U.S. Department of Labor

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

BRB No. 15-0209 BLA

FLOYD D. WHITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: 02/23/2016
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Floyd D. Whitt, Rural Retreat, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2013-BLA-5107) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed on November 22, 2011,[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). Because the administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability under 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant failed to establish a change in a condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter requesting that the Board remand this case for the Director to comply with the statutory obligation under 30 U.S.C. §923(b) to provide claimant with a complete pulmonary evaluation. In response to the Director's motion to remand, employer asserts that the Director waived his right to have the case remanded for another pulmonary evaluation because he did not specifically make this request before the administrative law judge. Employer also contends that the Director's motion should be denied because the

[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (unpub. Order).

[2] Claimant filed an initial claim for benefits on June 19, 1974, which was denied by the district director on July 11, 1980, for failure to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on February 3, 1992, which was denied on June 28, 1995, by Administrative Law Judge Christine M. Moore, because claimant did not establish the existence of pneumoconiosis or total disability. *Id.* The denial was affirmed by the Board on appeal. *Whitt v. Sea "B" Mining Co.*, BRB No. 95-1902 BLA (Apr. 25, 1996) (unpub.). Claimant subsequently filed a request for modification on April 1, 1997. Director's Exhibit 1. Administrative Law Judge Daniel F. Sutton denied benefits on April 6, 1998, finding that claimant did not establish a basis for modification of the prior denial. *Id.* On July 20, 1999, claimant filed a third claim for benefits, which was denied by the district director on September 28, 1999, for failure to establish the requisite elements of entitlement. Director's Exhibit 2. Claimant took no further action with regard to the denial of benefits until the filing of his current subsequent claim on November 22, 2011. Director's Exhibit 4.

administrative law judge did not find the Department of Labor (DOL)-sponsored examination by Dr. Habre or his opinion "inadequate[,] just outweighed by other evidence in the record." Employer's Response to Director's Motion to Remand at 6. Thus, employer contends that there is no basis for the Board to conclude that the Director's obligation under the Act has not been satisfied.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

When 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). In this case, claimant's prior claim, filed on July 20, 1999, was denied because he did not establish any of the requisite elements of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing at least one of those elements of entitlement[4] in order to obtain a review of his current subsequent claim on the merits. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that none of the six newly submitted pulmonary function tests, including the pulmonary function test obtained by Dr. Habre on February 1, 2012, is valid for the purpose of

[3] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

[4] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

establishing total disability under the regulatory criteria.[5] Decision and Order at 14. The administrative law judge found that the arterial blood gas study evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that the record does not contain any evidence to show that claimant has cor pulmonale with right-sided congestive heart failure, by which claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Habre, Fino, and McSharry. Decision and Order at 14-15. The administrative law judge found that "the only physician who has suggested that [claimant] has a totally disabling respiratory impairment is Dr. Habre," who performed the DOL-sponsored examination. Decision and Order at 14, *citing* Director's Exhibit 15. The administrative law judge observed that Dr. Habre described claimant's pulmonary function test as showing "disabling lung disease but acknowledged that the study was suboptimal, with lack of effort." *Id*. The administrative law judge further found that Dr. Habre described a restrictive ventilatory defect, based on the "normal FEV1 and FVC" which he correlated with obesity. *Id*. The administrative law judge noted that Dr. Habre diagnosed legal pneumoconiosis, which he indicated could be the basis for claimant's "disabling lung disease" but that Dr. Habre "did not further elaborate on the extent of [claimant's] disability, or whether it prevented him from performing his previous coal mine work." *Id*. The administrative law judge concluded that claimant failed to establish total disability based on the medical opinion evidence, and the evidence overall. *Id*. at 15. Thus, she denied claimant's subsequent claim. *Id*.

The Director argues that, insofar as Dr. Habre relied on an invalid pulmonary function test and the administrative law judge rationally found that Dr. Habre failed to address whether claimant is totally disabled from performing his usual coal mine work pursuant to 20 C.F.R. §718.204(b)(1), the Board should conclude that claimant has not received a complete pulmonary evaluation as required under the Act. The Director

[5] The administrative law judge noted that Dr. Fino reviewed the newly submitted pulmonary function tests and concluded that they were all invalid and "did not represent claimant's true functional capacity." Decision and Order at 14. Dr. Renn reviewed the February 1, 2012 test administered by Dr. Habre and gave multiple reasons why that test was invalid, including the fact that the tracings were not reproducible, the test showed lack of effort during the FVC maneuver, and obstruction of the mouth piece. *See* Decision and Order at 5; Employer's Exhibit 8. The administrative law judge stated that she credited "Dr. Renn's conclusions about the February 1, 2012 [pulmonary function test] over those of Dr. Michos, who reviewed the test, and checked a box indicating that the [tests] were acceptable." Decision and Order at 14.

therefore requests that the Board vacate the denial of benefits and remand this case in order for the Director to satisfy his statutory obligation to claimant. The Director's argument has merit.

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. In view of the administrative law judge's specific finding that Dr. Habre administered an invalid pulmonary function test and that he did not offer an opinion as to whether claimant is totally disabled from performing his usual coal mine employment, we agree with the Director that Dr. Habre's report is incomplete on the issue of total disability, a requisite element of entitlement. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990). We therefore vacate the administrative law judge's denial of benefits and remand the case to the district director in order for the Director to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required by the Act.[6] 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Hodges v. BethEnergy Mines Inc*., 18 BLR 1-84, 1-93 (1994).

[6] Contrary to employer's argument, we hold that the Director, Office of Workers' Compensation Programs, has timely raised the issue of whether claimant received a complete pulmonary evaluation. *See Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-88-90 (1994). Furthermore, we reject employer's assertion that because claimant "failed to fully comply" or gave poor effort during his pulmonary function testing with Dr. Habre, claimant should not be given the opportunity for a new test. Employer's Brief at 4. The regulation at 20 C.F.R. §725.406 specifically provides that where deficiencies in a report of a pulmonary function test are "the result of lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded to the district director for further development of the evidence and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge