U.S. Department of Labor

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

BRB No. 20-0325 BLA

WILLARD J. LASTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTENNIAL RESOURCES INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 05/18/2021
AMERICAN INTERNATIONAL c/o CHARTIS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

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

Ryan D. Thompson, Timothy J. Walker and Andrew L. Kenney (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Noran J. Camp's Decision and Order Awarding Benefits (2017-BLA-05379) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on February 14, 2014.[1]

The administrative law judge credited Claimant with twenty years of surface coal mine employment, with at least fifteen years in conditions substantially similar to those in an underground mine, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge improperly invoked the Section 411(c)(4) presumption because he erroneously found Claimant established total

[1] This is Claimant's seventh claim for benefits. The district director denied his most recent claim, filed on July 3, 2007, because Claimant failed to establish total disability. Director's Exhibit 6.

[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] 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(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 failed to establish total disability; therefore, to obtain review of the merits of his subsequent claim, he had to establish this element of entitlement. *See* 20 C.F.R. §725.309(c); Director's Exhibit 6.

disability.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Employer has filed a reply brief reiterating its arguments.

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.[5] 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).

A miner is totally disabled if 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). 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.[6] 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 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).

The administrative law judge found Claimant established total disability based on the pulmonary function studies and medical opinions. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 18-23. Employer argues the administrative law judge erred in finding the pulmonary function studies establish total disability. Employer's Brief at 14-17 (unpaginated). We disagree.

---

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-25.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[6] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13-14.

When weighing pulmonary function studies, the administrative law judge must determine whether they are in substantial compliance with the quality standards. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B. The administrative law judge considered five pulmonary function studies dated March 12, 2014, September 30, 2014, January 15, 2015, March 25, 2015, and June 29, 2017. Decision and Order at 8-13; Director's Exhibits 18, 20, 23; Claimant's Exhibit 6; Employer's Exhibit 4. He found the March 12, 2014, September 30, 2014, and March 25, 2015 studies all produced qualifying values for total disability, but the January 15, 2015 and June 29, 2017 studies both produced non-qualifying values.[7] *Id*. He further found the January 15, 2015 and March 25, 2015 studies valid for assessing respiratory impairment, but the remaining studies invalid. *Id.* He credited the March 25, 2015 qualifying study over the January 15, 2015 non-qualifying study because the former study was taken more recently. *Id*.

Employer argues the administrative law judge erred in finding the June 29, 2017 non-qualifying study to be invalid. Employer's Brief at 14-16 (unpaginated). We disagree. The regulations specify that pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient. 20 C.F.R. §718.103(b). The results of the June 29, 2017 study include three tracings of the flow versus volume, but do not include any electronically derived volume versus time tracings.[8] Employer's Exhibit 4. Thus substantial evidence supports the administrative law judge's finding that this study does not comply with the quality standards. *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); 20 C.F.R. §718.103(b); Decision and Order at 13.

We reject Employer's argument that the quality standards are inapplicable to non-qualifying studies. Employer's Brief at 16-17 (unpaginated). The regulations state "no

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

[8] Although Employer highlights a bar chart that lists the results of three FEV1, FVC, and DLCO trials measured in a range from zero to two-hundred, this chart does not include electronically derived volume versus time tracings. Employer's Brief at 14-16 (unpaginated).

results of a pulmonary function study shall constitute evidence of the presence *or absence of a respiratory* or pulmonary impairment unless it is conducted and reported in accordance with" the quality standards. 20 C.F.R. §718.103(c) (emphasis added).

Employer generally contends that even if this study is invalid but non-qualifying, it still establishes Claimant is not disabled because "[s]purious high values are not possible." Employer's Brief at 16-17 (unpaginated). Employer does not, however, allege the administrative law judge failed to consider relevant medical evidence supporting this position. Nor does it identify such medical evidence in the record before the Board. Thus we reject Employer's unsupported argument. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). Moreover, even if we assume the administrative law judge erred in finding the June 29, 2017 pulmonary function study Dr. Tuteur conducted is invalid, we decline to remand the case for him to reconsider the validity of that study. During a July 6, 2017 deposition, Dr. Tuteur explicitly agreed that while Claimant is not disabled because of a "primary pulmonary process," he is totally disabled based on the June 29, 2017 pulmonary function study. Employer's Exhibit 5 at 7-8, 11, 20, and 28. Thus Employer has not explained how crediting this study "could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the June 29, 2017 pulmonary function study is invalid. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990). Because Employer raises no additional allegation of error, we affirm the administrative law judge's finding that Claimant established total disability based on the pulmonary function studies because the most recent, valid pulmonary function study taken on March 25, 2015 is qualifying. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1288 (11th Cir. 2019); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

Employer does not separately challenge the administrative law judge's finding Claimant established total disability based on the medical opinions.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-23; Director's Exhibits 18, 23; Claimant's

[9] The administrative law judge specifically found Dr. Chavda's diagnosis of total disability is credible and outweighs Dr. Tuteur's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-18; Director's Exhibits 18, 23; Claimant's Exhibit 1; Employer's Exhibit 7.

Exhibit 1; Employer's Exhibit 7. We therefore affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 23. In addition, we affirm the administrative law judge's finding that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309.

Moreover, because Employer does not challenge the administrative law judge's finding that it failed to rebut the presumption, we affirm the award of benefits. *Skrack*, 6 BLR at 1-711; Decision and Order at 25-30.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge