U.S. Department of Labor

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

BRB No. 17-0682 BLA

WILLIAM L. BELT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 12/10/2018
	)	
ISLAND CREEK KENTUCKY MINING	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2013-BLA-05231) 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 subsequent claim filed on March 12, 2012, and has previously been before the Board.[1]

In his prior decision, the administrative law judge credited claimant with sixteen years of underground coal mine employment and determined that he has a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer did not rebut the Section 411(c)(4) presumption, and awarded benefits accordingly.

Employer appealed. The Board vacated the administrative law judge's finding that the medical opinion evidence established total disability and remanded the case to the administrative law judge. The Board instructed him to determine the exertional requirements of claimant's usual coal mine work as a cutting machine/continuous miner operator and to address whether the physicians accurately understood these requirements.[3]

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[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. The most recent prior claim, filed on August 9, 2004, was finally denied by the district director on May 24, 2005, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 2 at 5-6.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he 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] The Board affirmed the administrative law judge's findings that claimant worked for at least sixteen years in underground coal mine employment and had a smoking history of at least thirty-five years. Additionally, the Board affirmed the administrative law judge's determination that employer failed to rebut the presumption at Section 411(c)(4). Consequently, the Board held that if, on remand, claimant establishes total respiratory disability, he will have established a change in a condition of entitlement under 20 C.F.R. §725.309, invocation of the Section 411(c)(4) presumption, and entitlement to benefits. *See Belt v. Island Creek Kentucky Mining*, BRB No. 16-0293 BLA, slip op. at 4-6, 8-10, 11, 15 (Mar. 28, 2017) (unpub.).

Belt v. Island Creek Kentucky Mining, BRB No. 16-0293 BLA, slip op. at 4-6 (Mar. 28, 2017) (unpub.).

On remand, the administrative law judge found that claimant's usual coal mine work required medium labor, with periodic heavy labor. He further determined that Dr. Baker's opinion, as supported by Dr. Zaldivar's opinion, established that claimant is totally disabled. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement and invocation of the Section 411(c)(4) presumption. Based on the Board's affirmance of his prior determination that employer did not rebut the presumption, the administrative law judge awarded benefits.

Employer contends on appeal that the administrative law judge erred in finding total disability established at 20 C.F.R. §718.204(b)(2). Clamant responds, urging affirmance of the award of benefits. Employer has replied and reiterates its arguments. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Total Disability – Exertional Requirements

Employer asserts that the administrative law judge erred in going outside of the record and using the *Dictionary of Occupational Titles* (DOT) to determine the exertional requirements of claimant's usual coal mine work. We disagree. Pursuant to 29 C.F.R. §18.45:

> Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice at the hearing *or by reference in the administrative law judge's decision*, of the matters so noticed, and shall be given *adequate opportunity* to show the contrary.

[4] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 8; Hearing Transcript at 17. Accordingly, 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).

29 C.F.R. §18.45 (emphasis added); *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9 (1978). Consistent with 29 C.F.R. §18.45, the administrative law judge referenced the DOT in his Decision and Order[5] and the parties had thirty days to object to his use of the DOT classifications to assess the exertional requirements of claimant's work as a cutting machine/continuous miner operator. Decision and Order on Remand at 14 n.18. We therefore reject employer's allegation of error. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989).

Employer further argues that there is no factual basis for the administrative law judge's finding that claimant's usual coal mine work required heavy labor.[6] We reject employer's contention as the administrative law judge's conclusion is supported by substantial evidence. Claimant reported on his employment history forms that he had to lift fifty pounds several times per day, carry thirty pounds for a distance of forty yards several times per day, and that he was required to lift "very heavy" timbers and machine cables. Director's Exhibits 1 at 90, 6 at 1. At the hearing, claimant described his job as a cutting machine/continuous miner operator, which required him to walk approximately a mile per day, carry twenty-four pounds of drill bits, change the drill bits ten to twelve times per shift, and wear a tool belt weighing ten to twelve pounds. Hearing Transcript at 21, 30-31, 32, 36-38. Claimant also stated that he would fill in as a roof bolter, shot loader, and pinner, jobs requiring him to lift timbers and cables weighing over fifty pounds, and to

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[5] Referring to 20 C.F.R. § 404.1567, "a Social Security Administration regulation that adopts the exertional levels defined in the Dictionary of Occupational Titles [(DOT] for purposes of assessing disability," the administrative law judge observed that the regulation defines "medium" work as lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds and "heavy" work as lifting no more than one-hundred pounds with frequent lifting or carrying of fifty pounds or more. Decision and Order on Remand at 14 n. 8.

[6] Employer also generally alleges that the administrative law judge did not consider all evidence relevant to claimant's exertional requirements and that claimant's testimony on the exertional requirements of his usual coal mine work is unreliable. Because employer's unsupported assertions are not raised with sufficient specificity, we decline to address them. *See* 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (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).

drill up to one-hundred three-pound pins into the roof of the mine per shift.[7] *Id*. at 28-29, 30-31, 36-37. Dr. Chavda reported that claimant's job as a cutting machine operator required him to lift cables weighing between thirty and fifty pounds and other heavy supplies. Director's Exhibit 11 at 30. Dr. Baker indicated in his medical report that as a continuous miner operator, claimant lifted sixty to eighty pounds. Claimant's Exhibit 4 at 1. At his deposition, Dr. Baker described claimant's continuous miner operator job as "light to moderate" work, with light work defined as lifting ten to twenty pounds and moderate work defined as lifting twenty to fifty pounds. Employer's Exhibit 10 at 32.

Based on this evidence, the administrative law judge rationally determined that claimant's work as a continuous miner operator required wearing a tool belt weighing between ten and twelve pounds, walking about a mile a day, frequently lifting drill bit kits weighing approximately twenty-four pounds, and occasionally lifting thirty to fifty pound cables, and other materials weighing sixty to eighty pounds. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 14. He therefore permissibly concluded that claimant's usual coal mine work was "at the medium level of exertion" and "periodically . . . at the heavy level of exertion." *Jericol Mining, Inc., v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); Decision and Order on Remand at 14 n.18. Accordingly, we affirm the administrative law judge's finding that claimant's usual coal mine job required work at medium *and* heavy levels of exertion. *Id*. at 14.

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[7] Claimant testified as follows:

Q. What other jobs did you do in the mines?

A. I was an extra man. I had a steady job with the cutting machine but I was an extra man. I staggered everybody out for lunch.

Q. Okay. So, what else did you do?

A. Each car I staggered out, the drill, the loader, the pinner, just different things.

Q. When you say drill, is that drilling the holes before you blast?

A. Drilling the roof.

Hearing Transcript at 28.

Total Disability – The Medical Opinion Evidence

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. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying[8] 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[9] the administrative law judge considered the medical opinions of Drs. Baker and Zaldivar in conjunction with the exertional requirements of claimant's usual coal mine work. Dr. Baker opined that the moderate obstructive ventilatory defect shown on claimant's 2015 pulmonary function study demonstrated that he could only perform non-manual, or sedentary, labor. Employer's Exhibit 10 at 22, 32-33. Dr. Baker also stated that claimant could perform the part of his job that required him to sit at the controls of the cutting machine/continuous miner, but he would have difficulty performing work that required him to routinely lift anything over twenty pounds.[10] Employer's Exhibit 10 at 37-38. Dr. Zaldivar opined that the significant

[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).

[9] The administrative law judge found that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order on Remand at 13-15.

[10] Dr. Baker's deposition includes the following exchanges:

Q. So, his last job as he told you was as a continuous miner operator or a cutting machine operator.

A. Right.

Q. Could he do that?

A. No.

Q. Why?

obstructive impairment shown on the 2015 pulmonary function study would preclude claimant from performing heavy labor. Employer's Exhibit 15 at 9.

The administrative law judge found that Dr. Baker's opinion, as supported by the opinion of Dr. Zaldivar, was sufficient to establish that claimant is totally disabled. Decision and Order on Remand at 17. Based on a consideration of the record evidence as a whole, the administrative law judge further found that the preponderance of the medical opinion evidence supported a finding of total disability. *Id*.

Employer argues that the administrative law judge erred in crediting the total disability diagnosis made by Dr. Baker when the physician overestimated the exertional requirements of claimant's usual coal mine work, and improperly relied on non-qualifying pulmonary function studies. We disagree.

Although Dr. Baker answered in the affirmative when asked whether claimant could do his usual coal mine work "seated at the [continuous] miner," Dr. Baker also reported that claimant is precluded from doing a job that is more than sedentary and requires more than light exertion. Employer's Exhibit 10 at 32. Based on our affirmance of the administrative law judge's finding that claimant's usual work required medium exertion, with periods of heavy exertion, we reject employer's assertion that Dr. Baker relied on an overestimation of the exertional requirements of claimant's usual coal mine work to diagnose a totally disabling obstructive impairment. In addition, because a doctor can offer a reasoned opinion diagnosing total disability, even though the objective studies on which he or she relies are non-qualifying, the administrative law judge permissibly credited Dr. Baker's opinion that the FEV1 value on claimant's non-qualifying 2015 pulmonary

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> A. I think the exertion would be too much, and the dust would aggravate his condition more.
>
> . . .
>
> Q. So, you're saying he cannot lift twenty pounds.
>
> A. Well, somewhere in that neighborhood.
>
> Q. So, that means he – at best he could do a sedentary job, if he could do that.
>
> A. Yes, sir.

Employer's Exhibit 10 at 22, 32.

function study showed a moderate obstructive impairment that is totally disabling.[11] *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (6th Cir. 2005); Employer's Exhibit 10 at 22.

Because the administrative law judge properly compared the physicians' opinions with the exertional requirements of claimant's usual coal mine work, we affirm his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-123; Decision and Order on Remand at 17. We also affirm the administrative law judge's finding that claimant satisfied his burden to establish total disability based on a consideration of all relevant evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Thus, we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). Because employer did not rebut the Section 411(c)(4) presumption, we affirm the administrative law judge's finding that claimant is entitled to benefits.[12]

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[11] We reject employer's contention that Dr. Baker's diagnosis of a totally disabling respiratory or pulmonary impairment was merely an instruction that claimant avoid further coal dust exposure. Although Dr. Baker noted that additional exposure to coal dust would be harmful to claimant, Dr. Baker also identified claimant's obstructive impairment as an independent cause of claimant's inability to perform his usual coal mine work. Claimant's Exhibit 4 at 3; Employer's Exhibit 10 at 22, 29.

[12] We reject employer's reiteration of its argument in the prior appeal that when considering rebuttal of the Section 411(c)(4) presumption, the administrative law judge did not resolve a conflict in the evidence as to claimant's smoking history, and therefore erred in crediting the diagnoses of legal pneumoconiosis made by Drs. Chavda and Baker. The Board held that because those medical opinions do not support employer's burden to establish that claimant does not have legal pneumoconiosis, it need not address employer's argument. *See Belt*, BRB No. 16-0293 BLA, slip op. at 14 n.16. We decline to disturb our prior holding, which constitutes the law of the case, as employer has not shown that it was clearly erroneous or that any other exception to the doctrine applies. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Date of Onset

As a general rule, once entitlement is established, the date for the commencement of benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim such as this, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional proviso that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Employer contends that the administrative law judge erred in finding that claimant is entitled to benefits as of March 2012, the month in which claimant filed the current claim. Employer asserts that Drs. Chavda and Zaldivar opined that claimant's pulmonary function studies do not show disabling deficits in claimant's lung function until 2015. Employer asserts that benefits should commence as of June 2015, the month in which Dr. Baker examined claimant and assessed total respiratory disability. We reject employer's contention.

The onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the miner became totally disabled at some time prior to the date of such medical evidence. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). In this case, the administrative law judge reviewed the record and accurately found that none of the physicians expressed an opinion as to when claimant first became disabled. Decision and Order on Remand at 18. Thus, the administrative law judge rationally concluded that he could not determine the date when claimant became totally disabled. *See Owens*, 14 BLR at 1-50. We therefore affirm the administrative law judge's finding that benefits should commence as of March 2012, the month of the filing of the claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge