U.S. Department of Labor

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

BRB No. 16-0618 BLA

KIRBY ROSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING, INCORPORATED d/b/a SUN GLO	)	DATE ISSUED: 08/14/2017
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2013-BLA-05840) of Administrative Law Judge Larry A. Temin awarding 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). This case involves a subsequent claim filed on July 3, 2012.[1]

After crediting claimant with at least fifteen years of underground coal mine employment,[2] the administrative law judge found that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[5]

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[1] Claimant's initial claim, filed in 2002, was denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the [miner] has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 12-13. 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).

[3] Because the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Decision and Order at 14-15, 20.

[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 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) (2012); *see* 20 C.F.R. §718.305.

[5] Because employer does not challenge the administrative law judge's finding that claimant had at least fifteen years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Employer argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv)[6] and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. The administrative law judge considered seven pulmonary function studies, conducted on May 7, 2012, October 26, 2012, November 15, 2012, February 21, 2013, March 27, 2013, June 19, 2014, and July 28, 2014. The six most recent pulmonary function studies all produced qualifying values.[7] The administrative law judge, however, found that the three studies dated October 26, 2012, February 21, 2013, and July 28, 2014 were invalid. Decision and Order at 16-18. In considering the remaining four pulmonary function studies conducted on May 7, 2012, November 15, 2012, March 27, 2013, and June 19, 2014, the administrative law judge noted that the three most recent studies are qualifying. Decision and Order at 18-19. The administrative law judge therefore found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge erred in finding that the pulmonary function studies conducted on May 7, 2012, November 15, 2012, March 27, 2013, and June 19, 2014 are valid. Employer initially argues that the May 7, 2012 and March 27, 2013 pulmonary function studies "were not conducted and reported in accordance with the requirements of [20 C.F.R] §718.103(b) and Appendix B [to Part 718]." Employer's Brief at 15. Employer, however, submitted these pulmonary function studies as part of claimant's treatment records. Employer's Exhibit 9. The quality standards apply only to evidence developed in connection with a claim for benefits and, thus, they are inapplicable to hospitalization and treatment records. *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008); *see* 20 C.F.R. 718.101(b);

[6] The administrative law judge found that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 15.

[7] 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).

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Although the quality standards are inapplicable, the administrative law judge accurately noted that he must still be persuaded that "the evidence is reliable in order for it to form a basis for a finding of fact on an entitlement issue." Decision and Order at 16; 65 Fed. Reg. at 79,928. In making this assessment, the administrative law judge stated:

> The May 7, 2012 test was performed at the Stone Mountain Respiratory Clinic and was not validated or reviewed. The technician who performed the test noted the values represented [claimant's] "best efforts." Additionally, the test is accompanied by three spirometric tracings and the time-volume curve indicates that [claimant] was able to exhale for over 8 seconds. Thus, I find that the May 7, 2012 test is valid and can be used to establish disability.
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> The March 27, 2013 test was performed at the Stone Mountain Respiratory Clinic and was not validated or reviewed. (EX 9). The test is accompanied by three tracings and the time-volume curve indicates that [claimant] was able to exhale for over 7 seconds. Thus, I find that the March 27, 2013 test is valid and can be used to establish disability.

Decision and Order at 16-17.

Employer contends that the administrative law judge erred in determining that the May 7, 2012 and March 27, 2013 pulmonary function studies are sufficiently reliable to support a finding of total disability. Employer argues that certain computer-generated notations appearing on the reports call into question their reliability. Employer's Brief at 16. However, because employer challenges the reliability of this evidence for the first time on appeal, we decline to consider it.[8] *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Although the May 7, 2012 pulmonary function study produced non-qualifying values, the administrative law judge reasonably relied upon the more recent qualifying pulmonary function study conducted on March 27, 2013, as more probative of claimant's

[8] As noted *supra*, employer submitted the May 7, 2012 and March 27, 2013 pulmonary function studies as part of claimant's treatment records. Employer's Exhibit 9. Employer did not assert that either study was unreliable, nor did it provide the studies to its physicians, Drs. Rosenberg and Jarboe, for review.

current condition.[9] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 19. Because it is supported by substantial evidence,[10] we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Habre, Rosenberg, and Jarboe. The administrative law judge found that Dr. Habre's opinion that claimant is unable to perform his last coal mine job was well-reasoned. Decision and Order at 19; Director's Exhibit 12. Conversely, the administrative law judge found that the contrary opinions of Drs. Rosenberg and Jarboe were not well-reasoned.[11] Decision and Order at 19-20; Director's Exhibit 13; Employer's Exhibits 2-5, 12. The administrative law judge therefore found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Based upon a weighing of all the evidence,[12] the administrative law judge found that the evidence

[9] Employer does not challenge the administrative law judge's reliance upon the more recent pulmonary function study evidence.

[10] In light of our affirmance of the administrative law judge's crediting of the March 27, 2013 qualifying pulmonary function study, we need not address employer's argument that the administrative law judge erred in determining that the November 15, 2012 and June 19, 2014 qualifying pulmonary function studies are valid. A determination that the November 15, 2012 and June 19, 2014 qualifying pulmonary function studies should not have been considered because they are invalid would not undermine the administrative law judge's basis for finding that the pulmonary function study evidence established total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[11] The administrative law judge found that Dr. Rosenberg's opinion was internally inconsistent. Decision and Order at 19. The administrative law judge found that Dr. Jarboe's attempt to recalculate claimant's pulmonary function study values to support his opinion was not well-supported. *Id.* at 20.

[12] The administrative law judge found that the non-qualifying blood gas study evidence did not undermine the pulmonary function study evidence because blood gas study evidence measures a different form of impairment. Decision and Order at 19; *see*

established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

Because employer does not challenge the administrative law judge's bases for discrediting the opinions of Drs. Rosenberg and Jarboe, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, employer has not explained how the administrative law judge's error, if any, in his consideration of Dr. Habre's opinion undermines his assessment of the evidence at 20 C.F.R. §718.204(b)(2). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Even if the administrative law judge discredited Dr. Habre's opinion that claimant is totally disabled, he found no credible medical opinion evidence that supports a finding that claimant is not totally disabled from a pulmonary standpoint. Thus, there is no medical opinion evidence to be weighed against the pulmonary function study evidence, which the administrative law judge found sufficient to establish total disability. Consequently, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, and his finding that claimant suffers from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, because employer does not challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

Tussey v. Island Creek Coal Co., 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge