U.S. Department of Labor

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

BRB No. 19-0433 BLA

CHARLES LEONARD GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POWELL CONSTRUCTION COMPANY	)	
	)	DATE ISSUED: 10/29/2020
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 on Remand of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Scott R. Morris's Decision and Order Denying Benefits on Remand (2014-BLA-05789) rendered on a claim filed on October 23, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.

In a Decision and Order Awarding Benefits dated January 24, 2017, Administrative Law Judge Adele Higgins Odegard credited Claimant with 22.75 years of coal mine employment either in underground mines or surface mines in conditions substantially similar to those in an underground mine. She also found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). She further found Employer did not rebut the presumption and awarded benefits.

Considering Employer's appeal, the Board vacated the award of benefits because Judge Odegard did not render necessary findings or adequately explain her evaluation of the evidence as required by the Administrative Procedure Act (APA) when finding Claimant established 22.75 years of qualifying coal mine employment.[2] *Gray v. Powell Constr. Co.*, BRB No. 17-0258 BLA, slip op. at 2-4 (Mar. 28, 2018) (unpub.). The Board also held she erred in finding the medical opinions established Claimant is totally disabled from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). She specifically did not adequately explain her finding that Claimant's usual coal mine employment required moderate manual labor and erroneously equated his subjective symptoms with the exertional demands of his coal mine work. *Gray*, BRB No. 17-0258 BLA, slip op. at 5-9. Further, she substituted her opinion for that of a medical expert and failed to adequately explain her reliance on the American Medical Association's Guides to the Evaluation of Permanent Impairment when weighing the medical opinions of Drs. Zaldivar and Rasmussen. *Id*. Thus the Board vacated her finding Claimant invoked the Section 411(c)(4) presumption and was entitled to benefits. *Id*. a 10.

Due to Judge Odegard's retirement, the case was reassigned to Administrative Law Judge Scott R. Morris (the administrative law judge). In his June 5, 2019 Decision and Order Denying Benefits on Remand that is the subject of this appeal, the administrative law judge found Claimant established 20.92 years of qualifying coal mine employment but did not establish total disability. He therefore found Claimant did not invoke the

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2012); *see* 20 C.F.R. §718.305.

[2] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish entitlement to benefits under 20 C.F.R. Part 718. Thus he denied benefits.

On appeal, Claimant contends the administrative law judge erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The 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.[3] 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).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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. 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).

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.[4] 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*

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order on Remand at 8. We affirm these findings as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

& 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).

Claimant first argues the administrative law judge erred in assessing his usual coal mine employment. Claimant's Brief at 8-9. We disagree. The administrative law judge found Claimant's usual coal mine employment was as a crane operator. Decision and Order on Remand at 4. He noted Claimant testified this job involved "nothing physical . . . just getting in and out of the crane . . . and pulling the levers." *Id*., *quoting* Hearing Tr. at 26. He also noted Claimant was "required to climb a ladder, sometimes 10 to 12 feet high, to access the cab of the crane." *Id*. Taking official notice of the *Dictionary of Occupational Titles* (DOT), he found this work "required only light manual labor" based on the applicable description of a crane operator job in the DOT.[5] Decision and Order on Remand at 4.

Claimant argues the administrative law judge erred in relying on the DOT to evaluate his usual coal mine employment. Claimant's Brief at 7-8. Contrary to Claimant's argument, the administrative law judge permissibly relied on the DOT when assessing the exertional requirements of his crane operator job. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989) (reliance on the DOT is within the discretion of the administrative law judge).

Claimant next argues the administrative law judge erred in weighing Dr. Rasmussen's opinion.[6] 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 8-9. Dr. Rasmussen stated Claimant's usual coal mine employment required heavy to very heavy manual labor because he lifted and carried "heavy pieces of equipment and parts." Director's Exhibit 12 at 2. He acknowledged pulmonary function and arterial blood gas tests were normal, but stated Claimant had a reduced diffusion capacity that was thirty-eight percent predicted. *Id*. at 2-3. He opined this impairment reflects a "marked loss of lung function" representing a "severe chronic lung disease." *Id*. Based on this impairment,

[5] The administrative law judge noted that although the *Dictionary of Occupational Titles* (DOT) lists some crane operator jobs as requiring moderate strength, "those positions generally involve additional crane maintenance duties that Claimant did not perform." Decision and Order on Remand at 4. He found the DOT does, however, list "the position of Tower-Crane Operator, which - like Claimant's job - involves climbing a ladder to gain access to the crane controls, as requiring only light strength to perform." *Id*.

[6] Dr. Zaldivar opined Claimant is not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibit 1. The administrative law judge found his opinion internally inconsistent and inadequately explained. Decision and Order on Remand at 12.

Dr. Rasmussen opined Claimant "is incapable of performing his last regular mine job, which required heavy and some very heavy manual labor." *Id*.

The administrative law judge found Dr. Rasmussen incorrectly assumed Claimant's usual coal mine employment required heavy to very heavy manual labor rather than light manual labor as found by the administrative law judge. Decision and Order on Remand at 12-13. Contrary to Claimant's argument, the administrative law judge permissibly found Dr. Rasmussen's opinion unpersuasive because he failed "to compare Claimant's demonstrated pulmonary impairment against [the] degree of exertion" required of light manual labor.[7] *Id*.; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Claimant's Brief at 8-9. Because substantial evidence supports the administrative law judge's credibility determination, we affirm his finding Claimant did not establish total disability based on the medical opinion evidence.[8] 20 C.F.R. §718.204(b)(2)(iv).

Considering all of the relevant evidence together, the administrative law judge permissibly determined Claimant is not totally disabled by a respiratory or pulmonary impairment. *See Rafferty*, 9 BLR at 1-232; 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 14.

[7] Claimant asserts Dr. Rasmussen opined the diffusion capacity impairment would prevent Claimant from "being able to climb a ladder many times a day," a necessary duty of his usual coal mine employment. Claimant's Brief at 8-9. Based on our review of Dr. Rasmussen's opinion, we discern no such statement. Director's Exhibit 12.

[8] The administrative law judge acknowledged Claimant's lay testimony on the issue of total disability. Decision and Order on Remand at 13-14. Claimant specifically stated that he struggled to climb the ladder to his cab because he had "no wind," he had shortness of breath for the last three to four years, and he was prescribed home-oxygen use. Hearing Tr. at 19-20, 27; *see also* Director's Exhibit 3. The administrative law judge permissibly found "Claimant's subjective symptoms, though credibly expressed at the hearing, do not evidence the existence of a totally disabling pulmonary impairment." Decision and Order on Remand at 13-14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Heaton v. Director, OWCP*, 6 BLR 1-1222, 1224-25 (1984). Further, to the extent the administrative law judge discredited the medical opinions and found the objective testing does not establish total disability, Claimant's testimony "may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(3).

Thus, we affirm his finding Claimant did not invoke the Section 411(c)(4) presumption. Decision and Order on Remand at 14. Further, because Claimant did not establish total disability, benefits are precluded under Part 718. *See Trent*, 11 BLR at 1-127.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge