U.S. Department of Labor

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

BRB No. 22-0150 BLA

ROBERT G. HITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 8/16/2023
	)	
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 Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Oak Hill, West Virginia, for Claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2019-BLA-06164) rendered on a subsequent claim filed on February 23, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant established 22.17 years of qualifying coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response.[3]

The Benefit Review Board's scope of review is defined by statute. 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. §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).

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[1] Claimant filed four prior claims. Director's Exhibits 1, 2, 3, 4. On September 1, 1987 and February 11, 2000, the district director denied his first two claims, filed on February 23, 1987 and February 1, 1999, because Claimant failed to establish any element of entitlement. Director's Exhibits 1, 2. Claimant withdrew his third and fourth claims. Director's Exhibits 3, 4. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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 ALJ's finding that Claimant established 22.17 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-10.

[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

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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 these elements when certain conditions are met, but failure to establish any element 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).

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 ALJ must consider all relevant evidence and weigh the evidence supporting 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). Claimant contends the ALJ erred in finding he did not establish total disability based on Dr. Allen's opinion, Claimant's treatment records, and Claimant's hearing testimony at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[5] Claimant's Brief at 6-8.

The ALJ considered the opinions of Drs. Allen, Zaldivar, and Basheda, as well as Claimant's treatment records from Drs. Olson and Durham. Decision and Order at 15-28. Dr. Allen diagnosed a mixed obstructive and restrictive impairment which she opined would prevent Claimant from performing his last coal mining job. Director's Exhibit 17 at 4; Claimant's Exhibit 3 at 2. Dr. Zaldivar diagnosed asthma or chronic bronchitis related to asthma, but opined these conditions would not prevent Claimant from performing his

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 8, 11.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and blood gas studies do not weigh in favor of a finding of total disability, and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack*, 6 BLR at 1-711; Decision and Order at 13-15.

usual coal mining work. Employer's Exhibits 1 at 7, 10; 6 at 50-52; 8 at 27. Dr. Basheda diagnosed intermittent asthma and indicated Claimant may have a restrictive impairment but opined these conditions did not prevent Claimant from performing his last coal mining job. Employer's Exhibits 2 at 41; 7 at 33; 9 at 13. The ALJ also summarized the treatment records, Decision and Order at 23-24, and found that, although they "reflect that [] Claimant reported significant reported significant respiratory symptoms and was receiving treatment . . . , they do not establish total disability." *Id.* at 28.

In resolving the conflict in the medical opinions, the ALJ initially determined Claimant usual coal mining work required heavy labor.[6] Decision and Order at 11. She further considered the physicians' credentials and found them equally qualified.[7] *Id.* at 25. The ALJ found Dr. Allen's opinion neither reasoned nor documented. Decision and Order at 26-27. She further found Drs. Zaldivar's and Basheda's opinions not reasoned because both doctors based their opinions on the non-qualifying[8] objective testing but did not address whether Claimant could be totally disabled despite the non-qualifying objective testing. Decision and Order at 27; Employer's Exhibits 2 at 35-41; 6 at 32. Thus, because no well-reasoned opinion supported Claimant's burden to affirmatively establish total disability, the ALJ found the evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 27-28.

Claimant asserts the ALJ erred in discrediting Dr. Allen's opinion "despite the fact that part of the basis for Dr. Allen's opinion was her reasonable [reliance on Claimant's treatment records]." Claimant's Brief at 7. We disagree.

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[6] We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[7] Drs. Zaldivar and Basheda are Board-certified in internal and pulmonary medicine, whereas Dr. Allen is Board-certified in occupational medicine. Director's Exhibit 21; Employer's Exhibits 1, 2. The ALJ noted that, although Dr. Allen's Board-certification in occupational medicine does not suggest specific expertise in pulmonary conditions, it does suggest Dr. Allen can accurately determine whether an individual's condition would or would not preclude him from working in his usual occupation. Decision and Order at 25. She thus found each physician equally qualified. *Id.* We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ found Dr. Allen's opinion not reasoned because the physician apparently presumed Claimant stopped exercising during the April 18, 2018 exercise arterial blood gas study due to difficulty breathing, whereas "the record does not indicate why the exercise was stopped . . . or even reflect that [] Claimant reported shortness of breath during the test."[9] Decision and Order at 26. She further found Dr. Allen's opinion not documented because it indicated the doctor had reviewed other records but, with the exception of records from March 2018 which were appended to her initial report, it was unclear which records she relied on. Decision and Order at 26-27, 27 n. 47; Director's Exhibit 17 at 4, 24-35; Claimant's Exhibit 3. Claimant does not challenge these findings on appeal; thus, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant also generally contends the ALJ erred by not providing weight to Claimant's treatment records. Claimant's Brief at 6-7. The ALJ summarized the treatment records and accurately recounted Drs. Olson's and Durham's diagnoses and prescribed treatments. Decision and Order at 23-24; Director's Exhibit 19. She noted Dr. Durham's records contain information which could support a finding of total disability, including a diagnosis of a severe mixed restrictive and obstructive impairment based on his review of the March 21, 2018 pulmonary function study, as well as possibly the May 2, 2017 study, and that he prescribed oxygen for use while sleeping. Decision and Order at 23-24, 26; Director's Exhibit 19 at 37-38, 48. She ultimately concluded, however, that the treatment records do not establish total disability. Decision and Order at 28.

Claimant has not explained how the ALJ erred in her consideration of this evidence. His argument is a request that the Board reweigh the evidence, which we are not permitted to do. *Anderson*, 12 BLR at 1-113.

Claimant finally asserts the ALJ erred by failing to discuss and weigh his testimony that he lacks the respiratory ability to perform his usual coal mine job. Claimant's Brief at 8; Hearing Transcript at 27-30. We disagree. In a living miner's claim, "a miner's affidavit or testimony . . . may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(3); *see also* 20 C.F.R. §718.104(d)(5). The ALJ found the medical evidence under 20 C.F.R. §718.204(b)(2) did not establish total disability. Decision and Order at 28. Therefore, Claimant's testimony could not carry his burden to establish he is totally disabled. 20 C.F.R. §718.305(b)(3);

[9] The ALJ also noted the record reflects a respiratory therapist administered the April 18, 2018 arterial blood gas study, and that it was thus unclear whether Dr. Allen witnessed the administration of the exercise study. Decision and Order at 26 n. 43; Director's Exhibit 17 at 8-9.

Madden v. Gopher Mining Co., 21 BLR 1-122, 1-125 (1999) (a finding of total disability cannot be based solely on lay evidence).

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 it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) or under consideration of the evidence as a whole, and thus that Claimant did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 28. Further, because Claimant did not establish total disability, a requisite element of entitlement, benefits are precluded. *See* 20 C.F.R. §718.204(b)(2); *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge