U.S. Department of Labor

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

BRB No. 18-0143 BLA

MITCHELL BOSTIC, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/31/2018
WALTER ENERGY, INCORPORATED	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Mitchell Bostic, Jr., Tuscaloosa, Alabama.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer/carrier.

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 (2016-BLA-05904) of Administrative Law Judge Lystra A. Harris 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 April 3, 2015.[1]

After crediting claimant with seventeen years and three months of underground coal mine employment, the administrative law judge found that the new evidence does not establish complicated pneumoconiosis under 20 C.F.R. §718.304. She therefore found that claimant could not 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).[2] The administrative law judge further found that the new evidence does not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, as claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[3] or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), the administrative law judge denied benefits.

[1] Claimant filed three prior claims for benefits that were all finally denied. Claimant's most recent prior claim, filed on August 12, 2010, was denied by the district director on April 13, 2011 because claimant failed to establish total respiratory disability. Director's Exhibit 3. Claimant took no further action on that claim.

[2] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he 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.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 findings of the administrative law judge if they are 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'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).

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 total respiratory disability. Director's Exhibit 3. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing total respiratory disability. *See* 20 C.F.R. §725.309(c)(3).

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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6.

pulmonary function studies, 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).

Relevant to 20 C.F.R. § 718.204(b)(2)(i), the administrative law judge accurately found that the only new pulmonary function study of record, dated September 28, 2015, is non-qualifying.[5] Director's Exhibit 12. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability. 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; Director's Exhibit 12.

We also affirm the finding that the only new arterial blood gas study, dated September 28, 2015, produced non-qualifying values. *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 7; Director's Exhibit 12. Additionally, we affirm the administrative law judge's determination that there is no evidence in the record indicating that claimant has 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 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that the only new medical opinion of record is that of Dr. O'Reilly, who examined claimant on behalf of the Department of Labor. Decision and Order at 8; Director's Exhibit 12. Based on the "normal" results of the pulmonary function study and arterial blood gas study he conducted, Dr. O'Reilly opined that claimant has "normal lung function" and "no pulmonary impairment." Director's Exhibit 12. The administrative law judge permissibly credited Dr. O'Reilly's opinion as reasoned and documented, and properly found that claimant failed to demonstrate that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order at 7-8. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability by medical opinion

[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).

evidence at 20 C.F.R. §718.204(b)(2)(iv), and her finding that all the relevant evidence, when weighed together, does not establish total disability at 20 C.F.R. §718.204(b)(2).[6] *See 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 8.

Because claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's findings that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and failed to invoke the Section 411(c)(4) presumption.[7] We, therefore affirm the administrative law judge's denial of benefits.

[6] The administrative law judge also considered the results of two computed tomography scans taken as part of claimant's hospitalization or treatment. She correctly noted that these records do not contain any evidence of complicated pneumoconiosis. Decision and Order at 8 n.9. Nor do these records reference any respiratory or pulmonary impairment. The record contains no other new hospitalization or treatment notes.

[7] We also affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as the record contains no evidence of complicated pneumoconiosis. Decision and Order at 8 n.9.

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