U.S. Department of Labor

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

BRB No. 17-0562 BLA

EPHIE HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNICORN MINING INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/CHARTIS	)	DATE ISSUED: 08/30/2018
	)	
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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ephie Hensley, Bledsoe, Kentucky.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05869) of Administrative Law Judge Adele Higgins Odegard, rendered 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). Claimant filed this subsequent claim on September 24, 2014.[2]

After crediting claimant with thirty-two years of underground coal mine employment[3] based on the parties' stipulation, the administrative law judge found that the new x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304. She therefore found that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). She also found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, she found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] Because claimant did not establish total disability, an essential element of entitlement, the administrative law judge denied benefits.

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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).

[2] Claimant's previous claim for benefits, filed on November 20, 2001, was denied by Administrative Law Judge Daniel J. Roketenetz on July 21, 2005, for failure to establish any element of entitlement. Director's Exhibit 1. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Hensley v. Unicorn Mining, Inc*., BRB No. 05-0943 BLA (July 18, 2006) (unpub.).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. 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).

[4] Under Section 411(c)(4), a claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially

On appeal, claimant generally challenges the denial of benefits. Neither employer/carrier nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the findings of the administrative law judge if they are 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered nine interpretations of four x-rays. Dr. DePonte, dually-qualified as a B reader and Board-certified radiologist, interpreted a December 2, 2014 x-ray as positive for a Category A large opacity. Director's Exhibit 14. In the comments section of the ILO form, however, Dr. DePonte stated that the "ill-defined" and "irregular" three to four centimeter opacity in the lower lung zones may represent complicated pneumoconiosis Category A, but that the location is "atypical" for the disease. *Id*. She advised that "malignancy should be excluded by CT [scan] and/or comparison with prior studies." *Id*. Dr. Adcock, also a dually-

similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

qualified radiologist, interpreted the same x-ray as negative for complicated pneumoconiosis.[5] Director's Exhibit 15.

Dr. DePonte interpreted the July 2, 2014 x-ray as positive for a Category A large opacity, but again noted in the comments section of the ILO form that a comparison with "prior films and/or chest CT scan" is advised to address the etiology of the opacity. Director's Exhibit 16. Dr. Adcock interpreted this x-ray as negative for complicated pneumoconiosis. Director's Exhibit 17.

Dr. DePonte interpreted the August 31, 2016 x-ray as positive for a Category A large opacity, but noted in the comments section of the ILO form that the opacity "may" represent a large opacity of coal mine dust exposure in an atypical location. Claimant's Exhibit 1. Dr. Adcock interpreted this x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 6. Dr. Dahhan, a B reader, and Dr. Adcock, both interpreted the December 19, 2016 x-ray as negative for complicated pneumoconiosis. Employer's Exhibits 2, 5.

The administrative law judge recognized that Dr. DePonte "repeatedly noted the presence of [an] opacity that she stated was in an atypical location for complicated pneumoconiosis, and recommended CT scans or comparison with previous [x-rays] to rule out malignancy." Decision and Order at 24. The administrative law judge permissibly assigned diminished weight to Dr. DePonte's x-ray readings because Dr. DePonte "was not definitive in her diagnosis, and repeatedly articulated concern that this mass could be cancerous." *Id.*; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Melnick*, 16 BLR at 1-37. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge correctly found that the record contains no biopsy evidence of complicated pneumoconiosis. Decision and Order at 25.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether claimant could establish complicated pneumoconiosis by "other means." Decision and Order at 25-26. The administrative law judge correctly noted that the record contains no

[5] Dr. Gaziano reviewed the December 2, 2014 x-ray to assess its film for quality purposes only. Director's Exhibit 14.

CT scan or medical treatment records supporting a finding of complicated pneumoconiosis. *Id*.

Specifically, as summarized by the administrative law judge, Dr. Tiu read an October 11, 2013 CT scan as revealing several non-calcified nodules in the lungs, with the largest being 1.2 cm. Claimant's Exhibit 8. He also identified a three-centimeter, round mass in the right lobe of the thyroid. *Id*. Dr. Tiu diagnosed possible pulmonary metastasis, or primary lung carcinoma with pulmonary metastasis. *Id*. Dr. Tiu interpreted an October 9, 2014 CT scan as revealing a two-centimeter mass that he suspected was a primary or secondary lung neoplasm. *Id*. The administrative law judge accurately found that "Dr. Tiu did not attribute any of these masses to pneumoconiosis" or coal mine dust exposure. Decision and Order at 25. Claimant's medical records also include treatment with Dr. Dahhan and with Harlan Appalachian Regional Healthcare. Claimant's Exhibit 8. These treatment notes reference numerous large masses in claimant's x-rays and CT scans. *Id*. The administrative law judge correctly found, however, that "[n]owhere in [claimant's] treatment notes is there any suggestion that these masses were related to [his] history of coal mine dust exposure, or pneumoconiosis." Decision and Order at 25. She concluded that "what can be parsed together . . . is that . . . [c]laimant had enlarging masses in his left lung that Dr. Tiu thought were suspicious for cancer . . . . But there is nothing in the record to indicate any findings as to the[ir] etiology . . . and no documentation that they were found to be pneumoconiotic." *Id*. at 26.

Further, the administrative law judge accurately noted that Drs. Broudy and Dahhan opined that claimant does not have complicated pneumoconiosis and, therefore, determined that their opinions do not support claimant's burden of establishing that he has the disease at 20 C.F.R. §718.304(c). Director's Exhibits 14A, 15; Employer's Exhibits 1-4.

The record also includes Dr. Forehand's medical opinion. Director's Exhibit 14. Dr. Forehand initially did not diagnose complicated pneumoconiosis, based on his December 2, 2014 examination of claimant. Director's Exhibit 14 at 30-34. However, after reviewing Dr. DePonte's December 2, 2014 positive x-ray reading, Dr. Forehand opined that claimant has complicated pneumoconiosis with progressive massive fibrosis. *Id*. at 2. Although the administrative law judge did not independently weigh Dr. Forehand's opinion, we consider this error to be harmless on this record as weighed by the administrative law judge. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed above, we have affirmed the administrative law judge's finding that Dr. DePonte's x-ray readings do not definitively diagnose complicated pneumoconiosis, and that the x-ray evidence weighed together does not establish complicated pneumoconiosis. The record reflects that Dr. Forehand's diagnosis of complicated pneumoconiosis was based on Dr. DePonte's December 2, 2014 x-ray reading that was not credited by the administrative law judge. Thus, we need not remand this case for the administrative law

judge to consider Dr. Forehand's diagnosis of complicated pneumoconiosis, as the outcome of a remand would be foreordained. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Larioni*, 6 BLR at 1-1278.

Therefore, we affirm the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c). We further affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption—Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 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 against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In considering whether the evidence established the existence of a totally disabling impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge accurately found that the three pulmonary function studies of record, dated December 2, 2014, August 31, 2016, and December 19, 2016, were non-qualifying.[6] Decision and Order at 8-9; Director's Exhibit 14, Claimant's Exhibit 5; Employer's Exhibit 2. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), she correctly found that neither of the two arterial blood gas studies of record, dated December 2, 2014 and December 19, 2016, was qualifying for total disability. Decision and Order at 9-10; Director's Exhibit 14; Employer's Exhibit 2. Further, the administrative law judge accurately found that there is no evidence in the record of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10. Therefore, we affirm the administrative

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Forehand, Broudy, and Dahhan. She accurately noted that both Drs. Broudy and Dahhan opined that claimant is not totally disabled from performing his usual coal mine employment by a respiratory or pulmonary impairment. Decision and Order at 12-18; Director's Exhibits 14A, 15; Employer's Exhibits 1-4.

Dr. Forehand initially opined that claimant is not totally disabled because he has "sufficient residual ventilatory capacity" to return to his usual coal mine employment, based on normal pulmonary function and arterial blood gas testing. Director's Exhibit 14 at 33. However, after reviewing Dr. DePonte's positive reading of the December 2, 2014 x-ray, Dr. Forehand opined that claimant is "statutorily totally and permanently disabled" because he has complicated pneumoconiosis. *Id*. at 2. As discussed above, the administrative law judge found that claimant failed to establish that he has complicated pneumoconiosis and assigned diminished weight to Dr. DePonte's December 2, 2014 x-ray reading. The administrative law judge rationally found that Dr. Forehand's opinion that claimant has a "statutory" totally disabling respiratory impairment is not credible because "this was not a finding of a functional impairment." Decision and Order at 17 n. 17; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F. 2d at 255. The administrative law judge also considered claimant's treatment records and noted that while they list various medical conditions, they do not contain a reasoned medical opinion regarding the level of claimant's pulmonary disability. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984) (treatment for respiratory issues is insufficient, by itself, to establish a disabling pulmonary impairment); Decision and Order at 16-17; Claimant's Exhibit 8.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005). We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence overall fails to establish total respiratory or pulmonary disability. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 198; Decision and Order at 18. As claimant failed to establish a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).

Where no statutory presumptions apply, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his 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). As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish that he is totally disabled, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *Id*.

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

GREG J. BUZZARD
Administrative Appeals Judge