U.S. Department of Labor

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

BRB No. 18-0533 BLA

WOODROW NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
B & W RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 01/15/2020
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Woodrow Noble, Dice, Kentucky.

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

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2017-BLA-05919) of Administrative Law Judge Jason A. Golden rendered on a claim filed on September 7, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with at least thirty-two and one-quarter years of surface coal mine employment in conditions substantially similar to those in underground mines,[2] the administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). The administrative law judge further found claimant failed to establish total disability and thus did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director,

[1] Judy Hamblin, a black lung support technician 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. Hamblin is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88, 1-89 (1995) (Order).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 16; Director's Exhibit 6.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where claimant establishes 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) (2012), as implemented by 20 C.F.R. §718.305.

Office of Workers' Compensation Programs (the Director), has not filed a response brief to claimant's appeal.

Lucia Review

After claimant appealed, the Board informed him by letter dated July 25, 2019 that a recent United States Supreme Court decision, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), may apply to his case. The Board explained that it would consider whether *Lucia* applies to claimant's case only if claimant asked the Board to do so. Therefore, the Board asked claimant to respond whether he wanted the *Lucia* issue to be considered. The Board further explained that if he made such a request and should *Lucia* be found to apply, the case may be remanded for a new hearing before a different administrative law judge. Claimant responded that he wanted the Board to consider whether *Lucia* applies.

By orders dated August 16, 2019 and August 27, 2019, the Board informed the other parties of claimant's request and provided time to respond. Employer and the Director responded that based on the particular facts of this case, they object to remand and reassignment to another, properly appointed administrative law judge.

We agree with employer and the Director that this case should not be remanded for a new hearing before a new administrative law judge. In the same month the administrative law judge issued his Decision and Order Denying Benefits, the United States Supreme Court decided in *Lucia* that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution.[4] *Lucia*, 138 S.Ct. at 2055. The appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed administrative law judge. *Id.*, *citing Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

That administrative law judge must be able to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S.Ct. at 2055.

Before *Lucia* was issued however, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of Administrative Law Judge Golden on December 21, 2017. Administrative Law Judge Exhibit 1. The record reflects that the only action the administrative law judge took before his appointment was ratified was the issuance of a Notice of Hearing. The issuance of a Notice of Hearing alone does not involve any consideration of the merits, nor would it be expected to color the administrative law judge's consideration of the case. The Notice of Hearing simply reiterates the statutory and regulatory requirements governing the hearing procedures.

Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and had issued an initial decision while he was not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before."[5] *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand, and we decline to remand this case to the Office of Administrative Law Judges for a new hearing before a different, properly appointed administrative law judge.

Merits of Claim

In an appeal claimant files without the assistance of counsel, the Board considers whether the Decision and Order Denying Benefits is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

[5] On December 13, 2017, a lay representative from Stone Mountain Health Services requested leave to serve as a non-attorney representative of claimant before the administrative law judge. The administrative law judge took no action on this request before his appointment was ratified. Because receipt of a request to serve as a non-attorney representative is not based on the merits of the case and would not be expected to color the administrative law judge's consideration of the case, it likewise does not taint the proceedings so as to require remand for a new hearing before a different, properly appointed administrative law judge. *Id.*

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. Statutory presumptions may assist claimants in establishing the elements of entitlement, but failure to establish any 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 considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[6] *See* 20 C.F.R. §718.204(b)(1). Absent contrary probative evidence, a claimant may establish total disability based on pulmonary function or arterial blood gas studies, evidence of 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 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 considered two pulmonary function studies conducted on October 5, 2016 and March 28, 2017. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-10; Director's Exhibit 14; Employer's Exhibit 11. He found the October 5, 2016 study produced qualifying[7] values for total disability and the March 28, 2017 study produced non-qualifying values. Decision and Order at 9-10, 14. He acknowledged both studies "may accurately represent [claimant's] respiratory condition at the time each study was taken." Decision and Order at 14 (internal quotations omitted). He credited the March 28, 2017 non-qualifying study because it "is the most up to date representation" of claimant's

[6] The administrative law judge correctly found claimant cannot establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14.

[7] A "qualifying" pulmonary function study or arterial 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).

respiratory or pulmonary condition. *Id*. Thus he found the pulmonary function study evidence did not establish total disability. *Id*.

To summarize, the administrative law judge considered both studies, found "no evidence that [c]laimant failed to give good effort or cooperation during the tests," and concluded that the later study is the most current representation of claimant's condition as of the time of the hearing. *Id*.; *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624 (6th Cir. 1988) (the relevant inquiry is whether a claimant is disabled on the date of the hearing). Although the administrative law judge did not explicitly consider the length of time between the studies in giving greater weight to the later study (*see Greer v. Director, OWCP*, 940 F.2d 88, 90-01(4th Cir. 1991): two months is insignificant when evaluating miner's entitlement and thus court would not apply "later in time" rationale), any error is harmless. Even had the administrative law judge not given greater weight to the more recent study, there is "no evidence" in the record, as the administrative law judge indicated, that might warrant giving the earlier study greater weight. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014). Accordingly, at best the two studies are in equipoise. Since claimant has the burden of proof, the pulmonary function study evidence, on its own, does not support finding disability. Consequently, we affirm the administrative law judge's determination that claimant failed to show that he is disabled based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge also considered three arterial blood gas studies dated October 5, 2016, March 28, 2017, and June 19, 2017. Decision and Order at 10, 14; Director's Exhibit 14; Employer's Exhibits 11, 12. He correctly found that all three studies are non-qualifying. *Id*. Thus we affirm his finding that claimant did not establish total disability based on the arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). In addition, he correctly found there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 14. Thus we affirm his finding that claimant did not establish total disability based on this type of evidence. 20 C.F.R. §718.204(b)(2)(iii).

With respect to the medical opinion evidence, the administrative law judge considered the opinions of Drs. Ajjarapu, Dahhan, and Tuteur. Although he expressed reservations as to whether Dr. Ajjarapu had relied on finding moderate hypoxemia and a normal physical examination of the lungs in determining the severity of claimant's pulmonary impairment, or whether she understood or relied on the exertional requirements of claimant's last coal mine employment, the administrative law judge credited her opinion that claimant is completely and totally disabled based on the pulmonary function testing she administered. Decision and Order at 14-15. He also credited Dr. Dahhan's opinion, finding no evidence of a pulmonary impairment or disability, as reasoned and documented, and consistent with the testing Dr. Dahhan administered. *Id*. at 15. Finally, he gave Dr. Tuteur's opinion regarding disability little weight because it was unclear as to which

pulmonary function testing he reviewed and relied on, and whether he opined claimant is totally disabled from a pulmonary standpoint.[8] *Id.*

He found that the opinions of Drs. Dahhan and Ajjarapu were equally persuasive based on the evidence they considered, and that it is unknown what view Dr. Ajjarapu would have taken had she been aware of the later pulmonary function testing.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 11-15. Consequently, he determined that claimant failed to establish he is disabled based on the medical opinion evidence. Decision and Order at 15. This determination is supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-15; Director's Exhibit 14; Employer's Exhibits 11-13.

Finally, weighing the totality of the probative medical evidence, the administrative law judge permissibly found that claimant failed to establish he is disabled by a pulmonary or respiratory impairment, and therefore cannot establish all of the essential elements for entitlement to benefits. *Trent*, 11 BLR at 1-27; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

[8] The administrative law judge correctly observed that Dr. Tuteur left a blank on his report as to which pulmonary function tests he reviewed and relied upon, and referenced a pulmonary function test Dr. Baker performed which is not in evidence. Decision and Order at 13; Employer's Exhibit 12. Moreover, Dr. Tuteur did not directly address respiratory or pulmonary total disability. *Id.*

[9] To the extent the administrative law judge may have erred in finding the opinions of Drs. Dahhan and Ajjarapu equally persuasive despite the concerns he raised regarding Dr. Ajjarapu's opinion, any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The result, in terms of claimant meeting his burden based on the medical opinion evidence, would have been the same had the administrative law judge given Dr. Ajjarapu's opinion less weight. Further, his weighing of the other evidence was unaffected by his giving equal weight to the opinions of Drs. Ajjarapu and Dahhan.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge