U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0371 BLA

DANNY SPENCE Claimant-Petitioner v. EXCEL MINING, LLC and SELF INSURED THROUGH MAPCO, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/27/2016 DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Danny Spence, Ulysses, Kentucky, *pro se.*

Carl M. Brashear (Hoskins Law Offices), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (2011-BLA-5992) of Administrative Law Judge Alice M. Craft denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The case involves a subsequent claim filed on September 13, 2010.[2]

After crediting claimant with over fifteen years of underground coal mine employment,[3] the administrative law judge found that the evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits.

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

[2] Claimant filed a previous claim on December 10, 2002. Director's Exhibit 1. In a Proposed Decision and Order dated December 12, 2003, the district director denied claimant's claim because claimant failed to establish any element of entitlement. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. *Id.* However, after claimant failed to appear at a scheduled hearing and failed to respond to a Show Cause Order, Administrative Law Judge Thomas F. Phalen, Jr. dismissed the claim on June 8, 2005. An order of dismissal has "the same effect as a decision and order disposing of the claim on its merits . . . ." 20 C.F.R. §725.466(a).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer/carrier 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 below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Change in an Applicable Condition of Entitlement

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where 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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(c)(3); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

Total Disability

The administrative law judge initially considered whether the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains six new pulmonary function studies. While the first three pulmonary function studies, conducted on March 24, 2008, February 15, 2010, and November 16, 2010, produced qualifying values,[5] Director's Exhibits 13, 15, 16,

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718,

three later pulmonary function studies, conducted on December 20, 2010, February 14, 2011, and December 6, 2011, produced non-qualifying values. Director's Exhibit 16; Claimant's Exhibit 4; Employer's Exhibit 4.

In evaluating the conflicting pulmonary function study evidence, the administrative law judge noted that "[m]ore weight may be accorded to the results of a recent ventilatory study over those of an earlier study." Decision and Order at 20. Because the three most recent pulmonary function studies produced non-qualifying values, the administrative law judge found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

In resolving the conflict in the new pulmonary function study evidence, the administrative law judge relied upon what is commonly referred to as the "later evidence" rule. In *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992), a case involving x-ray evidence, the United States Court of Appeals for the Fourth Circuit set forth the limitations of the rule:

> In a nutshell, the theory is: (1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of the miner's condition than an earlier one.
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> This logic only holds where the evidence is consistent with premises (1) and (2) - i.e., the evidence, on its face, shows that the miner's condition has worsened. In that situation, it is possible to reconcile the pieces of proof. All may be reliable; they do not necessarily conflict, though they reach different conclusions. All other considerations aside, the later evidence is more likely to show the miner's current condition.
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> On the other hand, if the evidence, taken at face value, shows that the miner has improved, the "reasoning" simply cannot apply. *It is impossible to reconcile the evidence.* Either the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship.

Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Adkins, 958 F.2d at 51-52, 16 BLR at 2-64-65 (footnote omitted). In a case involving x-ray evidence, the United States Court of Appeals for the Sixth Circuit cited with approval the Fourth Circuit's rationale of the "later evidence" rule set forth in *Adkins. See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993).

In this case, the three most recent pulmonary function studies produced higher values than the three earlier pulmonary function studies. Thus, they do not demonstrate the expected deterioration in claimant's condition, but rather an improvement in his pulmonary function. Thus, a disharmony exists among the pulmonary function studies that cannot be resolved by the later evidence rule. *See Woodward*, 991 F.2d 314 at 319-20, 17 BLR at 2-84-85. Because the administrative law judge misapplied the later evidence rule, we vacate her finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand for further consideration.

As the administrative law judge based her evaluation of the medical opinion evidence on her weighing of the pulmonary function study evidence, we must also vacate her finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] On remand, in considering the new medical opinion evidence, the administrative law judge must first determine the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). The administrative law judge must then consider the documentation and reasoning underlying the medical opinions, and explain whether the medical opinions, when considered in light of the exertional requirements of claimant's usual coal mine employment, establish the existence of a totally disabling respiratory impairment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must also explain her findings in accordance with

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[6] The administrative law judge correctly noted that all of the new arterial blood gas studies of record are non-qualifying. Decision and Order at 11; Director's Exhibits 13, 15; Claimant's Exhibits 4, 5, 10, 14; Employer's Exhibit 4. Consequently, we affirm the administrative law judge's finding that the arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Moreover, because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 20.

the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[7] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[8] 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). However, if the administrative law judge, on remand, finds that the evidence does not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), she must deny benefits.[9] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[7] If the administrative law judge finds that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[8] The administrative law judge found that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 19. Because employer does not challenge this determination, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304; Decision and Order at 20.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

RYAN GILLIGAN
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge