U.S. Department of Labor

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

BRB No. 20-0034 BLA

LEE C. MORRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WARRIOR MET COAL, LLC	)	
	)	
Self-Insured	)	DATE ISSUED: 11/30/2020
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Cecilia B. Freeman (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Aaron D. Ashcraft and John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2019-BLA-05066) of Administrative Law Judge Larry W. Price denying Claimant's request for modification of

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 October 2, 2017.[1]

The administrative law judge accepted the parties' stipulation to 35.5 years of underground coal mine employment and found that granting Claimant's request for modification would be in the interest of justice. Decision and Order at 5, 6. He further found Claimant failed to establish total disability and, therefore, did not establish a basis for modification or invocation of the presumption that he is totally disabled due to pneumoconiosis.[2] Accordingly, the administrative law judge denied benefits.

On appeal, Claimant contends the administrative law judge erred in determining the medical opinion evidence failed to establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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 consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by

[1] Claimant filed two previous claims on May 12, 2008, and April 29, 2011. The district director denied both for failure to establish pneumoconiosis or total disability due to the disease. Director's Exhibits 1, 2. The district director denied the current subsequent claim on June 18, 2018, finding Claimant failed to establish total disability. Director's Exhibits 4, 39. Claimant thereafter requested modification, which the district director denied on October 10, 2018. Director's Exhibits 40, 46. The district director then referred the case for a hearing at Claimant's request. Director's Exhibits 47, 54.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis is not available in this case, as the record contains no evidence of complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as Claimant was employed in the coal mining industry in Alabama. *See*

30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (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 these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Modification of a denial of benefits may be granted if a change in conditions has occurred or there was a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310; *see Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 242 (11th Cir. 1987). When considering a modification request, the administrative law judge must consider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995). In this case, total disability was adjudicated against Claimant. He therefore was required to establish a change in condition or a mistake of fact regarding total disability to establish modification.

A miner is totally disabled if he has a respiratory or pulmonary impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure,[5] or medical opinions can establish disability. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds a claimant has established disability under one or more subsections, he must weigh that evidence against contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; H. Tr. at 7, 11, 21.

[5] Relevant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7, 9. He further found Claimant unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as the sole blood gas study was non-qualifying. Director's Exhibit 19; Decision and Order at 9.

determined Claimant did not establish total disability under any subsection. Decision and Order at 7-13.

The administrative law judge considered the three pulmonary function studies submitted on modification. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9; Claimant's Exhibits 1, 2; Director's Exhibit 19. Dr. Cooper's April 24, 2017 test and Dr. O'Reilly's January 4, 2019 test produced non-qualifying values.[6] Claimant's Exhibit 1; Director's Exhibit 19. Dr. Arm's April 1, 2019 test was qualifying but demonstrated excessive curve variation and lacked flow-volume loop results.[7] Claimant's Exhibit 2. Dr. O'Reilly agreed the test's significant variability rendered the results "unreproducible and therefore questionable." Claimant's Exhibit 2 at 32-35. Dr. Fino opined the April 2019 test showed submaximal effort and was thus unreliable and invalid. Employer's Exhibit 1; Claimant's Exhibit 2. The administrative law judge rationally determined the qualifying April 2019 study was unreliable and invalid, and merited no probative weight. Decision and Order at 8-9, 12-13; Claimant's Exhibit 2. Because the only valid studies were non-qualifying, he concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8-9. This finding is affirmed as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see* Claimant's Brief at 2.

Before weighing the medical opinions, the administrative law judge credited Claimant's testimony describing the exertional requirements of his usual coal mine employment as a roof bolter. Decision and Order at 2, 6; *see* H. Tr. at 12-19. Taking official notice of the *Dictionary of Occupational Titles* (DOT), the administrative law judge found Claimant's work was "at least a medium duty job." Claimant's Exhibit 3; Employer's Exhibit 1; Decision and Order at 6 & n.5, 11-13.

The administrative law judge next considered the medical opinions of Drs. O'Reilly and Fino.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-13. Dr. O'Reilly

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

[7] The quality standards require three flow-volume loops. 20 C.F.R. §718.103(b).

[8] The administrative law judge determined both physicians were well-qualified in pulmonary medicine, and each reported Claimant worked for 37 years in coal mine employment with no history of smoking. Decision and Order at 11 & n.6; *see Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989).

opined Claimant is totally disabled,[9] while Dr. Fino opined he is not.[10] The administrative law judge found Dr. O'Reilly's opinion not well-reasoned. Decision and Order at 11-12, 13. Finding Dr. Fino's opinion well-reasoned and better-supported, the administrative law judge determined the medical opinion evidence does not establish total disability. *Id.* at 12-13.

Claimant argues the administrative law judge erred by discrediting Dr. O'Reilly for relying on non-qualifying pulmonary function testing. Claimant's Brief at 4. Contrary to Claimant's argument, the administrative law judge properly recognized that a doctor can offer a reasoned medical opinion diagnosing total disability even though the underlying objective studies are non-qualifying. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460-61 (11th Cir. 1989); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); Decision and Order at 10, 12. He found, however, that Dr. O'Reilly failed to fully and adequately explain why the January 1, 2018 pre-bronchodilator study, even though non-qualifying, demonstrates a totally disabling respiratory impairment. Decision and Order at 12. Claimant's general assertion that Dr. O'Reilly examined Claimant, knew his medical history, and understood the exertional requirements of his job does not establish error in the administrative law judge's specific reason for finding Dr. O'Reilly's opinion not well-reasoned. Claimant's Brief at 4. As substantial evidence supports the administrative law judge's credibility determination, it is affirmed. *Jordan*, 876 F.2d at 1460; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

As Claimant makes no further arguments regarding the administrative law judge's weighing of the medical opinions, we affirm his finding Claimant failed to establish total

[9] Dr. O'Reilly performed Claimant's Department of Labor-sponsored evaluation on February 20, 2018. Based on Claimant's symptomology and objective testing, including a pulmonary function and blood gas study, he diagnosed pneumoconiosis and chronic bronchitis but did not find a totally disabling respiratory impairment. Director's Exhibit 19. In a subsequent April 15, 2019 deposition, Dr. O'Reilly opined Claimant's pre-bronchodilator FEV1 value of 58 percent predicted on pulmonary function testing and his more recent qualifying April 1, 2019 pulmonary function study demonstrate moderately severe chronic obstructive pulmonary disease, indicating Claimant is unable to perform his usual roof bolter job. Claimant's Exhibit 2 at 11-15, 20-30.

[10] Dr. Fino completed a consultative report in May 2019 in which he found no evidence of disability and opined Claimant's degree of impairment would not prevent him from performing the work of a roof bolter. Employer's Exhibit 1.

disability at Section 718.204(b)(2)(iv) and his finding that all of the relevant evidence, when weighed together, failed to establish total disability. 20 C.F.R. §718.204(b).

As Claimant failed to establish total disability, an essential element of entitlement, Claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 in this subsequent claim, or a change in condition or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 justifying modification. Consequently, we affirm the administrative law judge's denial of Claimant's request for modification, and his denial of benefits. Decision and Order at 1-5, 13.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge