BRB No. 10-0705 BLA

RAY SHADOWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/17/2011
	)	
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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits of Administrative Law Judge Jeffrey Tureck (08-BLA-5229) rendered on a subsequent claim,[1] filed on November 3, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the

[1] Claimant's previous claims, filed on February 24, 1996, November 4, 1999, and September 4, 2002, were denied for failure to establish any of the elements of entitlement. Decision and Order at 1; Director's Exhibits 1-3.

entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

By Order dated April 6, 2010, the administrative law judge directed the parties to submit position statements addressing the applicability of amended Section 411(c)(4) to this case. In response, claimant asserted that he meets the criteria for invocation of the Section 411(c)(4) presumption, while employer asserted that the presumption does not apply because the evidence does not establish total respiratory disability. Employer additionally requested that, if the administrative law judge determines that the presumption is invoked, the record be reopened for the parties to submit additional evidence to address the change in law.

The administrative law judge credited claimant with twenty-five years of coal mine employment, as stipulated by the parties,[2] and determined that claimant met the preliminary requirements for application of the amended Section 411(c)(4) presumption. However, the administrative law judge found that the evidence of record in claimant's previous claims, as well as the evidence submitted in support of his subsequent claim, was insufficient to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to establish invocation of the amended Section 411(c)(4) presumption. The administrative law judge further found that, even if the evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R §718.309(d)(2),[3] claimant's failure to establish total respiratory disability precludes him from entitlement to benefits under the Act. Accordingly, benefits were denied.

[2] As claimant was last employed in the coal mining industry in Illinois, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[3] Where, as here, 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 "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(d); *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(d)(2).

On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence at Section 718.204(b)(2)(iv). Further, claimant maintains that he is entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R Part 718, claimant must prove 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. Failure to establish any one of these elements precludes entitlement. *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).

Turning to the issue of total disability, claimant contends that the administrative law judge erred in finding that the medical opinion of Dr. Houser, that claimant is totally disabled from performing his usual coal mine employment duties as a bathhouse attendant, was entitled to no probative value at Section 718.204(b)(iv). Claimant asserts that Dr. Houser's opinion is well-reasoned and sufficiently documented to support a finding of total respiratory disability because Dr. Houser was aware of the duties of claimant's usual coal mine employment; he reviewed Dr. Repsher's reports and testing; and he relied on his own pulmonary function study results, which were qualifying[4] and deemed valid by the administrative law judge. Claimant argues that the administrative law judge failed to adequately explain why he discredited Dr. Houser's opinion, and asserts that the contrary opinions of Drs. Renn and Repsher, that claimant has the respiratory capacity to perform his usual bathhouse attendant duties, are seriously flawed. Claimant's arguments lack merit.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge initially found that claimant failed to establish total respiratory disability at Section 718.204(b)(2)(i)-(iii), as the weight of the pulmonary function study evidence was non-qualifying; all of the blood gas studies of record produced non-qualifying results; and there was no evidence of cor pulmonale with right-sided congestive heart failure. Despite finding that Dr. Houser's pulmonary function study was valid and produced qualifying results, the administrative law judge, in evaluating the pulmonary function study evidence at Section 718.204(b)(2)(i), permissibly concluded that Dr. Houser's study was unreliable and insufficient to establish total disability because relatively contemporaneous studies, performed both before and after Dr. Houser's study, produced significantly higher results. Decision and Order at 4. An administrative law judge may properly find a pulmonary function study that produces higher results to be more reliable than studies that produce lower results, *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990), and may question the reliability of a pulmonary function study in light of contemporaneous results of pulmonary function studies which produced higher values. *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

In evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge determined that Dr. Houser was the only physician who concluded that claimant had a moderately severe or severe obstructive impairment that prevented him from performing his bathhouse attendant duties. The administrative law judge found, however, that Dr. Houser's assessment of total disability "is based in significant part, if not entirely, on the results of the pulmonary function test he conducted….[b]ut his test produced much lower results than the pulmonary function tests conducted by Drs. Istanbouly and Repsher in connection with this subsequent claim." Decision and Order at 5. Additionally, the administrative law judge observed that Dr. Houser "did not reference any pulmonary function tests other than his own April 30, 2007 test in arriving at his conclusion that claimant is totally disabled." Decision and Order at 5. The administrative law judge next considered the remaining objective documentation provided by Dr. Houser, and determined that the at-rest blood gas testing conducted by Dr. Houser produced "virtually normal" results; the total lung capacity and residual volume were normal; and "the only test he mentioned which did not produce normal or near-normal results other than his pulmonary function test was the diffusing capacity obtained by Dr. Repsher, which Dr. Houser stated showed a moderate impairment." Decision and Order at 5 n.4. Since Dr. Houser's disability assessment was predominantly based on the results of his own pulmonary function study, which the administrative law judge found to be unreliable, the administrative law judge acted within his discretion in finding that Dr. Houser's opinion had no probative value. Decision and Order at 5; *see Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

It is for the administrative law judge to evaluate the medical opinions in the context of the factual circumstances of the case, and render credibility determinations. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). Because substantial evidence supports the administrative law judge's findings with regard to Dr. Houser's opinion, and the administrative law judge found that the remaining medical opinions of record either concluded that claimant was not disabled or were silent on the issue, we affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(b)(2)(iv). *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-9, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990).

As claimant failed to establish total disability pursuant to Section 718.204(b)(i)-(iv), we affirm the administrative law judge's findings that claimant failed to establish invocation of the rebuttable presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and is precluded from entitlement to benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge