U.S. Department of Labor

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

BRB No. 16-0629 BLA

EWELL V. DANIELS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C T L COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 08/15/2017
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ewell V. Daniels, Sr., Patchfork, Kentucky.[1]

John R. Sigmond and Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2014-BLA-05011) of Administrative Law Judge Adele Higgins Odegard 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). This case involves a claim filed on February 2, 2012.

After crediting claimant with twenty-one years of qualifying coal mine employment,[2] 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.[3] 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.[4] The administrative law judge, therefore, denied benefits.

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.

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[2] The record reflects that claimant's last coal mine employment was in Tennessee. Director's Exhibit 3. 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] 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.

[4] The administrative law judge also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 21-25.

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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered seven pulmonary function studies conducted between March 2, 2012 and April 29, 2015. The administrative law judge permissibly accorded less weight to the six most recent pulmonary function studies conducted on January 15, 2013, February 28, 2013, December 30, 2013, February 17, 2014, February 18, 2014, and April 29, 2015 because the studies were invalidated by Dr. Rosenberg,[5] a Board-certified pulmonologist.[6] *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

The administrative law judge found that although the March 2, 2012 pulmonary function study was valid,[7] its qualifying results were called into question by higher non-

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[5] Dr. Rosenberg invalidated these studies because he found that the flow-volume curves demonstrated suboptimal or incomplete effort. Employer's Exhibits 1, 5, 8. The administrative law judge further noted that the variability between the FEV1 values found in the January 15, 2013, February 28, 2013, December 30, 2013, February 18, 2014, and April 29, 2015 pulmonary function studies did not meet the regulatory guidelines found at 20 C.F.R. Part 718, Appendix B. Decision and Order at 11.

[6] The administrative law judge noted that Dr. Jarboe, a Board-certified pulmonologist, also invalidated the February 28, 2013 pulmonary function study that he administered "due to inconsistent and suboptimal effort." Decision and Order at 11; Director's Exhibit 19.

[7] The administrative law judge noted that two Board-certified pulmonologists, Drs.

qualifying values obtained during subsequent pulmonary function studies.[8] The administrative law judge found it significant that claimant, even with less than optimal effort, was able to produce non-qualifying values on several of these studies.[9] *See Anderson v. Youghiogheny & Ohio Coal Co*., 7 BLR 1-152, 1-154 (1984) (holding that a non-qualifying ventilatory study that represents poor cooperation is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983). Under the facts of this case, the administrative law judge, within a permissible exercise of her discretion, found that because several of claimant's subsequent pulmonary function studies produced higher values than those obtained during the March 2, 2012 pulmonary function study, they were more indicative of claimant's true pulmonary capacity and were, therefore, entitled to greater weight.[10] *See Andruscavage v. Director, OWCP*, No. 93-3291, 93-3291, *slip op.* at 9-10 (3d Cir. Feb. 22, 1994) (unpub.) (because pulmonary function studies are effort dependent, spuriously low values are possible but spuriously high values are not). Because it is supported by substantial evidence, the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is affirmed.

Rosenberg and Jarboe, questioned the validity of the March 2, 2012 pulmonary function study. Decision and Order at 11, 20. Dr. Rosenberg opined that claimant could have provided greater effort during the study, while Dr. Jarboe invalidated the study based on inconsistent effort. Director's Exhibit 19; Employer's Exhibit 1. However, because an equally qualified physician, Dr. Gaziano, opined that the results of the March 2, 2012 pulmonary function study were acceptable, the administrative law judge found that the study was valid. Decision and Order at 11; Director's Exhibit 14.

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

[9] Dr. Rosenberg opined that if claimant had provided better effort during the February 17, 2014 study, the non-qualifying values "would have been greater in magnitude." Employer's Exhibit 5.

[10] The pulmonary function studies conducted on January 15, 2013, February 28, 2013, December 30, 2013, and February 17, 2014 produced non-qualifying values. Director's Exhibit 19; Employer's Exhibits 2-4.

The administrative law judge correctly noted that all of the arterial blood gas studies, namely the studies conducted on March 2, 2012, February 28, 2013, and February 18, 2014, are non-qualifying. Decision and Order at 12-13; Director's Exhibits 14, 19; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's finding that the blood gas evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Because the administrative law judge also accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure, we affirm her finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 13.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker, Jarboe, and Rosenberg. Based upon claimant's qualifying March 2, 2012 pulmonary function study, Dr. Baker opined that claimant suffers from a totally disabling respiratory impairment. Director's Exhibit 14. The administrative law judge permissibly discounted Dr. Baker's opinion, since she found that the reliability of the March 2, 2012 pulmonary function study upon which the doctor relied was called into question by subsequent non-qualifying pulmonary function studies. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Drs. Jarboe and Rosenberg, the only other physicians to address the extent of claimant's pulmonary impairment, opined that claimant is not totally disabled from a pulmonary standpoint. Director's Exhibit 19 at 12; Employer's Exhibit 1 at 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because the medical evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[11] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of that affirmance, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; Decision and Order at 7.

[11] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is inapplicable. *See* 20 C.F.R. §§718.204(b)(1), 718.304; Decision and Order at 21 n.22.

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