U.S. Department of Labor

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

BRB No. 18-0134 BLA

DOUGLAS TACKETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG ADDCAR SYSTEMS, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/14/2019
UNDERWRITERS SAFETY & CLAIMS TPA	)	
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Glenn Martin Hammond (Glenn Martin Hammond Law Office PLLC), Pikeville, Kentucky, for claimant.

Richard H. Risse (White & Risse, LLP), Arnold, Missouri, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-BLA-05890) of Administrative Law Judge Joseph E. Kane, denying benefits 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 September 30, 2013.

After crediting claimant with at least twenty-eight years of coal mine employment,[1] the administrative law judge found that he did not establish the existence of complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Because claimant further failed to establish that he is totally disabled, the administrative law judge found that he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Employer/carrier responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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,

[1] The record reflects that claimant's last coal mine employment was in Indiana. Hearing Transcript at 28. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that 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). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 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 he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 gainful work. *See* 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). The administrative law judge must weigh all relevant supporting evidence against all relevant 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 generally asserts that the "pulmonary testing revealed [that] he qualified for total disability." Claimant's Brief at 5. We disagree. The administrative law judge considered two pulmonary function studies conducted on January 15, 2014 and January 21, 2015. Director's Exhibit 7; Employer's Exhibit 2. Because the January 15, 2014 pulmonary function study produced non-qualifying values,[4] the administrative law judge found it did not support a finding of total disability. Decision and Order at 11; Director's Exhibit 7. Although the January 21, 2015 pulmonary function study produced qualifying values, the administrative law judge accorded the study "no weight" because the administering physician, Dr. Rosenberg, as well as two reviewing physicians, Drs. Farney and Renn, invalidated it.[5] *See Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283 (7th Cir.

[4] 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).

[5] Dr. Rosenberg reported that claimant's "efforts were not maximal based on the shape of the flow-volume curve." Employer's Exhibit 2 at 2. Dr. Farney opined that claimant provided "submaximal effort" during the study. Employer's Exhibit 9 at 16. Dr.

1988); Decision and Order at 11; Employer's Exhibit 2. Because there are no valid qualifying pulmonary function studies in the record, the administrative law judge found the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11.

Claimant alleges no specific error in regard to the administrative law judge's weighing of the pulmonary function studies. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because claimant provides the Board with no basis upon which to review the administrative law judge's weighing of the pulmonary function study evidence, we affirm his determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120. We further affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determinations that claimant did not invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Decision and Order at 10.

Renn found the study invalid because claimant failed to maintain maximal effort throughout the entirety of the FVC maneuvers. 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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge