjarapu conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on April 9, 2018, and obtained non-qualifying pulmonary function and blood gas studies. Director’s Exhibit 16. She diagnosed chronic bronchitis based on Claimant’s reported symptoms of coughing and shortness of breath but stated he “retains the pulmonary capacity to do his previous coal mine employment.” *Id.* at 6-7. The ALJ permissibly found Dr Ajjarapu’s opinion reasoned, documented, and consistent with the objective evidence, and accurately

⁷ Dr. Ajjarapu’s April 9, 2018 pulmonary function study produced non-qualifying pre-bronchodilator and post-bronchodilator results and her April 9, 2018 blood gas study produced non-qualifying values at rest and with exercise. Director’s Exhibit 16 at 9, 13.

⁸ The ALJ correctly determined that pulmonary function and blood gas studies developed in connection with the prior claims are not relevant to whether Claimant established a change in an applicable condition of entitlement in this claim. See 20 C.F.R. §725.309(c)(4); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997); Decision and Order at 4-5.

concluded it does not aid Claimant in establishing total disability.⁹ See *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 7.

In a January 22, 2019 letter, Dr. Mahboob indicated he had treated Claimant since 2012 and summarily stated, “[w]e feel that [p]neumoconiosis is present and that the [C]laimant is totally disabled from a respiratory impairment due to this disease.” Claimant’s Exhibit 1. In addition, in the treatment records from St. Charles Breathing Center from February 17, 2016 to May 9, 2019, Dr. Mahboob noted Claimant worked as a “surface coal worker - heavy equipment operator” and that his job functions included cleaning and loading coal and powder crew equipment and shoveling the belt line. Claimant’s Exhibit 2 at 2, 7. He related Claimant’s symptoms of dyspnea after walking two hundred feet or ten steps, wheezing, a cough, and yellow-black sputum production. *Id.* at 2, 7, 13. Further, Dr. Mahboob and nurse practitioners Dean and Willis described Claimant as having shortness of breath, unspecified chronic obstructive pulmonary disease, chronic bronchitis, and coal workers’ pneumoconiosis. *Id.* at 5, 11, 17.

The ALJ permissibly discredited Dr. Mahboob’s opinion because he found Dr. Mahboob did not demonstrate an adequate understanding of the exertional requirements of Claimant’s usual coal mine employment as a sedentary truck driver, nor did he offer any explanation or support for his conclusion that Claimant has a totally disabling respiratory impairment. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7; Claimant’s Exhibits 1, 2. In addition, the ALJ accurately found that while the treatment records indicate Claimant has a respiratory disease, they do not specifically address whether he is totally disabled from performing his usual coal mine work by a respiratory or pulmonary impairment. Decision and Order at 5-7; Claimant’s Exhibit 2. Thus, we affirm the ALJ’s finding that the treatment records are also insufficient to establish Claimant is totally disabled. See *Banks*, 690 F.3d at 489; Decision and Order at 5-7.

⁹ Dr. Ajjarapu noted Claimant’s coal mine work required heavy exertion. Director’s Exhibit 16 at 1. While this conflicts with the ALJ’s finding that Claimant’s last work was sedentary, the Director correctly points out that it does not aid Claimant in establishing total disability because Dr. Ajjarapu nevertheless opined Claimant maintained the respiratory capacity to continue doing work that required heavy exertion and thus would also maintain the ability to continue doing sedentary work. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 6-7; Director’s Brief at 4 n.7.

As the ALJ permissibly rejected Dr. Mahboob's opinion, the only medical opinion of record that could support a finding of total disability, and determined Claimant's treatment records do not establish total disability, we affirm his finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).¹⁰ See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 7-8. We further affirm, as supported by substantial evidence, the ALJ's overall finding that Claimant did not establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 8.

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because Claimant failed to establish total disability, a requisite element of entitlement, we affirm the ALJ's findings that he did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that benefits are precluded under 20 C.F.R. Part 718.¹¹ 20 C.F.R. §718.204(b)(2); see *Anderson*, 12 BLR at 1-112.

¹⁰ Claimant testified he would not be able to operate a haul truck for a long period of time because of his "back and shoulder and stuff" and that his "breathing" would impact his ability to climb into the truck and operate it. Hearing Transcript at 14, 16. However, as the Director correctly points out, a miner's testimony alone is insufficient to establish total disability. See 20 C.F.R. §§718.204(d)(5), 718.305(b)(3); *Coleman v. Director, OWCP*, 829 F.2d 3, 4-5 (6th Cir. 1987); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987); Director's Brief at 5 n.8.

¹¹ Because Claimant did not establish total disability, he is also not entitled to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge