U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0303 BLA

ROGER K. McVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
S.S. JOE BURFORD, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 12/30/2016
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Roger K. McVey, Coalton, West Virginia, *pro se*.

Ashley M. Harman and Lucinda Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2011-BLA-5249) of Administrative Law Judge Natalie A. Appetta, 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). This case involves a subsequent claim filed on March 15, 2010, and is before the Board for the second time.[1]

On October 4, 2012, Administrative Law Judge Michael P. Lesniak issued the initial decision on the subsequent claim. Judge Lesniak credited claimant with no more than twelve years of coal mine employment, and found that claimant could not invoke the rebuttable presumption under Section 411(c)(4) of the Act that he is totally disabled due to pneumoconiosis.[2] Judge Lesniak further found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). Judge Lesniak, therefore, found that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final.[3] *See* 20 C.F.R. §725.309. Accordingly, benefits were denied.

Upon claimant's appeal without the assistance of counsel, the Board affirmed Judge Lesniak's determination that claimant failed to establish a sufficient length of coal mine employment to invoke the Section 411(c)(4) presumption, and his finding that the new evidence of record failed to establish that any of the applicable conditions of

[1] Claimant's initial claim, filed on June 26, 1995, was denied by the district director as an abandoned claim on October 15, 1996. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim 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). Because claimant's initial claim was denied by reason of abandonment, claimant could meet his burden under Section 725.309(c) by establishing any of the requisite elements of entitlement with new evidence submitted in support of the instant claim. 20 C.F.R. §725.409(c).

entitlement had changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309. The Board vacated the denial of benefits, however, and remanded the case to the district director for a complete pulmonary evaluation, in light of the concession by the Director, Office of Workers' Compensation Programs (the Director), that the medical report of Dr. Gaziano was incomplete because it lacked a valid pulmonary function study. Director's Exhibit 32; *McVey v. S.S. Joe Burford, Inc.*, BRB No. 13-0033 BLA (July 29, 2013) (unpub.).

After additional testing, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 40. Claimant requested a hearing, and the case was transferred to the Office of Administrative Law Judges (OALJ). Director's Exhibits 41, 44. By Order dated September 16, 2015, Administrative Law Judge Drew Swank granted claimant's request that the hearing be cancelled and that a decision on the record be issued. The parties were given additional time to present evidence. Subsequently, the case was reassigned to Administrative Law Judge Natalie A. Appetta (the administrative law judge).

In her Decision and Order dated March 10, 2016, the administrative law judge found that the claim was timely filed and that employer was the properly designated responsible operator. The administrative law judge credited claimant with 11.55 years of coal mine employment, and found that claimant could not invoke the Section 411(c)(4) rebuttable presumption. The administrative law judge further found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge found, therefore, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Carrier responds in support of the denial of benefits. The Director has not filed a brief in this appeal.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue 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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are

rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & 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 BLER 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).

Length of Coal Mine Employment

Because the administrative law judge's determination of the length of claimant's coal mine employment is relevant to whether claimant can 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), we will review the administrative law judge's finding that claimant established less than fifteen years of coal mine employment. The Board affirmed Judge Lesniak's finding that claimant worked for no more than twelve years in coal mine employment, as claimant conceded that he worked in coal mine employment only from 1973 to 1985.[5] 2012 Decision and Order at 7-8; Director's Exhibit 8; *McVey*, slip op. at 3-4.

Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] Judge Lesniak credited claimant with 11.55 years of coal mine employment, noting that claimant alleged, and claimant's Social Security Records support, that he worked in coal mine employment from 1973 through 1985. Director's Exhibits 7, 8. Judge Lesniak determined that "even if [claimant] received full credit for each of these years, he could not have worked more than twelve years in coal mining." 2012 Decision and Order at 8.

it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). To establish that he worked the requisite fifteen years in coal mining necessary to invoke the Section 411(c)(4) presumption, claimant submitted new evidence to the administrative law judge on remand alleging employment after 1985 that "should put [him] well over [the] necessary time of exposure." Claimant's Exhibit 1 at 5 (unpaginated). Specifically, claimant submitted a Certificate of Incorporation and Articles of Incorporation for a company he formed on August 18, 2011; the company's state certification as a mine contractor dated May 9, 2012; state approval of the company's mine safety program from 2012; the company's state safety and training reports from 2012, 2014, and 2015; various company certifications; and claimant's explanatory cover letter.[6] Claimant's Exhibits 1, 2.

The administrative law judge accurately summarized claimant's new evidence, and determined that it showed "at best" that claimant was the only employee of the company, observing that the monthly reports indicated no working employees at the mine sites.[7] The administrative law judge found no indication that claimant actually performed any work underground or in conditions substantially similar to those in an underground mine. Decision and Order at 6. The administrative law judge further found that there was no evidence showing that claimant earned any additional wages for coal mine work performed since 1985, and that claimant conceded that "[he has not] and clearly [is] not able to do any work." Claimant's Exhibit 1 at 5 (unpaginated); *Id*. The administrative law judge noted that to be eligible to receive credit for one year of coal mine employment, a miner must have worked "in or around a coal mine or mines for at least 125 "working days,"' and that a working day is defined as "any day or part of a day for which a miner received pay for work as a miner . . . ." 20 C.F.R. § 725.101(a)(32). The administrative law judge concluded that the evidence provided and the lack of additional earnings, along with claimant's admission that he has not worked, failed to support a finding of any additional years of coal mine employment. *Id*. Thus, relying on claimant's Social Security Records, his prior hearing testimony, and the findings of Judge Lesniak, the administrative law judge credited claimant with 11.55 years of coal mine employment. Because it is rational and supported by substantial evidence, we affirm the

[6] Claimant's exhibits also contain articles reprinted from The Center for Public Integrity website; a February 5, 2014, ophthalmology note with information showing "post-traumatic stress disorder (PTSD) 100% and limited motion of arm 20%" circled; medication information regarding claimant's PTSD, anxiety or agitation medication, with a hand-written notation of "not agent orange." Claimant's Exhibits 1, 2.

[7] The reports also indicate that no mine sites were identified. Claimant's Exhibit 1.

administrative law judge's finding that claimant established 11.55 years of coal mine employment, and not the fifteen years necessary to invoke the Section 411(c)(4) rebuttable presumption pursuant to 20 C.F.R. §718.305. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Muncy*, 25 BLR at 1-27.

The Existence of Pneumoconiosis

Section 718.202(a)(1)

The record contains four interpretations of two x-rays taken on April 13, 2010 and March 25, 2014 that were submitted in support of this subsequent claim. Dr. Gaziano, a B reader, and Dr. Wolfe, a B reader and Board-certified radiologist, interpreted the April 13, 2010 x-ray as negative for pneumoconiosis.[8] Director's Exhibit 12; Employer's Exhibit 5.

Dr. Smith, a B reader and Board-certified radiologist, and Dr. Wolfe interpreted the March 25, 2014 x-ray as negative for pneumoconiosis. Director's Exhibits 35, 38. Because there are no positive interpretations of the new x-ray evidence, we affirm the administrative law judge's finding that the new x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[9] Decision and Order at 9-11, 24.

[8] On remand, employer substituted Dr. Wolfe's interpretation of the April 13, 2010 x-ray for that of Dr. Wheeler. Director's Exhibit 21; Employer's Exhibit 5. While the administrative law judge considered interpretations by both Dr. Wolfe and Dr. Wheeler, in violation of the evidentiary limitations at 20 C.F.R. §725.414, any error is harmless, as the April 13, 2010 x-ray was uniformly interpreted as negative for pneumoconiosis. Decision and Order at 9-11; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.414.

[9] The record also contains two interpretations of a digital x-ray taken on January 19, 2012. Dr. Bellotte, a B reader, interpreted it as negative on January 19, 2012, and Dr. Tarver, a B reader and Board-certified radiologist, interpreted it as negative on December 18, 2014. While the administrative law judge considered both interpretations as "other medical evidence" at 20 C.F.R. §718.107, Dr. Tarver's interpretation should have been considered at 20 C.F.R. §718.202(a)(1), because this claim was filed before May 19, 2014 and the x-ray was read after May 19, 2014. *See* 79 Fed. Reg. 21,606 (Apr. 17, 2014); *see also* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11, issued by the Department of Labor on June 2, 2014 and September 29, 2014, respectively. Any error is

Section 718.202(a)(2), (3)

Because the record does not contain biopsy evidence or evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and the presumption at 20 C.F.R. §718.305 is inapplicable, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). Decision and Order at 24.

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis or legal pneumoconiosis[10] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that the medical opinion evidence considered by Judge Lesniak did not contain a diagnosis of clinical pneumoconiosis, and that the new evidence submitted on remand also did not contain such a diagnosis. Decision and Order at 25-27; Director's Exhibits 12, 31, 35; Employer's Exhibits 1, 7, 8; Claimant's Exhibits 1, 2. As it is supported by substantial evidence, we affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(4); *see Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

With respect to the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions and qualifications of Drs. Gaziano, Bellotte, Castle, and Scattaregia.[11] The administrative law judge determined that Drs. Gaziano,

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harmless, however, as both doctors interpreted the January 19, 2012 x-ray as negative. Decision and Order at 11-12, 24; *see Larioni*, 6 BLR at 1-1278.

[10] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[11] The administrative law judge correctly determined that Dr. Gaziano is Board certified in internal medicine and chest diseases, and Drs. Bellotte and Castle are Board certified in internal medicine with a subspecialty in pulmonary diseases. Decision and Order at 15-16; Employer's Exhibits 2, 8; Director's Exhibit 12. The administrative law judge noted that Dr. Scattaregia is in private practice in general medicine and clinical cardiology and has held various director positions at Stonewall Jackson Memorial

Bellotte, and Castle offered well-reasoned opinions that claimant does not suffer from legal pneumoconiosis,[12] as she found that the objective evidence of record supported their conclusions. Decision and Order at 26-27. In contrast, the administrative law judge determined that Dr. Scattaregia's opinion was internally inconsistent and not well reasoned. Decision and Order at 25-26. After indicating that claimant never smoked, that he had a history of heart conditions, and that the objective testing was normal with "no pulmonary disability," Dr. Scattaregia diagnosed chronic obstructive pulmonary disease (COPD) due to genetics, environment, tobacco, and coal and rock dust. Director's Exhibit 35. The administrative law judge found that Dr. Scattaregia's diagnosis of COPD related to "tobacco" was inconsistent with his reporting that claimant never smoked. Decision and Order at 25-26; Director's Exhibit 35.. The administrative law judge also noted that Dr. Scattaregia provided no explanation for his diagnosis, and that his report lacked a detailed coal mine employment history. Thus, the administrative law judge permissibly found that, because Dr. Scattaregia failed to provide a basis for his diagnosis of COPD due in part to coal and rock dust, his opinion was not sufficiently reasoned, and was entitled to less weight. Decision and Order at 25-26; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As the administrative law judge's credibility determinations are supported by substantial evidence, we affirm her finding that the medical opinion evidence does not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Lastly, pursuant to 20 C.F.R. §718.107, claimant may establish the existence of pneumoconiosis based on other evidence not specifically provided for in 20 C.F.R. §718.202(a). The administrative law judge reviewed claimant's medication records and his February 5, 2014 ophthalmology note with "post-traumatic stress disorder 100% and limited motion of arm 20%" circled. Finding that they contained only factual conclusions but provided no information as to claimant's pulmonary or respiratory condition, the

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Hospital in Weston, West Virginia. Decision and Order at 14; Director's Exhibit 35. Based on their various Board certifications and expertise in the area of pulmonary medicine, the administrative law judge permissibly concluded that the credentials of Drs. Gaziano, Bellotte and Castle outweighed those of Dr. Scattaregia. Decision and Order at 14-16, 26; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-341 (4th Cir. 1998).

[12] Dr. Gaziano opined that claimant does not suffer from any type of pulmonary disease, and Drs. Bellotte and Castle found no evidence of legal pneumoconiosis. Director's Exhibits 12, 31; Employer's Exhibits 1, 7, 8.

administrative law judge rationally concluded that this evidence was of little probative value. Similarly, the administrative law judge properly found that the articles from the Public Integrity website had no relationship to claimant personally or to his medical conditions and, therefore, were of "little, if any, probative value." Decision and Order at 26; Claimant's Exhibits 1, 2. The administrative law judge also permissibly found that claimant's 1985 5% disability award from the West Virginia Workers' Compensation Fund was of limited probative value, as there was no indication on what the award was based and no explanation of the evidence that supported the award. Decision and Order at 27; *see Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); Director's Exhibit 9. We, therefore, affirm the administrative law judge's finding that the other medical evidence was insufficient to establish the existence of pneumoconiosis at Section 718.107, as supported by substantial evidence.

Total Disability

The record contains two new pulmonary function studies, an April 13, 2010 study conducted by Dr. Gaziano that was invalidated due to poor effort, and a March 11, 2014 study conducted by Dr. Scattaregia that produced non-qualifying values.[13] Consequently, we affirm the administrative law judge's finding that the new pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The record contains three new arterial blood gas studies conducted on April 13, 2010, January 19, 2012, and March 11, 2014. Director's Exhibits 12, 31, 35. The administrative law judge correctly found that all of these studies are non-qualifying. Decision and Order at 13-14. Thus, we affirm the administrative law judge's finding that the new arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[14]

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that none of the new medical opinions supported a finding of total disability. The administrative law judge correctly stated that those physicians who submitted new

[13] 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).

[14] There is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii).

medical opinions, namely Drs. Gaziano, Bellotte, Scattaregia, and Castle, concluded that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.[15] Decision and Order at 27; Director's Exhibits 12, 31, 35; Employer's Exhibits 1, 7, 8. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Compton*, 211 F.3d at 207-08, 22 BLR at 2-168, or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the new evidence of record fails to establish a change in any of the applicable conditions of entitlement since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(c).

[15] Drs. Gaziano and Scattaregia did not diagnose a totally disabling pulmonary impairment. Director's Exhibit 12. Dr. Bellottte stated that there is no basis to conclude that claimant has a pulmonary disability that would prevent him from performing his previous coal mine employment. Employer's Exhibit 8, Director's Exhibit 31. Dr. Castle opined that claimant retains the respiratory capacity to perform his previous coal mining duties from a pulmonary or respiratory standpoint. Employer's Exhibits 1, 7.

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