U.S. Department of Labor

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

BRB No. 17-0267 BLA

HERBERT E. HALE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 02/20/2018
	)	
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Herbert E. Hale, Coeburn, Virginia.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2014-BLA-05763) of Administrative Law Judge William T. Barto, rendered on a miner's claim filed on August 20, 2013, pursuant to the provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with 36.34 years of underground coal mine employment. The administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012)[2] and also failed to establish an essential element of entitlement.[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits, on the ground that any error in the administrative law judge's findings is harmless. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are rational,

[1] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting, on behalf of claimant, that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). In the letter Ms. Napier stated, "[w]e feel that the medical evidence in the file will prove that the claimant is entitled to Black Lung benefits and hope that the board will grant a favorable decision in this matter." Letter Dated February 23, 2017 at 1 (unpaginated).

[2] Under Section 411(c)(4), 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 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), as implemented by 20 C.F.R. §718.305.

[3] 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).

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).

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 and comparable and gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies, or 2) arterial blood gas studies, or 3) medical evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies dated May 28, 2013, October 4, 2013, February 26, 2014, and May 2, 2016. Decision and Order at 5; Director's Exhibits 10-12; Employer's Exhibit 3. He correctly found that only Dr. Habre's October 4, 2013 study resulted in qualifying values.[5] Decision and Order at 5. However, the administrative law judge gave little weight to Dr. Habre's results for two reasons. *Id.* First, the administrative law judge permissibly gave some weight to Dr. Castle's invalidation[6] of Dr. Habre's study, finding the invalidation to be well-reasoned and supported by the evidence. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); Decision and Order at 5; Employer's Exhibit 1. Dr. Castle stated that "[t]he flow volume loops show less than maximal effort in that there is less than a maximum peak flow" and that "[t]here is also less effort exerted during the postbronchodilator study." Employer's Exhibit 1. Dr. Castle also found that the volume time curves show less than maximal effort, do not show

[4] Because claimant's last coal mine employment was in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[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] Dr. Castle authored a report, dated July 29, 2014, reviewing the October 4, 2013 pulmonary function study conducted by Dr. Habre and concluded that it is invalid. Employer's Exhibit 1.

a plateau was reached, and demonstrate variability in effort. *Id*. Second, the administrative law judge permissibly determined that the results of Dr. Habre's study "are extreme outliers from those obtained from other examinations." Decision and Order at 5; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. In the alternative, the administrative law judge rationally found that even if he gave full weight to Dr. Habre's study, the more recent, non-qualifying, studies are entitled to more weight. *See Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-14 (1993); Decision and Order at 5. Therefore, we affirm the administrative law judge's conclusion that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).[7]

The administrative law judge considered blood gas studies dated February 26, 2014 and May 2, 2016 pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6; Director's Exhibit 11; Employer's Exhibit 3. The administrative law judge correctly determined that neither of these studies produced qualifying values.[8] Decision and Order at 6. The administrative law judge did not consider the blood gas study performed by Dr. Habre on October 4, 2013. Director's Exhibit 10. However, remand is not required on this basis because the values obtained on Dr. Habre's blood gas study are not qualifying and, therefore, cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. Consequently, error, if any, in the administrative law judge's failure to consider this study is harmless. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Therefore, we affirm the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Relevant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge accurately determined that there is no evidence in the record that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 4. Consequently, we affirm his finding that claimant is unable to establish total disability by this method.

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[7] Employer notes that the administrative law judge did not consider the March 13, 2014 pulmonary function study that it submitted as part of a treatment note from St. Charles Respiratory Clinic but acknowledges that error, if any, in the administrative law judge's failure to consider this study is harmless because it was also non-qualifying. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4; Employer's Exhibit 2.

[8] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

In weighing the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Habre's opinion that claimant has a totally disabling respiratory impairment and the contrary opinions of Drs. Fino and McSharry. Decision and Order at 6-7; Director's Exhibits 10-11; Employer's Exhibits 3-5. In evaluating the physicians' opinions, the administrative law judge permissibly found that Dr. Habre's opinion is entitled to less weight because it was based on a pulmonary function study that the administrative law judge found to be invalid.[9] *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 6-7. The administrative law judge also permissibly determined that the opinions of Drs. Fino and McSharry are entitled to greater weight because they are well-reasoned and consistent with the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability.[10] *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 6-7. Thus, we affirm the administrative law judge's finding that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's determination that, weighing the evidence as a whole, claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986); Decision and Order at 7. Because claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[9] Dr. Habre stated that claimant "did show the presence of significant decline in spirometric measurement and the presence of complete and total disabling lung disease." Director's Exhibit 10.

[10] Dr. Fino indicated that "[t]he spirometry performed during my examination was normal so there is clearly no ventilator[y] impairment, and there is no impairment in oxygen transfer based on the blood gases. There is a decrease in the diffusing capacity. . . . It is not impairing and it certainly is not disabling." Director's Exhibit 12. Dr. McSharry observed that "[t]he claimant has no evidence of disabling lung impairment by [Department of Labor] standards. . . . I see no evidence for disability in this claimant." Employer's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge