U.S. Department of Labor

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

BRB No. 19-0202 BLA

JAMES D. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/23/2020
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

James D. Johnson, Evarts, Kentucky.

Williams A. Lyons (Lewis and Lewis Law Offices) Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2018-BLA-05012) of the Administrative Law Judge Lauren C. Boucher issued on a subsequent claim filed on November 3, 2016,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with at least seventeen years of coal mine employment, the administrative law judge found he does not have complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found claimant is not totally disabled and thus 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) (2012).[3] Because claimant did not establish total disability, he also was unable to establish a change in an applicable condition of entitlement and the administrative law judge denied benefits. 20 C.F.R. §725.309.

On appeal, claimant generally contends the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order Denying Benefits is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they are rational, supported by

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude v. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant filed two previous claims for benefits. Director's Exhibits 1, 2. His last claim was denied for failure to establish total disability. Director's Exhibit 2.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Statutory presumptions may assist claimants to establish the elements of entitlement when certain conditions are met.

In addition, when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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(d); *see 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(d)(2). In this case, claimant's prior claim was denied for failure to establish total disability. Director's Exhibit 2. Thus, he had to submit new evidence establishing this element of entitlement in order to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity 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 reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must

[4] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

X-ray Evidence – 20 C.F.R. §718.304(a)

The administrative law judge considered nine interpretations of five x-rays. Decision and Order at 9-10. Because each physician who read the x-rays is dually qualified as a B reader and Board-certified radiologist, she gave "each x-ray interpretation equal weight based on the physicians' equivalent radiological qualifications." *Id*. at 11. She also noted all of the x-rays were taken within a sixteen month period and thus did "not assign greater probative weight to any x-ray based on temporal proximity." *Id*.

Dr. DePonte read the August 11, 2016 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Kendall read it as negative. Director's Exhibit 16; Employer's Exhibit 10. Dr. DePonte read the January 23, 2017 and June 5, 2017 x-rays as positive for complicated pneumoconiosis, Category A, while Dr. Smith read them as negative. Director's Exhibit 10; Claimant's Exhibit 2; Employer's Exhibits 8, 11. The administrative law judge found the August, 11, 2016, January 23, 2017, and June 5, 2017 x-rays in equipoise. Decision and Order at 12.

Dr. Alexander read the August 17, 2017 x-ray as positive for simple pneumoconiosis with a "possible 20 [millimeter] density in right paratracheal region, question adenopathy." Claimant's Exhibit 3. Dr. Alexander did not classify the density as a large opacity, Category A, B, or C, on the ILO form and did not diagnose complicated pneumoconiosis. *Id*. Dr. Smith read the x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 9. The administrative law judge found the August 17, 2017 x-ray "weighs against a finding of complicated pneumoconiosis." Decision and Order at 12.

Dr. DePonte read the December 28, 2017 x-ray as positive for complicated pneumoconiosis, Category A; there are no other readings of that film. Claimant's Exhibit 1. The administrative law judge found the x-ray positive for complicated pneumoconiosis. Decision and Order at 12. Considering all five x-rays together, she found the x-ray evidence in equipoise and insufficient to establish complicated pneumoconiosis.[5] *Id*.

The administrative law judge properly considered the qualifications of the physicians and performed both a qualitative and quantitative analysis of the conflicting x-

[5] The administrative law judge found claimant established simple pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 12.

rays. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 12.[6] Because the administrative law judge permissibly found the x-ray evidence in equipoise, she properly found claimant did not satisfy his burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We therefore affirm her finding that claimant did not establish complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a)

Other Evidence – 20 C.F.R. §718.204(c)

The record contains a December 27, 2103 CT scan from Mountain Home Veteran's Administration Medical Center. The administrative law judge correctly found she could not consider it because it predates the prior claim's denial.[7] 20 C.F.R. §725.309; Decision and Order at 13. The administrative law judge also noted that although Dr. Quayam interpreted an April 1, 2015 CT scan contained in the treatment records as showing "multiple tiny bilateral pulmonary nodules" indicative of pneumoconiosis, he did not diagnose complicated pneumoconiosis. Claimant's Exhibit 7

Regarding the medical opinion evidence, Dr. Ajjarapu performed the complete pulmonary evaluation for the Department of Labor on January 23, 2017. Director's Exhibits 10. The administrative law judge noted correctly that Dr. Ajjarapu diagnosed complicated pneumoconiosis, relying on Dr. DePonte's positive reading of the January 23, 2017 x-ray. *Id*. She permissibly assigned little weight to Dr. Ajjarpu's opinion as based on an x-ray report contrary to her overall determination the x-ray evidence is inconclusive for complicated pneumoconiosis. *See Rowe*, 710 F.2d at 255; Decision and Order at 18. We therefore affirm the administrative law judge's finding that claimant did not establish complicated pneumoconiosis based on the medical opinion evidence.[8] *Id*.

[6] There is no biopsy evidence in the record to establish complicated pneumoconiosis. 20 C.F.R. §718.304(b).

[7] The December 27, 2013 CT scan does not assist claimant in proving complicated pneumoconiosis as Dr. Wilson interpreted the scan as showing nodules consistent with pneumoconiosis but did not specify if they were large opacities or otherwise diagnose complicated pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibit 16.

[8] Drs. Dahhan opined claimant does not have complicated pneumoconiosis. Employer's Exhibit 13 at 8. Dr. Tuteur did not address complicated pneumoconiosis. Employer's Exhibit 14.

The administrative law judge also permissibly found that while the treatment records "contain references to pneumoconiosis . . . they are not indicative of reasoned and documented diagnoses." Decision and Order at 18; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). Specifically, the record includes a treatment note from 2016, in which a nurse practitioner wrote "CWP simple, all zones, ½ per cxr in 2014 now complicate with A opacities." Claimant's Exhibit 6 at 5. Because the administrative law judge was unable to determine the basis for the nurse's notation, she permissibly gave it little weight. *See Rowe*, 710 F.2d at 255; Decision and Order at 18. We therefore affirm her finding that the treatment records do not establish complicated pneumoconiosis. Decision and Order at 18.

Thus, because it is supported by substantial evidence, we affirm the administrative law judge's overall determination, based on her consideration of all the relevant evidence, that claimant does not have complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Gollie*, 22 BLR at1-311; *Melnick*, 16 BLR at1-33-34; Decision and Order at 18. We therefore affirm her finding that claimant did not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304.

20 C.F.R. Part 718 - Total Disability

A miner is considered 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 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 consider all of the relevant evidence and weigh the evidence supporting a finding of 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).

The administrative law judge noted that a 2016 pulmonary function test contained in the treatment records "appeared to qualify" while three subsequent studies dated January 23, 2017, June 5, 2017 and August 17, 2017 were non-qualifying.[9] Decision and Order at 19 n.12. She permissibly found the weight of the pulmonary function study evidence does

[9] 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).

not establish total disability. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20. She also noted correctly that there are no qualifying blood gases and no evidence in the record indicating claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 19 n.11, 20; Director's Exhibit 10; Employer's Exhibit 14.

In considering the medical opinions, the administrative law judge noted Dr. Ajjarapu opined claimant is totally disabled from a pulmonary standpoint based on Dr. DePonte's interpretation of complicated pneumoconiosis on the January 23, 2017 x-ray. Decision and Order at 10. Additionally, Dr. Ajjarapu described an "abnormal physical examination with respect to lungs" and noted the pulmonary function study showed a "moderate pulmonary impairment." *Id*.

We see no error in the administrative law judge's determination that Dr. Ajjarapu's opinion is not well-reasoned. Decision and Order at 22. The administrative law judge accurately found Dr. Ajjarapu relied on claimant's x-ray findings but she did not discuss whether he has "a *loss of function* or [is] unable to perform his usual coal mine work." *Id*. at 21; *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 578 (6th Cir. 2000). She permissibly found Dr. Ajjarapu did not adequately explain why claimant's physical findings are "abnormal" or "to what extent such abnormality would affect [his] lung function." Decision and Order at 22; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). Further, the administrative law judge permissibly found Dr. Ajjarapu did not adequately explain how a "moderate respiratory impairment" prevented claimant from performing the exertional requirements of his usual coal mine work as a foreman. Decision and Order at 22; *see Cornett*, 277 F.3d at 578; *Rowe*, 710 F.2d 251, 255.

The administrative law judge must weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability.[10] 20 C.F.R. §718.204(b)(2)(iv). As claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that he did not invoke the Section 411(c)(4) presumption or establish a

[10] Dr. Dahhan opined claimant has no respiratory or pulmonary impairment. Employer's Exhibit 12. Dr. Tuteur diagnosed a mild restrictive impairment but opined claimant is not totally disabled by it. Employer's Exhibit 15 at 13-14.

change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.305, 725.309; *White*, 23 BLR at 1-3.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge