U.S. Department of Labor

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

BRB No. 15-0398 BLA

BALLARD W. TOLLIVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 04/28/2016
	)	
ZURICH AMERICAN INSURANCE GROUP	)	
	)	
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Robert P. Normann (Muchow, Becker & Pasquarelli), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-BLA-06331) of Lystra A. Harris (the administrative law judge) denying benefits on a claim filed on June 8, 2011, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least 25 years of qualifying coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iv) and 718.204(b)(2) overall. Consequently, the administrative law judge found that claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and thus that he failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[2] The administrative law judge noted that "[c]laimant testified [at the hearing] that his mining employment was all underground." Decision and Order at 4, *citing* Hearing Tr. at 14-17.

[3] Because the administrative law judge's length of coal mine employment finding and his finding that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was last employed in the coal mining industry

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding that the evidence failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Specifically, claimant asserts that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered Dr. Rasmussen's opinion that claimant has a disabling respiratory or pulmonary impairment, and Dr. Zaldivar's opinion that claimant does not have a disabling respiratory or pulmonary impairment.[5] The administrative law judge acknowledged that Drs. Rasmussen and Zaldivar "are similarly highly qualified to render an opinion."[6] Decision and Order at 13. Nevertheless, the administrative law judge found that Dr. Zaldivar's opinion outweighed Dr. Rasmussen's contrary opinion, because she found that "Dr. Rasmussen's opinion is not supported by the objective testing performed." *Id*. at 14. The administrative law judge therefore found that the medical opinion evidence did not establish total respiratory disability.

Claimant argues that the administrative law judge erred in discounting Dr. Rasmussen's opinion.[7] Specifically, claimant avers that "the administrative law judge

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in West Virginia. Director's Exhibit 3; Hearing Tr. at 30. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[5] In a November 30, 2010 report, Dr. Rasmussen opined that claimant has a respiratory or pulmonary impairment that prevents him from performing his last coal mine job. Director's Exhibit 11.

During a deposition taken on October 11, 2013, Dr. Rasmussen opined that claimant has a totally disabling pulmonary impairment. Claimant's Exhibit 4 (Dr. Rasmussen's Depo. at 24).

In an October 24, 2011 report, Dr. Zaldivar opined that claimant is fully capable from a pulmonary standpoint of performing his usual coal mine work. Employer's Exhibit 1.

[6] Dr. Rasmussen is Board-certified in Internal Medicine and Forensic Medicine. Director's Exhibit 11; Claimant's Exhibit 4 (Dr. Rasmussen's Depo. at 4). Dr. Zaldivar is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 2.

[7] Claimant argues that the administrative law judge erred in discounting Dr.

erred in not properly comparing the results of the exercise studies performed by Drs. Rasmussen and Zaldivar as Dr. Rasmussen properly explained why his test was a better indication of why [claimant] has a totally disabling pulmonary impairment." Claimant's Brief at 8. We disagree.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en banc); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge noted that "[Dr. Rasmussen] acknowledged that both his and Dr. Zaldivar's [objective] studies showed [c]laimant's pulmonary condition to be normal."[8] Decision and Order at 14. The administrative law judge also noted that "Dr. Rasmussen opined that, as the results of the [arterial blood gas tests] conducted by him in 2010 were borderline, they were abnormal 'for all practical purposes.'" *Id*. Further, the administrative law judge noted that, although Dr. Zaldivar found a moderate diffusion abnormality, "[Dr. Zaldivar] concluded that [c]laimant's diffusion abnormality did not affect his blood gases during exercise, which had far exceeded the borderline results of Dr. Rasmussen's study." *Id*. The administrative law judge permissibly discounted Dr. Rasmussen's opinion because Dr. Rasmussen failed to adequately explain how the underlying objective evidence supported his opinion.[9] *See Tackett*, 12 BLR at 1-14;

Rasmussen's disability opinion by "automatically finding that later test results are a better indication of the true status of a [miner's] pulmonary function than earlier tests." Claimant's Brief at 8. Contrary to claimant's assertion, the administrative law judge did not specifically apply the later evidence rule in considering the medical opinions and objective tests. We therefore reject claimant's assertion that the administrative law judge erroneously discounted Dr. Rasmussen's disability opinion because of the later non-qualifying values produced during exercise on Dr. Zaldivar's October 17, 2011 arterial blood gas study.

[8] The administrative law judge noted that "Dr. Rasmussen based his opinion on non-qualifying [pulmonary function and arterial blood gas studies]." Decision and Order at 13-14.

[9] The administrative law judge found "it very significant that Dr. Rasmussen's opinion relied heavily on his non-qualifying, arterial blood gas study when he diagnosed [c]laimant with a total disability and concluded that [c]laimant does not retain the pulmonary capacity to perform his regular coal mine employment." Decision and Order at 14. In addition, the administrative law judge noted that, "while Dr. Rasmussen rejected the opinion that [c]laimant's admittedly 'significant' heart disease and treatment history had any effect, he testified that he did not review any cardiology medical records," and "[he] further acknowledged that [c]laimant reported chest discomfort with

Oggero, 7 BLR at 1-865. Consequently, we reject claimant's assertion that the administrative law judge erred in failing to properly compare the results of the exercise arterial blood gas studies of Drs. Rasmussen and Zaldivar in considering their opinions. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.

Furthermore, we affirm the administrative law judge's finding that claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and total respiratory disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112.

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heavy exercise." *Id*., *citing* Claimant's Exhibit 4 (Dr. Rasmussen's Depo. at 38-39).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge