U.S. Department of Labor

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

BRB No. 17-0247 BLA

STANLEY WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALPHA MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/15/2018
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

John M. Gambrel (Gambrel & Wilder Law Offices, PLLC), London, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05313) of Administrative Law Judge John P. Sellers, III, 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 claim filed on June 19, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment based on employer's stipulation, but found that the evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) or establish entitlement under the alternative provisions at 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that he did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established "at least fifteen" years of underground coal mine employment. Decision and Order at 3; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, 1-2 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption

Because claimant established at least fifteen years of underground coal mine employment, he is entitled to the Section 411(c)(4) presumption if he also establishes that he suffers from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function testing, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant asserts that the administrative law judge erred in finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) based on the pulmonary function study evidence of record. We disagree. The administrative law judge considered the results of three pulmonary function studies dated November 7, 2013, May 8, 2014, and July 24, 2014.[4] Decision and Order at 18-20; Director's Exhibits 12, 14;

[4] The administrative law judge noted that the record also contains an August 26, 2013 pulmonary function study, administered by Dr. Habre during claimant's Department of Labor-provided complete pulmonary evaluation. Decision and Order at 10 n.10; Director's Exhibit 12 at 12. Because Dr. Gaziano invalidated that test due to "less than optimal effort, cooperation, and comprehension," Dr. Habre administered a second pulmonary function study on November 7, 2013. Decision and Order at 10 n.4; Director's Exhibit 12 at 32, 46. Thus, the administrative law judge considered the results

Claimant's Exhibit 4. The November 7, 2013 study administered by Dr. Habre yielded qualifying[5] values both before, and after, the administration of a bronchodilator. Director's Exhibit 12. The May 8, 2014 study administered by Dr. Jarboe yielded non-qualifying pre-bronchodilator and post-bronchodilator values. Director's Exhibit 14. The July 24, 2014 study administered by Dr. Ajjarapu yielded qualifying pre-bronchodilator values and no post-bronchodilator test was performed. Claimant's Exhibit 4. The administrative law judge concluded that the pulmonary function study evidence was "inconclusive" as the qualifying July 24, 2014 study was performed less than three months after the non-qualifying May 8, 2014 study, and no doctor opined that the May 8, 2014 study was "an aberration and should be dismissed." Decision and Order at 19-20, 23. Thus, the administrative law judge found that the pulmonary function study evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[6] *Id*. at 20.

Claimant asserts that the November 7, 2013 pulmonary function studies performed by Dr. Habre and the May 8, 2014 pulmonary function studies performed by Dr. Jarboe both indicate that claimant is totally disabled. Contrary to claimant's assertion, the administrative law judge properly found that the November 7, 2013 studies performed by Dr. Habre were qualifying both pre-bronchodilator and post-bronchodilator, but that the May 8, 2014 studies performed by Dr. Jarboe were non-qualifying both pre-bronchodilator and post-bronchodilator. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19; Director's Exhibits 12, 14. Moreover, as claimant acknowledges, despite Dr. Jarboe's observation that claimant gave "inconsistent effort" on the pre-bronchodilator study, his "FEV1 levels were above the 60% predicted normal levels" on the May 8, 2014 pre-bronchodilator and post-bronchodilator studies.[7] Claimant's Brief at 6; *see* 20

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of the November 7, 2013 study in place of the invalidated August 26, 2013 study. Decision and Order at 10 n.10, 18-20.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] The administrative law judge found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as all of the blood gas studies yielded non-qualifying values and there is no evidence establishing that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 20. As these findings are unchallenged on appeal, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[7] To the extent that claimant argues that his inconsistent effort on the May 8, 2014 pre-bronchodilator study undermined the reliability of Dr. Jarboe's non-qualifying

C.F.R. §718.204(b)(2)(i); Decision and Order at 14-15, *quoting* Director's Exhibit 14 at 12.

Weighing the conflicting pulmonary function study results, the administrative law judge correctly noted that "the last two tests were only separated by a period of less than three months, and all the tests were performed with[in] a matter of months from each other." Decision and Order at 19, *referencing* Director's Exhibits 12, 14; Claimant's Exhibit 4. Therefore, the administrative law judge permissibly found that the tests were "essentially contemporaneous" and that their chronological relationship was not a significant factor. *Id*.; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687-88 (6th Cir. 2014). The administrative law judge further correctly noted that no doctor opined that Dr. Jarboe's May 8, 2014 non-qualifying pre-bronchodilator and post-bronchodilator values were "an aberration and should be dismissed." Decision and Order at 20. Therefore, the administrative law judge permissibly found that "[g]iven the presence of the non-qualifying study, producing much higher values, in the middle of the two qualifying studies, and only three months before the most recent study," the pulmonary function study evidence failed to "preponderate[] in favor of a finding of total disability." *Id*. at 19; *see* 20 C.F.R. §718.204(b)(2)(i); *Keathley*, 773 F.3d at 740, 25 BLR at 2-687-88; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Claimant raises no other challenge to the administrative law judge's consideration of the pulmonary function study evidence. *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). As substantial evidence supports the administrative law judge's finding that the pulmonary function study evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) it is affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 20.

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of

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pulmonary function study results, such argument is rejected. *See Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984) (holding that a non-qualifying pulmonary function study that represents poor effort is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983); Director's Exhibit 14 at 12.

Drs. Habre[8] and Ajjarapu,[9] who opined that claimant suffers from a totally disabling respiratory impairment, along with the contrary opinion of Dr. Jarboe. Director's Exhibits 12 at 1-2 and 8; 14 at 13-14. The administrative law judge noted that while Dr. Habre based his opinion that claimant is totally disabled, in part, on the qualifying values from the November 7, 2013 pulmonary function study, he did not review the subsequent non-qualifying pulmonary function studies of May 8, 2014 in offering his opinion. Decision and Order at 21. The administrative law judge noted that although Dr. Ajjarapu reviewed all of the pulmonary function study evidence of record, she "did not discuss the objective test results or explain how she resolved their conflicting nature." *Id*. at 22. In addition, the administrative law judge found Dr. Ajjarapu to be "the least qualified of the three physicians." *Id*. Finally, the administrative law judge noted that although Dr. Jarboe had reviewed the qualifying November 7, 2013 and the non-qualifying May 8, 2014 pulmonary function studies, he did not review the qualifying July 24, 2014 study. *Id*. at 23. Therefore, the administrative law judge found that Dr. Jarboe did not adequately address the qualifying pulmonary function study evidence in rendering his opinion that claimant is not totally disabled by a respiratory impairment. *Id*. As no physician of record reviewed all three pulmonary function studies and adequately explained the conflict in the evidence, the administrative law judge found that none of the medical opinions were persuasive. *Id*. Consequently, he found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Claimant argues that the administrative law judge failed to properly consider the opinions of Drs. Habre and Ajjarapu that claimant is totally disabled by a respiratory impairment, and specifically asserts that the administrative law judge erred in giving less weight to Dr. Ajjarapu, based on her qualifications. We disagree.

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[8] The administrative law judge noted that Dr. Habre originally opined that claimant does not have a disabling lung disease, based on the August 26, 2013 pulmonary function study, which was later invalidated. Decision and Order at 20, *citing* Director's Exhibit 12 at 59-60. Consequently, the administrative law judge gave Dr. Habre's original opinion "little, if any" weight. Decision and Order at 20. The administrative law judge further noted that upon Dr. Habre's review of the November 7, 2013 pulmonary function study, which was performed to replace the invalidated study, Dr. Habre opined that claimant has a disabling respiratory impairment. Decision and Order at 21, *citing* Director's Exhibit 12 at 8. Dr. Habre stated that he based his finding of totally disabling lung disease "mainly" on that pulmonary function study. *Id*.

[9] Dr. Ajjarapu diagnosed a disabling respiratory impairment, but did not identify what objective testing she relied upon in rendering her diagnosis. *See* Director's Exhibit 12 at 1-2.

Contrary to claimant's assertion, the administrative law judge permissibly discredited the opinions of Drs. Habre and Ajjarapu because neither doctor adequately addressed the conflicting objective test results in finding that claimant is totally disabled by a respiratory impairment. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 18-23. Moreover, the administrative law judge rationally considered the relative qualifications of the physicians. The administrative law judge permissibly determined that Dr. Ajjarapu, who is Board-certified in family medicine, is less qualified to offer an opinion regarding whether claimant is totally disabled by a respiratory impairment than Drs. Habre and Jarboe, who are Board-certified in internal medicine and pulmonary disease. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 22; Director's Exhibits 12 at 3, 62; 14 at 22.

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013). Other than generally asserting that the "overall weight" of the evidence establishes a totally disabling respiratory impairment, claimant is seeking a reweighing of the evidence, which the Board is not empowered to do. Claimant's Brief at 2; *see Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the weight of the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

As claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), we also affirm the administrative law judge's overall finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2).[10] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986); Decision and Order at 23. In light of our affirmance of the administrative law judge's finding that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20

[10] To the extent that claimant argues that he meets the criteria for inclusion in the pilot program launched by the Department of Labor "to strengthen the [§]413(b) medical opinion," we note that Dr. Ajjarapu's opinion was obtained by the district director as part of the pilot program. Claimant's Brief at 6-7; Director's Exhibit 12 at 1-7. Thus, claimant was determined to be eligible for the program.

C.F.R. Part 718, entitlement to benefits is precluded in this case.[11] *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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

[11] We, therefore, need not address claimant's allegations of error concerning the existence of pneumoconiosis or disability causation.