U.S. Department of Labor

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

BRB No. 20-0112 BLA

DANIEL L. HAFEMEISTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILL BRANCH COAL CORPORATION	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 02/17/2021
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Daniel L. Hafemeister, Keokee, Virginia.

John R. Sigmund (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer/Carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Theodore W. Annos's Decision and Order Denying Benefits (2018-BLA-05505) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 29, 2016.

The administrative law judge credited Claimant with thirty-two years of underground coal mine employment but found he did not establish a totally disabling pulmonary or respiratory impairment. He therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) filed a response brief, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order below is supported by substantial evidence.[2] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

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

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested 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. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14; Director's Exhibits 4, 6.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Tr. at 8.

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).

To invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), a 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 and comparable gainful work.[5] *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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

20 C.F.R. §718.204(b)(2)(i) - Pulmonary Function Studies

The administrative law judge considered the results of the six pulmonary function studies of record dated November 13, 2015, February 20, 2017, August 28, 2017, March 6, 2018, July 25, 2018, and July 31, 2018.[6] Decision and Order at 6-7, 15-16; Director's Exhibits 11, 16; Claimant's Exhibit 4; Employer's Exhibits 2, 3, 7. The November 13, 2015 study produced qualifying pre-bronchodilator values, and included no post-

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes 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.

[5] Claimant last worked in coal mine employment as a maintenance man and fire boss. Tr. at 14.

[6] The March 6, 2018 and July 31, 2018 pulmonary function studies are contained in Claimant's treatment records. Employer's Exhibits 2, 7.

bronchodilator results.[7] Claimant's Exhibit 4. The February 20, 2017 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibit 11. The August 28, 2017 and March 6, 2018 studies produced non-qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 16; Employer's Exhibit 2. Finally, the July 25, 2018 and July 31, 2018 studies produced non-qualifying pre-bronchodilator results, and included no post-bronchodilator results. Employer's Exhibits 3, 7.

The administrative law judge found the preponderance of the pulmonary function studies produced non-qualifying values. Decision and Order at 15. Noting that the two qualifying studies were performed before the four non-qualifying studies, he further stated, "more weight is generally given to the most recent evidence due to the progressive and irreversible nature of pneumoconiosis." *Id*. at 15-16. He thus concluded the pulmonary function study evidence does not establish total disability. *Id*. at 16.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that it is rational to credit more recent evidence, solely on the basis of recency, only if the more recent evidence shows that a miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (case involving x-rays);[8] *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). On the other hand, it may be reasonable for an administrative law judge to rely on the more recent evidence, such as a qualifying or a non-qualifying pulmonary function study, if he finds it more accurately reflects a miner's

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

[8] The Fourth Circuit reasoned that because pneumoconiosis is a progressive disease and a miner with pneumoconiosis cannot get better, it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows the miner's condition has improved. *Adkins*, 958 F.2d at 52 ("[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier"). Moreover, better results are not necessarily more credible than lower results among valid pulmonary function tests. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level).

current condition. *See Gray v. Director, OWCP*, 943 F.2d 513, 521 (4th Cir. 1991); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc). An administrative law judge must undertake a qualitative analysis of the evidence in rendering his findings of fact. *See Thorn*, 3 F.3d at 718; *see also Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Woodward*, 991 F.2d at 319-20.

The administrative law judge's statement that the non-qualifying pulmonary function studies can be given more weight based on recency is inconsistent with *Adkins*. His error is harmless, however, as he also permissibly found the preponderance of the studies – four of the six – are non-qualifying for total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Further, the record contains no evidence undermining the presumption that these studies are valid and in compliance with the regulatory quality standards. *See* 20 C.F.R. §718.103(c). As substantial evidence supports the administrative law judge's finding that four of six probative pulmonary function studies are non-qualifying, we affirm his finding that Claimant did not establish total disability by a preponderance of pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

20 C.F.R. §718.204(b)(2)(i), (iii) - Arterial Blood Gas Studies and Cor Pulmonale

The administrative law judge correctly noted none of the arterial blood gas studies, conducted on February 20, 2017, August 28, 2017, and July 25, 2018, are qualifying. Decision and Order at 8, 16; Director's Exhibits 11, 16; Employer's Exhibit 3. Therefore, we affirm his finding the blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge also accurately found the record contains no evidence of cor pulmonale with right-sided congestive heart failure, which precludes a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16.

20 C.F.R. §718.204(b)(2)(iv) – Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinion of Dr. Ajjarapu that Claimant is totally disabled and the opinions of Drs. Dahhan and McSharry that he is not. We affirm her rejection of Dr. Ajjarapu's opinion and thus her determination that Claimant did not establish total disability based on the medical opinions.

Dr. Ajjarapu evaluated Claimant as part of the Department of Labor-sponsored pulmonary evaluation on February 20, 2017. Director's Exhibit 11. She diagnosed chronic bronchitis based on Claimant's symptoms, and a "severe" and disabling pulmonary impairment based on his qualifying pre-bronchodilator pulmonary function study. *Id.* at 6-7. On November 17, 2017, Dr. Ajjarapu issued a supplemental report addressing Claimant's non-qualifying pulmonary function study conducted by Dr. McSharry on August 28, 2017. Director's Exhibits 16 at 3, 20. Dr. Ajjarapu confirmed her disability assessment, explaining Dr. McSharry's pulmonary function study does not undermine the valid study on which she relied because: COPD symptoms can "come and go;" chronic bronchitis symptoms can "wax and wane;" and "various circumstances" can also affect the degree of impairment measured. Director's Exhibit 20 at 2. The administrative law judge permissibly found Dr. Ajjarapu's reliance on the fluctuating nature of Claimant's disabling symptoms undermined by the fact all four of the most recent pulmonary function studies, including the three that postdate her supplemental opinion, are non-qualifying for total disability.

We further affirm the administrative law judge's permissible finding that the opinions of Drs. Dahhan and McSharry[9] are consistent with the weight of the non-qualifying pulmonary function and blood gas studies. *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); Decision and Order at 17. Further, their opinions that Claimant is not totally disabled do not support Claimant's burden to establish he is totally disabled. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

The administrative law judge is entitled to determine the weight to be accorded the medical evidence of record. The Board is not empowered to reweigh it or substitute its judgment for that of the administrative law judge. *Lane v. Union Carbide Corp.*, 105 F.3d

[9] Dr. Dahhan conducted a records review and evaluated Claimant on July 25, 2018. Employer's Exhibit 3. He opined that Claimant's August 28, 2017 and July 25, 2018 pulmonary function studies demonstrate no pulmonary impairment and Claimant retains the pulmonary capacity to return to his previous coal mine work. *Id*. at 2-4. Dr. McSharry evaluated Claimant on August 28, 2017, and found "no evidence" of lung disease or respiratory impairment by blood gas testing, pulmonary function testing, or examination. Director's Exhibit 16 at 4. He subsequently reviewed Claimant's November 2015 and February 2017 qualifying pulmonary function studies, as well as his "normal" studies dated March 6 and July 25, 2018. Employer's Exhibit 5 at 17. He opined that Claimant's health must have changed in the period between his qualifying and normal/near normal pulmonary function study results, and concluded there is no evidence of a disabling respiratory impairment. *Id*. at 18.

166 (4th Cir. 1997). As the administrative law judge permissibly rejected the only medical opinion of record that could support a finding of total disability, we affirm his finding Claimant failed to establish total disability by medical opinion at 20 C.F.R. §718.204(b)(2)(iv) as it supported by substantial evidence. *Lane*, 105 F.3d 166; Decision and Order at 18.

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the medical evidence, weighed separately and together, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 8. As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) or establish an essential element of entitlement pursuant to 20 C.F.R. Part 718; therefore, we affirm the administrative law judge's denial of benefits.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge