U.S. Department of Labor

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

BRB No. 18-0152 BLA

RODRICK D. FELTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/26/2019
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05183) of Administrative Law Judge Richard M. Clark 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 miner's subsequent claim filed on June 26, 2014.[1]

The administrative law judge credited claimant with nineteen years of underground coal mine employment, as stipulated by the parties and supported by the record, and found the new evidence does not establish complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore found claimant could 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).[2] The administrative law judge further found the new evidence does not establish claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, as claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[3] or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[4] the administrative law judge denied benefits.

[1] Claimant filed two prior claims, both of which were finally denied. Decision and Order at 1, 2; Director's Exhibits 1, 2. His most recent prior claim, filed on June 12, 2002, was denied on July 10, 2006, because he did not establish total respiratory disability. Director's Exhibit 2. The Board affirmed the denial, and claimant took no further action; thus, the denial became final. *Feltner v. Shamrock Coal Co., Inc.*, BRB No. 06-0834 BLA (May 31, 2007) (unpub.).

[2] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine 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); *see* 20 C.F.R §718.305.

[4] When a miner files an application 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

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence does not stablish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant also contends the administrative law judge erred in finding the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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.

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.[5] 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. Failure to establish any 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).

Invocation of the 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

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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)(3). Claimant's prior claim was denied because he did not establish total respiratory disability. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing total respiratory disability. *See* 20 C.F.R. §725.309(c)(3).

[5] 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 1 at 3.

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. The administrative law judge must 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) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Claimant challenges the administrative law judge's weighing of the x-ray evidence. Claimant's Brief at 3. The administrative law judge considered six interpretations of four new x-rays dated February 27, 2013, May 29, 2014, April 14, 2015, and September 17, 2015. Decision and Order at 4, 9; Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2, 5. Dr. Alexander, dually qualified as a B reader and Board-certified radiologist, read the February 27, 2013 x-ray as negative for complicated pneumoconiosis; there are no other interpretations of this x-ray. Decision and Order at 4, 9; Claimant's Exhibit 2. Dr. DePonte, also dually qualified, interpreted the May 29, 2014 x-ray as positive for complicated pneumoconiosis, Category B; there are no other interpretations of this x-ray. Decision and Order at 4, 9; Claimant's Exhibit 1. Dr. DePonte also read the April 14, 2015 x-ray as positive for complicated pneumoconiosis, Category B, but Drs. Seaman and Meyer, also dually qualified, interpreted the x-ray as negative for complicated pneumoconiosis. Decision and Order at 4, 9; Director's Exhibit 12; Employer's Exhibits 2, 5. Finally, Dr. Kendall, dually qualified, interpreted the September 17, 2015 x-ray as negative for complicated pneumoconiosis; there are no other interpretations of this x-ray. Decision and Order at 4, 9; Employer's Exhibit 1.

Claimant contends that because Dr. DePonte read two separate films as positive for complicated pneumoconiosis, "it can be concluded that the presence of complicated pneumoconiosis has been established." Claimant's Brief at 3. As the administrative law judge observed, all of the interpreting physicians of record are dually-qualified readers, and only Dr. DePonte reported the presence of Category B opacities. Contrary to claimant's argument, considering the quality and quantity of the x-ray evidence as a whole, the administrative law judge permissibly found Dr. DePonte's positive x-ray interpretations outweighed by the preponderance of negative interpretations by dually-qualified physicians. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 9. In asserting Dr. DePonte's x-ray readings are sufficient to establish complicated pneumoconiosis, claimant asks us to reweigh the evidence, which we are not authorized to do. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish

complicated pneumoconiosis based on the x-ray evidence. *See* 20 C.F.R. §718.304(a); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); Decision and Order at 9.

Because claimant raises no further challenge,[6] we affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered 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).

The administrative law judge correctly observed that, as all of the new pulmonary function studies and blood gas studies are non-qualifying,[7] and the record contains no evidence of cor pumonale, total disability cannot be demonstrated pursuant to 20 C.F.R.

[6] The administrative law judge further found the record contains no autopsy or biopsy evidence, pursuant to 20 C.F.R. §718.304(b). Decision and Order at 9. He also considered the medical opinions, pursuant to 20 C.F.R. §718.304(c), noting correctly that while Dr. Rasmussen diagnosed complicated pneumoconiosis, Drs. Tuteur and Rosenberg observed no evidence of the disease. *Id.* Finding Dr. Rasmussen based his diagnosis of complicated pneumoconiosis on Dr. DePonte's positive reading of the April 14, 2015 x-ray, which the administrative law judge determined was outweighed by the negative interpretations of record, the administrative law judge permissibly concluded claimant failed to establish complicated pneumoconiosis through medical opinion evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); Decision and Order at 9-10. Since there is no other evidence of complicated pneumoconiosis, the administrative law judge concluded claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 9. We affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] 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).

§718.204(b)(2)(i)-(iii). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 7-8.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Rasmussen, Rosenberg and Tuteur. Decision and Order at 7-8. The administrative law judge accurately found that none of the physicians opined claimant is totally disabled from his usual coal mine employment by a respiratory or pulmonary impairment. Dr. Rasmussen opined that claimant has no respiratory impairment or disability, and can perform his usual coal mine work. Director's Exhibit 12. Dr. Rosenberg similarly opined that claimant has no respiratory impairment or disability. Employer's Exhibit 6. Dr. Tuteur diagnosed chronic obstructive pulmonary disease with mild exercise intolerance but did not provide a clear opinion regarding claimant's ability to perform his usual coal mine work.[8] Relying on the opinions of Drs. Rasmussen and Rosenberg, the administrative law judge concluded that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 8. He further found 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 8.

Claimant 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, since 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.

As neither Dr. Rasmussen nor Dr. Rosenberg, upon whose opinions the administrative law judge relied, diagnosed a respiratory impairment, no discussion of the exertional requirements of claimant's work was necessary. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (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

[8] Dr. Tuteur stated the pulmonary function studies demonstrated "a mild obstructive abnormality possibly associated with a borderline to mild restrictive component" and the blood gas studies demonstrated "no impairment of oxygen gas exchange at rest, and very mild during exercise." Employer's Exhibit 1.

at all"); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Moreover, both physicians acknowledged claimant's usual coal mine work in rendering their opinions that claimant is not totally disabled. [9]

We further reject claimant's assertion that total disability is established because it can be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 4. Even if one of the physicians had recommended against further coal mine dust exposure, it would be insufficient to establish total respiratory disability. *See Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP,* 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989). We also reject claimant's argument that he must be assumed to be totally disabled in light of the progressive and irreversible nature of pneumoconiosis, as an administrative law judge's finding of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b).

As claimant makes no further challenge to the administrative law judge's consideration of the medical opinion evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability. 20 C.F.R. §802.211. Because claimant failed to establish a totally disabling respiratory or pulmonary impairment, we also affirm the administrative law judge's findings that claimant failed to establish a change in an applicable condition of entitlement, and failed to invoke the Section 411(c)(4) presumption.

[9] Dr. Rasmussen noted claimant was a general inside laborer, he had worked as a cutting machine operator, shuttle car operator, and loading machine operator, and his last job was as a roof bolter, which required heavy and some very heavy manual labor. Director's Exhibit 12. Dr. Rosenberg similarly noted claimant's jobs included roof bolting and operating a cutting machine, loading machine, shuttle car, and continuous miner. Employer's Exhibit 6.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge