U.S. Department of Labor

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

BRB No. 17-0443 BLA

HUBERT DARRELL PORTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH STAR MINING, INCORPORATED	)	DATE ISSUED: 04/26/2018
	)	
and	)	
	)	
ANESTHESIOLOGISTS PROFESSIONAL EMPLOYERS' RISK SERVICES	)	
	)	
Employer/Carrier-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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jennifer L. Conner (Law Offices of John C. Collins), Salyersville, Kentucky, for claimant.

Felicia A. Snyder (Snyder Law Office, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-05729) of Administrative Law Judge Patrick M. Rosenow, rendered on a claim filed on September 16, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation to twenty years of underground coal mine employment. The administrative law judge determined that the evidence was insufficient to establish that claimant is totally disabled and thus found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[1] The administrative law judge further found that benefits were precluded under 20 C.F.R. Part 718, as claimant failed to establish total disability and the existence of pneumoconiosis.

On appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

A miner is totally disabled if he or she has a respiratory or pulmonary impairment which, standing alone, prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood-gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability

[1] Section 411(c)(4) of the Act provides that a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in underground mines, and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6, 7.

against the contrary 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 found that the two pulmonary function studies, dated October 13, 2011 and May 1, 2014, and the one arterial blood-gas study, dated October 11, 2013, were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).[3] Decision and Order at 9; Director's Exhibit 9; Claimant's Exhibit 1. The administrative law judge noted that there was no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 9. He also found that the medical opinion evidence was insufficient to establish that claimant has a totally disabling or pulmonary respiratory impairment that would preclude claimant from performing his usual coal mine employment. *Id.* at 9-10.

Claimant challenges the administrative law judge's weighing of the medical opinions of Drs. Mettu and Dotson under 20 C.F.R. §718.204(b)(2)(iv).[4] Dr. Mettu examined claimant on October 13, 2011 for the Department of Labor. Director's Exhibit 9. Dr. Mettu opined that claimant suffers from a mild respiratory impairment that would not prevent him from performing his usual coal mine employment. *Id*. Claimant's treating physician, Dr. Dotson, prepared a letter dated February 9, 2016. Claimant's Exhibit 2. Dr. Dotson indicated that she treated claimant for six years for chronic obstructive pulmonary disease and multiple lung nodules, which she attributed to coal workers' pneumoconiosis.[5]

[3] A "qualifying" pulmonary function test 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, Appendices B and C. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[5] The administrative law judge summarized the treatment records from Dr. Dotson, dating from November 4, 2010 to February 18, 2015, which included, *inter alia*, claimant's complaints of shortness of breath and diagnoses of hyperlipidemia, hypertension, coal workers' pneumoconiosis, chronic obstructive pulmonary disease, acute upper respiratory infection and gastroesophageal reflux disease. Decision and Order at 7; Claimant's Exhibits 3, 4. On December 21, 2012, Dr. Dotson reported that claimant had a "lung mass with negative bronchoscopy." Claimant's Exhibit 4.

Id. She stated that she "would not recommend that [claimant] return to his previous employment in the coal mines due to his lung issues." *Id.*

Claimant argues that the administrative law judge should have given controlling weight to Dr. Dotson's opinion on the issue of total disability, based upon her status as claimant's treating physician. Claimant asserts that Dr. Dotson's opinion is credible because it is supported by her treatment records and the May 1, 2014 pulmonary function test showing a reduced FEV1/FVC ratio. Claimant's Exhibits 1, 2.

Contrary to claimant's assertion, an administrative law judge is not required to give greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). We see no error in the administrative law judge's finding that Dr. Dotson's opinion is not persuasive.

The administrative law judge permissibly found that Dr. Dotson's opinion was not reasoned and documented. [6] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Although Dr. Dotson noted her "long history" of treating claimant, the administrative law judge correctly observed that Dr. Dotson "provides no reasoning" as to why she would not recommend that claimant return to his usual coal mine employment. Decision and Order at 10; *see* Claimant's Exhibit 2. Dr. Dotson did not discuss how the objective evidence supported her opinion and did not discuss the results of the pulmonary function test referenced in claimant's brief. Claimant's Exhibit 2. We therefore affirm the administrative law judge's finding that Dr. Dotson's opinion is not credible to establish that claimant is totally disabled. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (a physician's recommendation against further exposure to coal dust is not equivalent to a finding of total disability).

[6] The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides that absent contrary probative evidence, total disability may be established "if a physician exercising *reasoned* medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in" the miner's usual coal mine work. (emphasis added)

Because Dr. Dotson's opinion is the only opinion supportive of claimant's burden of proof and the administrative law judge gave permissible reasons for discrediting it, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 19-20. Because claimant did not establish a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's findings that claimant is unable to invoke the Section 411(c)(4) presumption and that benefits are precluded under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

RYAN GILLIGAN
Administrative Appeals Judge

[7] Claimant argues that the administrative law judge erred in crediting Dr. Mettu's opinion because the physician's examination was conducted over five years ago. Because we have affirmed the administrative law judge's discrediting of Dr. Dotson's opinion, we need not address claimant's arguments regarding the credibility of Dr. Mettu's opinion. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).