U.S. Department of Labor

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

BRB No. 17-0597 BLA

RALPH UPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOUR ACES MINING, INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYER INSURANCE OF WAUSAU c/o LIBERTY MUTUAL INSURANCE GROUP	)	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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ralph Upton, Middlesboro, Kentucky.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2015-BLA-05794) 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).[2] This case involves a miner's subsequent claim filed

[1] The administrative law judge noted that a hearing was initially held in this case on June 3, 2016, at which time claimant informed her that he wished to seek counsel and asked for a continuance, which was granted. Decision and Order at 4, *referencing* June 3, 2016 Hearing Transcript at 3-4. The hearing was rescheduled for December 1, 2016. By letter dated July 13, 2016, the administrative law judge properly informed claimant of his right to be represented by an attorney of his choice, without charge to him, and provided him with a list of resources to assist him in obtaining counsel. She also informed claimant that if he did not obtain counsel, he should nonetheless expect to go forward with the new hearing. At the December 1, 2016 hearing claimant stated that he was unable to obtain counsel and was representing himself. Hearing Transcript at 4-5. The administrative law judge conducted a thorough examination of claimant, eliciting testimony on the elements of entitlement in his claim. Hearing Transcript at 4-5, 19-28, 34. Accordingly, the administrative law judge complied with the requirements of 20 C.F.R. §725.362(b) in conducting the hearing. 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304, 1-307 (1984).

[2] The administrative law judge entitled her decision: "Decision and Order Granting Employer's Renewed Motion for Summary Decision and Dismissing Claimant's Claim." Decision and Order at 1. The regulations provide that "[a] full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law." 20 C.F.R. §725.452(c). While the administrative law judge purported to grant employer's motion on the grounds that "the record contains no genuine issue of material fact that claimant is not totally disabled," she in fact held a full hearing on December 1, 2016. Decision and Order at 2, 4, 5. Further, to the extent the administrative law judge stated that claimant's claim was "dismissed," this was error, as the requirements for the dismissal of a claim have not been met. *See* 20 C.F.R. §725.465. This error was harmless, however, as the administrative law judge also stated that "[i]n other words . . . Claimant's claim is denied." Decision and Order at 12 n.13; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

on August 11, 2014.[3]

The administrative law judge found that the evidence does not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore 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),[4] or establish entitlement to benefits, without the benefit of the presumption, under 20 C.F.R. Part 718.[5] Accordingly, the administrative law judge denied benefits.[6]

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[3] Claimant filed two prior claims that were both finally denied. Claimant's most recent prior claim, filed on March 19, 2012, was denied by the district director on December 31, 2012 because claimant failed to establish any element of entitlement. Director's Exhibit 2 at 10. Claimant took no further action on that claim.

[4] 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.

[5] The administrative law judge did not render a length of coal mine employment determination in this case. The district director credited claimant with seven years of coal mine employment, from January 1, 1978 to December 31, 1992, in each of his three claims. Director's Exhibits 1 at 5; 2 at 11, 29 at 9. On his coal mine employment history form, claimant listed coal mine employment in 1980, 1981, 1982, 1983, 1985, 1987, 1988, 1990, 1991 and 1992. Director's Exhibit 1 at 166-67.

[6] When a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish pneumoconiosis or total disability. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total respiratory disability. *See* 20 C.F.R. §725.309(c)(3).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file 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 Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (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.[7] 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).

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 total disability is established by: qualifying pulmonary function studies or arterial blood gas studies,[8] 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).

Relevant to 20 C.F.R. § 718.204(b)(2)(i), the administrative law judge considered the results of four pulmonary function studies dated June 22, 2002, June 6, 2012, October

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

29, 2014, and April 12, 2016.[9] Director's Exhibits 1, 2, 12; Employer's Exhibit 1. The administrative law judge properly found that all of the pulmonary function studies are non-qualifying and that, therefore, this evidence fails to establish total respiratory disability.[10] 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); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 6-7.

Likewise, the administrative law judge properly determined that the four arterial blood gas studies of record, dated June 22, 2002, June 6, 2012, October 29, 2014, and April 12, 2016, produced non-qualifying values. Director's Exhibits 1, 2, 12; Employer's Exhibit 1. Thus we affirm, as supported by substantial evidence, the administrative law judge's determination that total respiratory disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 8-9.

Similarly, we affirm the administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure and, thus, total disability cannot be demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 9.

[9] Because this is a subsequent claim, claimant had the burden of establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 based on new evidence submitted with his August 11, 2014 claim. Director's Exhibit 4. Here, however, the administrative law judge considered Dr. Baker's medical opinions from the prior claims, including the objective tests he administered, together with the new evidence developed in connection with the current claim. Director's Exhibits 1 at 49, 2 at 122.

[10] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that the preponderant evidence shows that claimant's height is 69 inches, and stated that she would use the closest greater table height of 69.3 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 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Baker,[11] Dahhan,[12] and McSharry[13] who each described the results of claimant's objective testing as "normal" and opined that he does not have a totally disabling respiratory impairment. Director's Exhibits 1, 2, 12; Employer's Exhibit 1. Thus, the administrative law judge properly determined that claimant failed to demonstrate that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G.*

[11] In his June 22, 2002 report, Dr. Baker diagnosed Coal Workers' Pneumoconiosis, 1/0, and legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and smoking. Dr. Baker emphasized, however, that claimant's pulmonary function study and blood gas study were "within normal limits," and that claimant had no impairment and retained the respiratory capacity to perform his usual coal mine work. Director's Exhibit 1 at 49. In his June 6, 2012 report, Dr. Baker stated: "The patient's pulmonary function studies and arterial blood gases are both normal. He primarily has Coal Workers' Pneumoconiosis 1/0 and chronic bronchitis. This would be only a mild impairment. He would have the pulmonary capacity to perform the duties required in his last coal mine job." Director's Exhibit 2 at 122, 126. Dr. Baker listed claimant's usual coal mine work as a "roof bolter, [continuous] miner, scoop, and shuttle car [operator]." *Id.* at 122.

[12] In a report dated October 29, 2014, Dr. Dahhan noted that claimant worked underground as a scoop, shuttle car, and continuous miner operator. Director's Exhibit 12 at 17. He stated that claimant "has no findings to indicate any functional pulmonary impairment and/or disability as confirmed by the normal clinical examination of the chest, normal pulmonary function studies, normal blood gases at rest and after exercise, and negative x-ray reading." Director's Exhibit 12 at 18. Thus, Dr. Dahhan concluded that claimant "retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand." *Id.*

[13] In a report dated April 20, 2016, Dr. McSharry noted that claimant's last coal mining job for at least a year was as a continuous miner operator, which required "a 1 or 2 hour period of heavy exertion on most days," but otherwise required medium to light exertion. Employer's Exhibit 1 at 3. He stated that claimant's pulmonary function testing was normal "other than for diffusion abnormalities" and that his arterial blood gas testing was also normal. *Id.* at 2. Dr. McSharry concluded that based on the results of his examination and testing, as well as his review of additional medical records, "there is no disabling respiratory impairment in this claimant." *Id.*

Moore & Sons, 9 BLR 1-4 (1986) (en banc); Decision and Order at 9-11. Because this determination is supported by substantial evidence, it is affirmed.

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.[14] *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 11. 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).[15] 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.[16] *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[14] The administrative law judge noted that claimant testified at the formal hearing regarding his pulmonary condition. The administrative law judge properly found, however, that the regulation set forth in 20 C.F.R. §718.204(d)(5) precluded her reliance on lay evidence to establish total disability when, in cases like this, the record contains medical evidence that addresses the miner's pulmonary or respiratory condition. 20 C.F.R. §718.204(d)(5); Decision and Order at 11 n.12.

[15] 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, any error in the administrative law judge's failure to make a length of coal mine employment determination would be harmless. *See Larioni*, 6 BLR at 1-1278. Additionally, because the record contains no evidence of complicated pneumoconiosis, claimant cannot 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); *see* 20 C.F.R. §§718.204(b)(1), 718.304.

[16] In light of our affirmance of the denial of benefits, the administrative law judge's failure to determine whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 prior to reviewing the old and new evidence of total disability together, is harmless. *See Larioni*, 6 BLR at 1-1278.

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