U.S. Department of Labor

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

BRB No. 20-0141 BLA

JIMMY RAE GREER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 01/29/2021
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Jonathan C. Calianos's Decision and Order Denying Benefits (2017-BLA-05752) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on August 3, 2016.[1] 20 C.F.R. §725.309(c).

The administrative law judge credited Claimant with twenty-three years of underground coal mine employment based on the parties' stipulation, and found Claimant did not establish a totally disabling pulmonary or respiratory impairment. He therefore found Claimant did not establish a change in an applicable condition of entitlement or invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2]

On appeal, Claimant challenges the administrative law judge's finding that he did not establish total respiratory disability at 20 C.F.R. §718.204(b). Employer filed a response brief, urging affirmance of the denial.[3] The Director, Office of Workers' Compensation Programs, did not file a response brief. Claimant filed a reply brief.

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).

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[1] Claimant filed one prior claim for benefits on February 22, 2002. On February 3, 2003, the district director denied that claim because Claimant did not establish total respiratory disability. Director's Exhibit 1 at 11. Claimant took no further action until he filed the present claim on August 3, 2016. Director's Exhibits 1, 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 finding Claimant established twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4.

When a miner files a claim for benefits more than one year after the final denial of a previous claim, he must establish "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). The district director denied Claimant's prior claim because he did not establish total respiratory disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, Claimant had to establish this element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

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] 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).

The administrative law judge found the pulmonary function studies, arterial blood gas studies, and medical opinions do not support a finding of total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 8-19. Weighing the evidence as a whole, he found Claimant did not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order 20. Therefore, he denied the claim. On appeal, Claimant asserts the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv).[6]

[5] The administrative law judge found Claimant's usual coal mine employment was performing heavy work as a unit foreman/supervisor. Decision and Order at 10-11; Director's Exhibit 5 at 1; Tr. at 18-21, 37.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the arterial blood gas studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack*, 6 BLR at 1-711.

Pulmonary Function Studies

Relevant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three pulmonary function studies dated September 7, 2016, June 30, 2017, and September 12, 2017, and found each produced non-qualifying values.[7] Director's Exhibit 11 at 16; Claimant's Exhibit 5; Employer's Exhibit 6. As none of the pulmonary function studies qualified for total disability, the administrative law judge determined Claimant did not establish total disability by a preponderance of the new pulmonary function study evidence. Decision and Order at 8.

Claimant asserts the administrative law judge erred in finding the pulmonary function studies non-qualifying because his results are "close to" the qualifying values. Claimant's Brief at 2-3. We disagree. Pulmonary function study values exceeding those specified in the table at 20 C.F.R. Part 718, Appendix B, are "non-qualifying" and do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). In this case, the administrative law judge accurately observed that Claimant's height of 66 inches and age of 78 and 79 years at the time of testing correspond to a FEV1 table value of 1.57.[8] He further accurately observed that the September 7, 2016 study produced pre- and post-bronchodilator FEV1 values of 1.58 and 1.81, the June 30, 2017 study produced a pre-bronchodilator FEV1 value of 1.94 and was not conducted post-bronchodilator, and the September 12, 2017 study produced pre- and post-bronchodilator values of 1.87 and 2.13. Decision and Order at 7-8; Director's Exhibit 11; Claimant's Exhibit 5; Employer's Exhibit 6. As all of the new pulmonary function studies yielded values exceeding the applicable table value, we affirm the administrative law judge's finding that the studies are non-qualifying and, therefore, do not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See* 20 C.F.R. §718.204(b)(2)(i)(A).

Medical Opinions

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge addressed the medical opinions of Dr. Chavda, that Claimant was totally disabled on September 7, 2016 but was not disabled as of June 30, 2017, Drs. Baker and Sood, that Claimant is totally disabled, and Drs. Broudy and Rosenberg, that Claimant is not totally disabled. The administrative law judge found Dr. Chavda's opinions, as a whole, do not support a finding of total disability. Decision and Order at 17. Further finding the opinions of Drs. Baker

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

[8] The maximum age for which values are reported in Appendix B is 71 years.

and Sood not well-reasoned or documented, and the opinions of Drs. Broudy and Rosenberg do not support Claimant's burden, the administrative law judge found the preponderance of the medical opinion evidence does not establish total disability. *Id*. at 18-19.

Claimant asserts the administrative law judge erred in rejecting the opinions of Drs. Chavda, Baker, and Sood. Claimant's Brief 6-11; Claimant's Reply Brief at 6-12. We disagree. Claimant correctly states that Dr. Chavda's 2016 medical opinion, by itself, supports a finding of total disability as he opined Claimant's September 13, 2016 pulmonary function study evidenced "significantly low FEV1 and [sic] FVC and MVV" values that preclude his performing the heavy labor of his last coal mine job. Director's Exhibit 11 at 11. However, the administrative law judge accurately observed that Dr. Chavda's July 3, 2017 opinion contradicts his 2016 diagnosis of total pulmonary disability. Specifically, as the administrative law judge stated, Dr. Chavda opined Claimant's June 30, 2017 pulmonary function study showed he did "not have total pulmonary disability as he has mild FVC reduction and he has normal [FEV1] for his age and height." Decision and Order at 17; Employer's Exhibit 10 at 4. As Dr. Chavda offered inconsistent opinions as to the existence of a totally disabling respiratory impairment, the administrative law judge permissibly found his opinions, "as a whole, do not support a finding of total disability." *See Island Creek Coal Co. v. Holdman,* 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995); Decision and Order at 17.

Dr. Baker evaluated Claimant on September 12, 2017. He diagnosed clinical pneumoconiosis based on x-ray evidence, mild resting arterial hypoxemia based on a blood gas study, and chronic bronchitis based on Claimant's history, and opined Claimant "would have difficulty performing his prior work as a laborer, shuttle car operator or supervisor, his former coal mine jobs." Claimant's Exhibit 5 at 3-4. The administrative law judge permissibly discounted Dr. Baker's opinion because he provided no explanation for finding that any of the conditions he diagnosed prevent Claimant from performing his last coal mine job. Decision and Order at 18; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Moreover, Claimant largely summarizes Dr. Baker's opinion and asserts it is "reasoned" and sufficient to establish total disability. Claimant's Brief at 8-10; Claimant's Reply at 2-8. We consider this a request to reweigh the evidence, which we are not empowered to do. *Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 500 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Dr. Sood reviewed Claimant's medical records and issued a report dated November 14, 2017. Claimant's Exhibit 6 at 1. He diagnosed total respiratory disability based on Claimant's 2016 pulmonary function studies yielding near-qualifying FEV1 values, his June 30, 2017 pulmonary function study demonstrating a Class I diffusing capacity

impairment, and a May 13, 2014 six-minute walk test demonstrating a Class IV exercise capacity impairment, which he stated would preclude Claimant's performing the heavy physical labor of his last coal mine employment. *Id.* at 8, 13. The administrative law judge found Dr. Sood, without providing any explanation, selectively relied on Claimant's 2016 near-qualifying FEV1 value despite the preponderance of the pulmonary function study evidence yielding normal, or near-normal, FEV1 values; failed to explain how Claimant's Class I diffusion capacity impairment would preclude his performing his usual coal mine work; and predicated his diagnosis of a Class IV exercise capacity impairment on a May 13, 2014 six-minute walk test that is not contained in the record. Decision and Order at 18-19. Claimant summarizes Dr. Sood's opinion and asserts it is reasoned, without identifying any error in the administrative law judge's credibility determinations. *Wiley*, 892 F.2d at 500; *Rowe*, 710 F.2d at 255; *Anderson*, 12 BLR at 1-113; Claimant's Brief at 10-11; Claimant's Reply at 10-12. As the administrative law judge's findings are supported by substantial evidence, we affirm his permissible finding that Dr. Sood did not offer a reasoned diagnosis of total disability. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

As the administrative law judge permissibly rejected each medical opinion supporting 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 supported by substantial evidence. Decision and Order at 19.

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.[9] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 20. 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 establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) or invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). As Claimant did not establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits.

[9] Claimant also summarizes his testimony regarding his exertional limitations. Claimant's Brief at 4-5. To the extent he is alleging his testimony, by itself, is sufficient to establish total disability, we disagree. *See* 20 C.F.R. §718.204(d)(5)("In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony.").

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge