U.S. Department of Labor

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

BRB No. 17-0591 BLA

RONNIE SOUTHWOOD, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 08/30/2018
	)	
and	)	
	)	
SUN COAL COMPANY, c/o HEALTHSMART CCS	)	
	)	
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 Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Ronnie Southwood, Sr., Combs, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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 Denying Benefits (2014-BLA-05632) of Administrative Law Judge Jennifer Gee rendered on a claim filed on July 23, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with eleven years of coal mine employment, consistent with the parties' stipulation and supported by claimant's Social Security Administration (SSA) earnings records. Having found less than fifteen years of coal mine employment, the administrative law judge determined that clamant could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that although claimant established the existence of pneumoconiosis, he did not establish total 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 in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the findings rendered in the Decision and Order below are rational, supported by substantial evidence, and in accordance with applicable law.[3] *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they satisfy this criteria. 33 U.S.C. §921(b)(3), as incorporated by

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[1] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting, on behalf of claimant, that the Board review the administrative law judge's decision, but she 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 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 are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Because claimant's last coal mine employment was in Kentucky, 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); Decision and Order at 3; Director's Exhibits 3, 6; Hearing Transcript at 16.

30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant reported on his application for black lung benefits that he worked for twenty years in underground coal mine employment, ending on May 12, 1996. Director's Exhibit 2. On Form CM-911, entitled Employment History, claimant listed coal mine employment from 1975 to 1995. Director's Exhibit 3. The district director found that claimant had eleven years of coal mine employment between January 1, 1978 and May 28, 1994. Director's Exhibit 55. Claimant and employer agreed at the hearing that claimant worked in and around coal mines for eleven years.[4] Hearing Transcript at 5, 10. In her Decision and Order, the administrative law judge credited claimant with eleven years of coal mine employment, stating: "The parties have agreed that [claimant] had [eleven] years of coal mine employment. This is supported by the [claimant's SSA] earnings report." Decision and Order at 4, *citing* Director's Exhibit 6. We affirm the administrative law judge's finding of less than fifteen years of coal mine employment as it is supported by substantial evidence in the form of claimant's SSA earnings records.[5] *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988) (en banc). Accordingly, we also affirm her determination that claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

[4] Claimant was represented by Robin Napier and Diane Jenkins, also a lay representative, of Stone Mountain Health Services of St. Charles, Virginia, at the hearing. Hearing Transcript at 4.

[5] Although the administrative law judge did not explain her determination that claimant's Social Security Administration earnings records corroborate the parties' stipulation to eleven years of coal mine employment, a review of these records supports her finding. They show that claimant had a total of seven full calendar years of such employment for the periods between 1985 and 1987, and 1990 and 1993. Director's Exhibit 6. Applying the calculation method set forth in 20 C.F.R. §725.101(a)(32)(iii) to the partial years of employment, claimant had no more than five additional years of coal mine employment, falling short of the fifteen years of qualifying coal mine employment required for invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i). The absence of an explanation from the administrative law judge does not, therefore, require remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

II. Establishing Entitlement Without the Section 411(c)(4) Presumption

To establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption,[6] claimant must establish that: he has pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that his total disability is due to pneumoconiosis. 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).

A. Total Disability

The regulations provide that 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 and gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies, or 2) arterial blood gas studies, or 3) medical evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Relevant to 20 C.F.R. §718.204(b)(2)(i), the parties designated seven pulmonary function studies, comprised of four tests that were qualifying[7] before the use of a bronchodilator and eight non-qualifying tests – three performed before the use of a bronchodilator and five performed after the use of a bronchodilator.[8] Director's Exhibit

[6] The administrative law judge correctly found that claimant also cannot establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 17.

[7] 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).

[8] The August 19, 2013 and February 19, 2014 pulmonary function studies yielded qualifying pre-bronchodilator values, and non-qualifying post-bronchodilator values. Director's Exhibit 12; Claimant's Exhibit 5. The pulmonary function studies performed on December 12 and 13, 2013 produced qualifying pre-bronchodilator values, and did not include post-bronchodilator values. Claimant's Exhibit 6; Employer's Exhibit 10. The

12; Claimant's Exhibits 5, 6, 12; Employer's Exhibits 6, 10, 11. We affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i) because a preponderance of the pulmonary function study evidence was non-qualifying.[9] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

The administrative law judge next considered the medical opinions of Drs. Alam, Rosenberg and Jarboe under 20 C.F.R. §718.204(b)(2)(iv).[10] Dr. Alam examined claimant on August 19, 2013, at the request of the Department of Labor (DOL). Director's Exhibit

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March 13, 2013 pulmonary function study produced non-qualifying pre-bronchodilator values, and did not include post-bronchodilator values. Claimant's Exhibit 12. The December 11, 2011 and October 9, 2014 pulmonary function studies produced non-qualifying values before and after the administration of a bronchodilator. Employer's Exhibits 6, 11. The record also contains two pulmonary function studies in claimant's treatment records that the administrative law judge did not consider. Any error in this regard is harmless, however, as the pre-bronchodilator study dated April 15, 2014 was non-qualifying, and the qualifying pre-bronchodilator study done on December 16, 2015 (which Dr. Rosenberg also found was invalid) does not alter the administrative law judge's conclusion that the preponderance of the pulmonary function studies is non-qualifying. *See Larioni*, 6 BLR at 1-1278; Employer's Exhibit 21.

[9] The administrative law judge credited Dr. Vuskovich's opinion invalidating the qualifying pre-bronchodilator pulmonary function studies performed on December 12 and 13, 2013, and February 19, 2014. Decision and Order at 18. Dr. Vuskovich stated that the December 2013 testing was invalid due to lack of effort and the absence of volume time tracings, and that the MVV results were not acceptable on the February 19, 2014 pre-bronchodilator study that was qualifying based on the FEV1 and MVV values. Claimant's Exhibits 5, 6; Employer's Exhibits 3, 20. The administrative law judge did not compare Dr. Vuskovich's findings to those of the administering physicians, nor did she explain why she considered his invalidation of these pulmonary function studies to be reasoned and documented. These errors are harmless, however, as even if the invalidated qualifying pulmonary function studies are counted, the preponderance of the studies remains non-qualifying. *See Larioni*, 6 BLR at 1-1278.

[10] The administrative law judge did not render findings at 20 C.F.R. §718.204(b)(2)(ii) and (iii). Claimant is precluded from establishing total disability under these subsections, however, as the three blood gas studies of record produced non-qualifying values and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8; Director's Exhibit 12; Employer's Exhibits 5, 6.

22. He diagnosed emphysema and a restrictive lung defect, but concluded that claimant is not disabled from a pulmonary standpoint. Director's Exhibit 22. Dr. Rosenberg examined claimant on February 19, 2014 and diagnosed mild restrictive and obstructive impairments, a mildly reduced total lung capacity, and a reduced diffusing capacity. Employer's Exhibit 5. He stated that claimant would be totally disabled from performing his usual coal mine job, but he indicated that the disabling impairment might be temporary, as claimant was recovering from heart surgery and a car accident in which he fractured several ribs. *Id*. Dr. Rosenberg further opined, "to better assess whether or not this disability is long[-]term in nature, it would be best to repeat pulmonary function tests . . . at least three to four months from now." *Id*. In a supplemental report dated September 28, 2016, Dr. Rosenberg reviewed pulmonary function studies dated March 13, 2013, April 15, 2014, and December 16, 2015.[11] Employer's Exhibit 21. He stated that the April 15, 2014 "spirometry is not disabling based on DOL criteria" and that "[t]he most recent valid pulmonary function tests in the file are not qualifying."[12] *Id*. Dr. Jarboe examined claimant on October 9, 2014 and diagnosed a mild to moderate degree of airflow obstruction due to smoking, but opined that claimant is not disabled from a pulmonary standpoint. Employer's Exhibit 6.

The administrative law judge concluded that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19. We affirm this finding because it is rational and supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). As the administrative law judge's accurate summary of the medical opinions reflects, Drs. Alam and Jarboe explicitly stated that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. Decision and Order at 19; Director's Exhibit 22; Employer's Exhibit 6. With respect to Dr. Rosenberg's opinion, the administrative law judge correctly observed both the tentative nature of his initial diagnosis of total disability, and his findings that the subsequent pulmonary function study done on

[11] Dr. Rosenberg also reviewed the March 13, 2013 pulmonary function study, which was performed before the study he obtained during his examination of claimant on February 19, 2014. Employer's Exhibit 21. As for the studies subsequent to his own, Dr. Rosenberg invalidated the December 16, 2015 pulmonary function study because claimant's effort was incomplete and commented that the values generated on the April 15, 2014 study could have been higher than recorded because claimant did not reach a plateau on the time volume curves. *Id*.

[12] The April 15, 2014 study is the most recent study that Dr. Rosenberg reviewed and found to be valid for the purpose of assessing whether claimant had a disabling respiratory or pulmonary impairment. Employer's Exhibit 21.

April 15, 2014 produced "results of greater magnitude than at the time of my evaluation" and was non-qualifying. Employer's Exhibit 21; Decision and Order at 8-9, 19. The administrative law judge permissibly determined, therefore, that Dr. Rosenberg's opinion does not support a finding that claimant has a totally disabling respiratory or pulmonary impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 19.

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, was insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR at 1-19, 1-21(1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 19. In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27.

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