U.S. Department of Labor

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

BRB No. 17-0564 BLA

BILLY E. BARNETT Claimant-Petitioner v. VIRGIL MULLINS TRUCKING, INCORPORATED and TRAVELERS INDEMNITY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/20/2018 DECISION and ORDER

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

Billy E. Barnett, Martin, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05643) of Administrative Law Judge Larry A. Temin 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). This case involves a miner's claim filed on April 14, 2014.

The administrative law judge credited claimant with 10.736 years of coal mine employment and thus 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).[2] Considering whether claimant could establish entitlement without the benefit of the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational and in accordance with law.[3] 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).

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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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v.*

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).

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies dated April 9, 2013, May 14, 2014, January 22, 2015, March 10, 2016, and August 17, 2016.[4] Decision and Order at 9; Director's Exhibit 11; Claimant's Exhibits 4, 5; Employer's Exhibits 3, 5. The April 9, 2013 study, administered at the St. Charles Respiratory Clinic, yielded non-qualifying[5] pre-bronchodilator values and included no post-bronchodilator results. Decision and Order at 9, 16; Claimant's Exhibit 4. Both the May 14, 2014 study, conducted by Dr. Ajjarapu, and the January 22, 2015 study, conducted by Dr. Rosenberg, produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Decision and Order at 9, 16; Director's Exhibit 11 at 14; Employer's Exhibit 3. The March 10, 2016 study yielded non-qualifying values both before and after the administration of a bronchodilator.

Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 19.

[4] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's average reported height was 66.6 inches, and stated that he would use the closest table height of 66.5 inches for purposes of assessing the pulmonary function studies for total disability. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8 n.28.

[5] A "qualifying" pulmonary function study or arterial 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. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Decision and Order at 9, 16; Employer's Exhibit 5. Finally, the August 17, 2016 study, administered at the St. Charles Respiratory Clinic, yielded non-qualifying pre-bronchodilator values and included no post-bronchodilator results. Decision and Order at 9, 16; Claimant's Exhibit 5. Considering the validity of the studies, the administrative law judge found the April 9, 2013[6] study to be invalid, but found that the May 14, 2014,[7] January 22, 2015,[8] March 10, 2016,[9] and August 17, 2016[10] studies produced valid results.

[6] The administrative law judge noted that the technician who conducted the April 9, 2013 study reported that claimant gave his "best efforts." Decision and Order at 9, *quoting* Claimant's Exhibit 4. The administrative law judge further noted, however, that the report summary from the study indicated that there were no acceptable trials and only one reproducible trial. Decision and Order at 16, *referencing* Claimant's Exhibit 4. In addition, Dr. Vuskovich reviewed the results of the April 9, 2013 study and opined that claimant "did not put forth the effort required to generate valid spirometry results." Employer's Exhibit 7. Therefore, the administrative law judge was not persuaded that the study was reliable, and concluded that it was not entitled to any probative weight. Decision and Order at 16.

[7] The administrative law judge noted that the technician who conducted the May 14, 2014 study reported that claimant's cooperation and understanding were "good," and that the study was validated by Dr. Gaziano, who found that the vents were acceptable. Decision and Order at 16; Director's Exhibit 11 at 12, 14. Drs. Vuskovich and Rosenberg reviewed the results of the May 14, 2014 study, however, and opined that claimant gave suboptimal effort. Director's Exhibit 12; Employer's Exhibit 3. Determining that Drs. Vuskovich and Rosenberg did not provide adequate explanations to support their opinions, the administrative law judge found the May 14, 2014 study valid. Decision and Order at 16.

[8] The administrative law judge noted that no physician invalidated the January 22, 2015 study, and that the technician who administered the study indicated that claimant demonstrated good effort and understanding. Decision and Order at 16, *referencing* Employer's Exhibit 3.

[9] The administrative law judge noted that no physician invalidated the March 10, 2016 study, and that the technician who administered the study indicated that claimant demonstrated good effort and understanding. Decision and Order at 16, *referencing* Employer's Exhibit 5.

[10] Dr. Vuskovich reviewed the results of the August 17, 2016 study and indicated by check-mark that the results were unacceptable. Decision and Order at 16-17; Employer's Exhibit 8. The technician who conducted the study, however, reported that

Decision and Order at 15-17. Evaluating the pulmonary function studies as a whole, and noting that the uniformly non-qualifying March 10, 2016 and August 17, 2016 studies are valid and more recent than the other studies by more than a year, the administrative law judge permissibly accorded them the greatest weight. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-148 (6th Cir. 1988) (administrative law judge may credit evidence that better reflects the miner's respiratory or pulmonary status at the time of the hearing); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge properly found that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as there are no qualifying blood gas studies of record and there is no evidence establishing that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 15.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Ajjarapu, Rosenberg, and Tuteur. Decision and Order at 10-14, 17-18; Director's Exhibit 11; Employer's Exhibits 3, 4, 5, 9. Dr. Ajjarapu examined claimant on May 14, 2014 and diagnosed "some pulmonary impairment," but opined that claimant was able to perform his usual coal mine employment. Director's Exhibit 11 at 36. On September 26, 2014, Dr. Ajjarapu submitted a "clarification" report stating that after re-reviewing claimant's pulmonary function testing, and discussing with claimant his current physical capabilities and the exertional demands of his usual coal mine work, she had concluded that claimant is totally disabled from performing his work in the coal mines. *Id*. at 37. In contrast, Dr. Rosenberg examined claimant on January 22, 2015, and opined that claimant is not disabled from a pulmonary perspective from performing his previous coal mining job or similar arduous types of labor. Employer's Exhibit 3 at 4. Dr. Tuteur examined claimant on March 10, 2016, and diagnosed a moderate obstructive ventilatory defect, but concluded that it was "of insufficient magnitude to cause disability from a ventilatory standpoint." Employer's Exhibit 5 at 3-4.

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claimant exhibited "good effort," and that the report summary indicated the American Thoracic Society standards for reproducibility had been met. Decision and Order at 16-17, *referencing* Claimant's Exhibit 5; Employer's Exhibit 8. Observing that Dr. Vuskovich did not offer any explanation for his opinion that the results were unacceptable, the administrative law judge found the August 17, 2016 test valid. Decision and Order at 16-17.

The administrative law judge permissibly accorded little weight to Dr. Ajjarapu's opinion, in part, because her September 26, 2014 revised opinion diagnosing total disability did not address the subsequent pulmonary function tests of record, particularly the "March 10, 2016 and August 17, 2016 tests . . . which had non-qualifying results." *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (recognizing that administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health); Decision and Order at 17-18. It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge provided a valid basis for according diminished weight to the opinion of Dr. Ajjarapu, the only opinion supportive of claimant's burden, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[11] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 18. Consequently, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2).[12] As claimant has failed to prove total disability, an essential element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, an award of benefits is precluded.[13] *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[11] The administrative law judge correctly noted that there are no hospital or treatment notes in the record. Decision and Order at 10.

[12] Because claimant did not establish total disability, he is unable to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). Therefore, we need not address the administrative law judge's length of coal mine employment determination as any error therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[13] A review of the record reveals no evidence of complicated pneumoconiosis. Therefore, claimant cannot invoke the irrebuttable presumption of total

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §§718.204(b)(1), 718.304.