U.S. Department of Labor

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

BRB No. 19-0014 BLA

RICKY W. KELLY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE	)	DATE ISSUED: 12/18/2019
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-05448) of Administrative Law Judge Scott R. Morris rendered on a claim filed on April 11, 2016

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 25.47 years of underground coal mine employment and found claimant did not establish complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore found claimant did 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). He further found the evidence does not establish total disability under 20 C.F.R. §718.204(b)(2) and claimant therefore did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant identifies favorable x-ray and medical opinion evidence to assert he established the existence of complicated pneumoconiosis. He also contends the administrative law judge erred in finding the medical opinion evidence did not establish total disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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. Statutory presumptions may assist claimants in establishing the elements of entitlement, but failure to establish any of these elements precludes an

[1] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R §718.305.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 19.

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).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act establishes an irrebuttable presumption of total disability due to pneumoconiosis if a miner has a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. A claimant's introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically invoke the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) to determine if claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

The administrative law judge considered eight interpretations of four x-rays dated May 10, June 7, August 31, and November 10, 2016. Decision and Order at 17-19; Director's Exhibits 13, 14, 17, 21, 22; Claimant's Exhibit 3; Employer's Exhibits 2, 3, 5. All interpreting physicians agree claimant has simple pneumoconiosis, but disagree as to whether he has complicated pneumoconiosis.

Claimant contends that because Drs. Baker, Westerfield, and Crum respectively read the May 10, June 7, and November 10, 2016 x-rays as positive for complicated pneumoconiosis, "it can be concluded that the presence of complicated pneumoconiosis has been established, and, as a consequence, that the claimant has established total disability pursuant to §718.304(a)." Claimant's Brief at 3. He also asserts the medical opinions of Drs. Baker, Westerfield, and Chavda support a finding of complicated pneumoconiosis. *Id.* at 3-4.

Although claimant identifies evidence supportive of his claim, he does not address the administrative law judge's weighing of that evidence in light of contrary evidence in the record, including other physicians' readings of each of the aforementioned x-rays as negative for large opacities of pneumoconiosis. Because claimant raises no specific allegation of error with regard to the administrative law judge's rationale in weighing the

x-ray[3] and medical opinion[4] evidence, we reject claimant's assertion that the x-ray readings by Drs. Baker, Westerfield, and Crum and the medical opinions by Drs. Baker, Westerfield, and Chavda established complicated pneumoconiosis under 20 C.F.R. §718.304(a), (c). *See* 20 C.F.R. §§802.211, 802.301, 718.202(a)(1); *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). Claimant's assertions amount to a request

[3] Dr. Baker, a B reader, read the May 10, 2016 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 17 at 7. Dr. Seaman, a dually-qualified B reader and Board-certified radiologist, read it as negative for large opacities. Employer's Exhibit 2. Dr. Westerfield, a B reader, read the June 7, 2016 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 13 at 10. Dr. Wolfe, who is dually-qualified, read it as negative. Director's Exhibit 22 at 3. Drs. Wolfe and Seaman read the August 31, 2016 x-ray as negative for large opacities; there are no positive readings for complicated pneumoconiosis. Director's Exhibit 21 at 3; Employer's Exhibit 3. Finally, Dr. Crum, who is dually-qualified, read the November 10, 2016 x-ray as positive for complicated pneumoconiosis, while Dr. Seaman read it as negative for large opacities. Claimant's Exhibit 3 at 6; Employer's Exhibit 5.

The administrative law judge rationally resolved any conflict in the x-ray readings by according greatest weight to the interpretations of dually-qualified radiologists based on their superior credentials. *See generally Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); Decision and Order at 18-19. He permissibly found the May 10, June 7, and August 31, 2016 x-rays are negative for complicated pneumoconiosis, and the November 10, 2016 x-ray is in equipoise as to the existence of large opacities of pneumoconiosis. Decision and Order at 19. The administrative law judge thus rationally concluded that the x-ray evidence does not support a finding of complicated pneumoconiosis under Section 718.304(a). *Id.*

[4] The administrative law judge found that the medical opinions of Drs. Baker, Westerfield, and Chavda, diagnosing complicated pneumoconiosis, are not probative because they were based solely on their own interpretations of x-rays, which the administrative law judge ultimately determined were negative for the existence of complicated pneumoconiosis. *See* n.3 *supra*; Decision and Order at 19. The administrative law judge also considered the reports of Drs. Basheda and Spagnolo, which indicated the absence of complicated pneumoconiosis, and found Dr. Trent's narrative x-ray report that failed to diagnose complicated pneumoconiosis merited no weight because it did not use the ILO system. Decision and Order at 19. The administrative law judge thus concluded that no other evidence of record supports the existence of complicated pneumoconiosis under Section 718.304(c). *Id.* at 20.

that the Board reweigh the evidence, which we are not authorized to do. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27. Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish complicated pneumoconiosis under 20 C.F.R. §718.304(a), (c). We also affirm, as unchallenged on appeal, the administrative law judge's finding that the record contains no autopsy or biopsy evidence pursuant to 20 C.F.R. §718.304(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19. Because claimant raises no further challenge, and the administrative law judge's findings are otherwise supported by substantial evidence, *see* n.3, 4, *supra*, we affirm his conclusion that claimant did not invoke the irrebuttable presumption of total disability due to complicated pneumoconiosis at 20 C.F.R. §718.304.

Section 411(c)(4) Presumption – Total Disability

A miner is 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 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). We initially affirm, as unchallenged on appeal, the administrative law judge's finding that because all pulmonary function and blood gas studies are non-qualifying[5] and because the record contains no evidence of cor pumonale, claimant cannot establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack*, 6 BLR at 1-711; Decision and Order at 10-11.

Claimant asserts that the reasoned and documented opinions of Drs. Westerfield, Baker, and Chavda establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). He contends the administrative law judge erred by not comparing the exertional requirements of claimant's usual coal mine employment with the physicians' assessments of claimant's respiratory impairment. Claimant's Brief at 3-4. Claimant further contends that because pneumoconiosis has been proven to be a progressive and irreversible disease, and considerable time has passed since claimant's initial diagnosis of pneumoconiosis, "[i]t can therefore be concluded" that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. *Id.* at 4. Claimant's arguments lack merit.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values 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).

The administrative law judge correctly found that none of the physicians who provided medical reports --Drs. Baker, Westerfield, Chavda, Basheda, and Spagnolo-- opined that claimant has a pulmonary impairment that prevents him from performing his usual coal mine employment. Decision and Order at 11-15; Director's Exhibits 13, 17, 20; Claimant's Exhibit 3; Employer's Exhibits 6, 8, 9. He found that although Drs. Westerfield, Baker, and Spagnolo noted that claimant suffered from some respiratory symptoms and clinically insignificant hypoxemia, they each concluded that the objective tests showed no pulmonary impairment.[6] Decision and Order at 11-15. This finding is affirmed, as it is both unchallenged on appeal and supported by substantial evidence. *See Skrack*, 6 BLR at 1-711; *see also* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

Contrary to claimant's contention, because none of the physicians opined that claimant had a respiratory impairment, no discussion of the exertional requirements of claimant's work was necessary. *See generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997) (an administrative law judge "may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all"); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). We further reject claimant's assertion that in light of the progressive and irreversible nature of pneumoconiosis, it can be concluded that claimant's condition has worsened since the initial diagnosis of pneumoconiosis, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 5. Total disability may not be assumed; an administrative law judge's finding of total disability must be based on the evidence of record. 20 C.F.R. §725.477(b).

We therefore affirm the administrative law judge's finding that claimant did not establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(iv), and that all the relevant evidence, weighed together, does not establish total disability at 20 C.F.R. §718.204(b)(2). *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 15. Because claimant did not establish a totally disabling

[6] The administrative law judge considered Dr. Baker's notation that the presence of progressive massive fibrosis on x-ray implied claimant was totally disabled, but found this notation "appears to be a legal conclusion" based on the irrebuttable presumption of total disability and is inconsistent with the physician's statement that claimant had a "0%" pulmonary impairment value and could return to his work as a coal miner. Decision and Order at 12, 15; Director's Exhibits 13, 17; Claimant's Exhibit 3. The administrative law judge thus rationally concluded that Dr. Baker's overall opinion does not support a total disability finding. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995); Decision and Order at 15.

respiratory or pulmonary impairment, we affirm the administrative law judge's findings that claimant cannot invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718. Decision and Order at 15.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge