U.S. Department of Labor

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

BRB No. 18-0445 BLA

CHARLES BURCHETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UPTOWN MINING CORPORATION	)	
	)	DATE ISSUED: 08/07/2019
Employer-Respondent	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-05098) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on October 17, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with eleven years of underground coal mine employment, as stipulated by the parties, but found he is not totally disabled.[2] 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts the administrative law judge erred in finding he did not establish total disability based on the pulmonary function studies and medical opinions. Claimant further alleges the administrative law judge erred in not rendering findings on the issues of pneumoconiosis and disability causation. Additionally, claimant argues that because the administrative law judge discredited Dr. Alam's pulmonary function studies, he has not received a complete pulmonary evaluation as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting she satisfied her obligation to provide claimant with a complete pulmonary evaluation.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[1] Claimant's previous claim, filed on March 5, 1992, was finally denied by Administrative Law Judge Martin J. Dolan, Jr., on September 14, 1993, for failure to establish total disability. Director's Exhibit 1. The Board affirmed Judge Dolan's decision on appeal. *Burchett v. Uptown Mining Corp.*, BRB No. 93-2463 BLA (Jan. 24, 1995) (unpub.). Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 2.

[2] As claimant established fewer than fifteen years of coal mine employment he is unable to invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that: claimant established eleven years of coal mine employment; he does not have complicated pneumoconiosis, 20 C.F.R. §718.304; and he did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[4] 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 he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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). Because claimant's prior claim was denied for failure to establish total disability, Director's Exhibit 1, he had to submit new evidence establishing he is totally disabled in order to obtain a merit review of his subsequent claim. *Id.*

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). Total disability may be established by: qualifying[5] pulmonary function studies or 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). If the administrative law judge finds total disability established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See*

[4] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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); Director's Exhibit 4.

[5] 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).

Defore v. Ala. By-Products Corp., 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

I. Pulmonary Function Studies

The record contains nine pulmonary function studies. Director's Exhibits 9, 10, 18; Claimant's Exhibits 6, 7; Employer's Exhibits 1, 2, 4, 5-9. The administrative law judge determined that only three of the studies, dated April 26, 2013, September 20, 2013, and May 18, 2017 were valid.[6] Decision and Order at 18. He found the September 20, 2013 study qualifying, before and after use of a bronchodilator, and the April 26, 2013 and May 18, 2017 studies non-qualifying, before and after use of a bronchodilator. *Id*. at 19. Finding the more recent, non-qualifying May 18, 2017 pre-bronchodilator study was the most probative of claimant's respiratory condition, the administrative law judge concluded claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(i). *Id*. at 20, *citing 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).

Claimant argues that the administrative law judge mischaracterized the May 18, 2017 pulmonary function study as non-qualifying. Claimant's Brief at 17. We disagree.

A pulmonary function study is qualifying if the FEV1 value is equal to or less than the value listed in Table B1 (Males), Appendix B to 20 C.F.R. Part 718, for claimant's age and height, and if: either the FVC or MVV value is equal to or less than the value listed in the applicable table for the miner's age and height, or the FEV1/FVC ratio is equal to or less than 55 percent. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge noted the nine studies listed varying heights for claimant, ranging from sixty-two to sixty-nine inches. Decision and Order at 6 n.4. He permissibly resolved the conflict by averaging the various heights and found claimant's actual height is 65.5 inches. *Id.*; *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height). Applying claimant's age of 62

[6] We affirm, as unchallenged, the administrative law judge's determinations that there are only three valid pulmonary function studies, and that two pulmonary function studies conducted by Dr. Alam as part of the Department of Labor (DOL) pulmonary evaluation, on December 3, 2014 and May 26, 2015, were invalid due to poor effort. *See Skrack*, 6 BLR at 1-711 (1983); Decision and Order at 16, 8-19; Director's Exhibit 9.

years when the May 18, 2017 study was conducted and the "closest" table height value of 65.4 inches, the administrative law judge correctly found that the study was non-qualifying as the FEV1 and FVC results did not satisfy the table values.[7] Decision and Order at 7.

Additionally, even if we were to apply a lesser height of 65 inches, as suggested by claimant, the May 18, 2017 study is still non-qualifying.[8] Claimant's Brief at 17. Under Appendix B, for a miner 62 years of age and 65 inches tall, the FEV1 value must be equal to or less than 1.62. The May 18, 2017 study is non-qualifying because it had FEV1 values of 2.07 and 1.72, which exceed the table values.[9] Table B 1, Males, Appendix B; Employer's Exhibit 5.

For these reasons, we reject claimant's contention the administrative law judge mischaracterized the May 18, 2017 study as non-qualifying. Because claimant raises no other specific arguments with regard to the administrative law judge's weighing of the pulmonary function studies, we affirm his determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 20; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

---

[7] Under Appendix B, for a miner 62 years of age and 65.4 inches tall, the FEV1 value must be equal to or less than 1.65. In addition to a qualifying FEV1 value, either the FVC value must be equal to or less than 2.12, or the MVV value equal to or less than 65, or the FEV1/FVC ratio equal to or less than 55 percent. The May 18, 2017 study had a pre-bronchodilator FEV1 of 2.07 and a post-bronchodilator FEV1 of 1.72, which are non-qualifying. Employer's Exhibit 5. The study also had a pre-bronchodilator FVC value of 2.32 and a post-bronchodilator FVC value of 1.72, which are non-qualifying. *Id*. No MVV values were obtained. *Id*. The FEV1/FVC ratio was non-qualifying with a pre-bronchodilator value of 89 percent and a post-bronchodilator value of 100 percent. *Id*.

[8] Claimant states that "for someone age 62 years old and 65 inches tall, an FVC result of 2.08 or less would be qualifying" Claimant's Brief at 17. The pre-bronchodilator FVC value of 2.32 exceeds the table value of 2.08 and is non-qualifying. *Id*. Although the post- bronchodilator FVC of 1.72 is less than the table value, the May 18, 2017 study is still non-qualifying overall because it did not include a qualifying FEV1. Employer's Exhibit 5.

[9] The May 18, 2017 study is also non-qualifying if we apply the table values for a miner 65.7 inches tall and age 62. Again the pre-bronchodilator FEV1 of 2.07 and a post-bronchodilator FEV1 of 1.72 exceed the FEV1 table value of 1.68. *See* Appendix B.

II. Medical Opinions

Claimant next contends the administrative law judge erred in not crediting the opinion of his treating physician, Dr. Sikder, that he is totally disabled. Claimant's Brief at 20. Contrary to claimant's contention, an administrative law judge is not required to give greater weight to the opinion of a treating or examining physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5); *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). Rather, the regulation provides that the administrative law judge may accord controlling weight to a treating physician's opinion only if the opinion is also determined to be credible "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003) (holding that the opinions of treating physicians get the deference they deserve based on their power to persuade).

The administrative law judge permissibly determined that Dr. Sikder's opinion was not reasoned because it was based, in part, on the invalid June 30, 2015 pulmonary function study.[10] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 20; Director's Exhibit 20. The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge, and the Board is not empowered to reweigh the evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson*, 12 BLR at 1-113. Thus, we affirm the administrative law judge's finding that Dr. Sikder's opinion is entitled to little probative weight despite her role as claimant's treating physician.

As there are no other new medical opinions in the record supportive of claimant's burden of proof,[11] we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole.[12] We therefore affirm the administrative law judge's finding that claimant did

[10] The administrative law judge also noted Dr. Sikder did "not adequately set forth the clinical findings, observations, facts, and other data upon which she based her diagnosis" of total disability. Decision and Order at 21.

[11] Drs. Baker, Alam, Fino, and Dahhan opined that claimant is not totally disabled. Director's Exhibit 9; Claimant's Exhibit 12; Employer's Exhibits 4, 6, 10.

[12] Contrary to claimant's contention, because the administrative law judge found the new evidence did not establish total disability, an essential element of entitlement, it was not necessary to consider whether he has pneumoconiosis. Moreover, claimant's failure to

not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

III. Complete Pulmonary Evaluation

Claimant asserts that because Dr. Alam examined him as part of the Department of Labor examination, and his pulmonary function studies were found invalid by the administrative law judge, the Director did not fulfill her obligation to provide him with a complete pulmonary evaluation. Claimant's Brief at 21. We disagree.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). A complete pulmonary evaluation "includes a report of physical examination, a pulmonary function study, a chest radiograph, and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). If a test result is unreliable due to the miner's "lack of effort," the Director must afford the miner "one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

As the Director correctly notes, claimant was provided two pulmonary function studies in accordance with 20 C.F.R. §725.406(c), but each study was invalidated based on poor effort.[13] We must conclude, under the facts of this case, that the Director has discharged her obligation to afford claimant an "additional opportunity to produce a satisfactory result" on his pulmonary function test. 20 C.F.R. §725.406(c). Moreover, Dr. Alam conducted all medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and specifically linked his conclusions to those tests. Director's Exhibit 9. The Director therefore met her statutory obligation to provide claimant with a complete pulmonary

---

establish total disability precludes a finding of total disability due to pneumoconiosis – the causation element. *See 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).

[13] Claimant was examined by Dr. Alam on behalf of the DOL on December 3, 2014. Director's Exhibit 9. The pulmonary function study obtained during that examination was invalidated by Dr. Gaziano for less than optimal effort, cooperation, and comprehension by claimant. *Id*. The DOL provided claimant a second pulmonary function study on May 26, 2015, which was also invalidated by Dr. Gaziano for the same reasons. *Id*.

evaluation under 30 U.S.C. §923(b). *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge