U.S. Department of Labor

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

BRB No. 20-0078 BLA

LARRY HAMILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/27/2021
Self-Insured Employer-Respondent	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Larry Hamilton, Hazard, Kentucky.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Joseph E. Kane's Decision and Order Denying Benefits (2017-BLA-05045) 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 October 21, 2015.[2]

The administrative law judge credited Claimant with thirty-four years of underground coal mine employment, based on the parties' stipulation. Because the evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, he found Claimant 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) (2018). Because Claimant further failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, the administrative law judge 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), or affirmatively establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, did not file a response brief.[3]

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order below is supported by substantial evidence. *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

[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] Claimant filed a prior claim but withdrew it. Director's Exhibits 2, 50. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established thirty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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. *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).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he is suffering or suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together all the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. 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).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered nine interpretations of four x-rays dated July 28, 2015, November 30, 2015, May 4, 2016, and November 30, 2017.[5] All the physicians who read Claimant's x-rays are dually-qualified

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5, 24 at 10-12; Hearing Tr. at 12.

[5] Claimant's treatment records contain interpretations of three x-rays dated January 17, 2013, October 13, 2015, and March 29, 2018. Dr. Patel interpreted the January 17, 2013 x-ray as showing lung fields clear of any infiltrate and no active disease. Employer's

B readers and Board-certified radiologists. Dr. DePonte read the July 28, 2015 x-ray as positive for complicated pneumoconiosis, while Dr. Tarver read the same x-ray as negative for the disease. Director's Exhibit 15; Employer's Exhibit 1. Dr. DePonte read the November 30, 2015 x-ray as positive for complicated pneumoconiosis, while Drs. Miller and Wolfe read the same x-ray as negative for the disease.[6] Director's Exhibits 10, 16, 19. Finally, Dr. DePonte read the May 4, 2016 and November 30, 2017 x-rays as positive for complicated pneumoconiosis, while Dr. Kendall read the same x-rays as negative for the disease. Director's Exhibit 18; Claimant's Exhibits 1, 2; Employer's Exhibit 9. The administrative law judge determined all the physicians are equally qualified as dually-qualified radiologists. Decision and Order at 11.

The administrative law judge permissibly found the July 28, 2015, May 4, 2016, and November 30, 2017 x-rays in equipoise as two dually-qualified radiologists gave conflicting readings of them. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *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); Decision and Order at 11-12. He also permissibly found the November 30, 2015 x-ray negative for pneumoconiosis because two dually-qualified radiologists read the x-ray as negative for complicated pneumoconiosis and one dually-qualified radiologist read it as positive for the disease. *Ondecko*, 512 U.S. at 281; *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 11. As he found the record contains one negative x-ray reading, and the remaining readings are in equipoise, he properly concluded Claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). We affirm this finding as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge correctly noted the record contains no biopsy evidence. Decision and Order at 12.

Exhibit 4 at 11. Dr. Trent interpreted the October 13, 2015 x-ray as showing chronic scarring and interstitial fibrotic changes with no new focal infiltrates since January 17, 2013. *Id*. at 9. Dr. Trent interpreted a March 29, 2018 x-ray as showing: "lungs poorly expanded [with] chronic scarring" and "no focal infiltrates." *Id*. at 5. As these x-ray were not interpreted in accordance with the ILO classification system and did not discuss the presence or absence of complicated pneumoconiosis, the administrative law judge did not consider them when weighing the x-ray evidence. Decision and Order at 10, 13.

[6] Dr. Lundberg, dually qualified as a B reader and Board-certified radiologist, read the November 30, 2017 x-ray for quality purposes only. Director's Exhibit 11.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether Claimant established complicated pneumoconiosis by "other means." Decision and Order at 12-13. He considered Claimant's treatment records, which include three computed tomography (CT) scans taken on January 19, 2015, September 10, 2016 and February 22, 2018. Dr. Pampati interpreted the January 19, 2015 CT scan of Claimant's abdomen and pelvis as showing unremarkable lung bases and poorly calcified 3-4 mm granuloma in the right lung base. Employer's Exhibit 4 at 10. Dr. Satpathy interpreted the September 10, 2016 CT scan of Claimant's abdomen and pelvis as showing clear lung bases. *Id*. at 8. Dr. Arron interpreted the February 22, 2018 CT scan of Claimant's chest as showing: chronic lung changes that could be related to pneumoconiosis; a large density over the sternum which is likely a sebaceous cyst; and, a density in the upper lobe that is possibly pneumonia. Claimant's Exhibit 4 at 1; Employer's Exhibit 4 at 6. The administrative law judge accurately noted none of the physicians interpreted the CT scans as showing progressive massive fibrosis or complicated pneumoconiosis. Decision and Order at 13. Because it is supported by substantial evidence, we affirm the administrative law judge's finding the CT scan evidence does not establish Claimant has complicated pneumoconiosis. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.).

Further, the administrative law judge accurately noted Claimant's treatment records do not address the presence or absence of complicated pneumoconiosis.[7] Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the treatment records do not establish Claimant has complicated pneumoconiosis. *See Martin*, 400 F.3d at 305.

The administrative law judge also considered the medical opinions of Drs. Vuskovich, Tuteur, and Ajjarapu. Dr. Ajjarapu opined Claimant has complicated pneumoconiosis, while Drs. Vuskovich and Tuteur opined he does not have the disease. Director's Exhibits 10, 14, 17; Employer's Exhibits 5-8. The administrative law judge permissibly rejected Dr. Ajjarapu's diagnosis because it is based solely on Dr. DePonte's November 30, 2015 x-ray interpretation, which is contrary to his weighing of the x-ray evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 14. Because the administrative law judge permissibly rejected the only medical opinion that

[7] Claimant's treatment records, dated from October 2015 to October 2017, note his complaints of dry cough, shortness of breath, dyspnea on exertion, and contain the following diagnoses: acute bronchitis, unspecified; coal workers' pneumoconiosis; and chronic obstructive pulmonary disease with acute exacerbation. Claimant's Exhibit 5.

could support a finding of complicated pneumoconiosis, we affirm his finding the medical opinions do not establish Claimant has the disease at 20 C.F.R. §718.304(c).

Weighing all evidence of record, the administrative law judge found Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Because this finding is supported by substantial evidence, we affirm it. We further affirm the administrative law judge's finding Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3).

Invocation of the Section 411(c)(4) Presumption—Total Disability

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. To establish total disability, Claimant must show 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). He 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 and determine whether the claimant established total disability by a preponderance of the 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 accurately found there are no qualifying pulmonary function studies or arterial blood gas studies of record.[8] Decision and Order at 5; Director's Exhibit 10; Employer's Exhibit 2. Therefore, we affirm his findings Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii).

Next, the administrative law judge accurately found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5. Consequently, Claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Vuskovich, Tuteur, and Ajjarapu.[9] Dr. Ajjarapu opined Claimant is totally disabled, while Drs. Vuskovich[10] and Tuteur[11] opined he is not. Director's Exhibits 10, 14, 17; Employer's Exhibits 5-8. The administrative law judge noted Dr. Ajjarapu concluded Claimant met the Department of Labor criteria for total disability based on Dr. DePonte's reading of the November 30, 2015 x-ray as positive for complicated pneumoconiosis. Decision and Order at 7. He noted Dr. Ajjarapu explained "[m]iners with large opacities, should not continue to work in coal dust environment[s] and therefore, [Claimant] is total[ly] and completely disabled as a result of his work in the mines." Decision and Order at 7; Director's Exhibit 10 at 8. Noting Claimant failed to establish he has complicated pneumoconiosis by the x-ray evidence, the administrative law judge permissibly found Dr. Ajjarapu's opinion does not establish Claimant is totally disabled because the basis for her opinion is undermined. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 7. As the administrative law judge permissibly rejected Dr. Ajjarapu's opinion, the only medical opinion of record that could support a finding of total disability, we affirm his finding Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) as it is supported by substantial evidence. Decision and Order at 8.

We also affirm, as supported by substantial evidence, the administrative law judge's finding 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, we affirm the administrative law judge's finding he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

As Claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits.

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[9] The administrative law judge also considered Claimant's treatment records and properly determined they do not contain any reasoned medical opinions on the issue of total disability. Decision and Order at 8; Claimant's Exhibit 5; Employer's Exhibit 4.

[10] Dr. Vuskovich opined Claimant has the pulmonary capacity to return to his most recent coal mine job. Director's Exhibit 17; Employer's Exhibit 5.

[11] Dr. Tuteur opined Claimant is "not disabled due to a primary pulmonary process of any kind." Employer's Exhibit 7.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge