U.S. Department of Labor

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

BRB No. 19-0082 BLA

DANNY THORNSBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T R C MINING CORPORATION	)	DATE ISSUED: 02/11/2020
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Danny Thornsberry, Kite, Kentucky.

Cameron Blair and Caleb T. Taylor (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2017-BLA-05636) of Administrative Law Judge Jason A. Golden rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves a miner's subsequent claim filed on March 8, 2016.[2]

The administrative law judge credited claimant with twenty-five years of coal mine employment, but found the new evidence did not establish complicated pneumoconiosis and therefore claimant 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); 20 C.F.R. §718.304. Because claimant further failed to establish total disability, the administrative law judge found he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] He therefore denied benefits.

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

[2] On September 26, 2007, the district director denied claimant's first claim, filed on February 15, 2007, because he did not establish total respiratory disability. Director's Exhibit 1. Claimant did not take any further action until filing his current claim. Director's Exhibit 4.

[3] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); 20 C.F.R. §718.305.

[4] Where 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)(3). Because claimant's prior claim was denied because he did not establish total respiratory disability, Director's Exhibit 1, he could meet his burden under 20 C.F.R. §725.309(c)(3) by establishing that element of entitlement.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order Denying Benefits below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are 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 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). Statutory presumptions may assist claimants to establish the elements of entitlement.

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). 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

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Tr. at 7-8; Director's Exhibit 5.

the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge addressed seven interpretations of three x-rays taken on February 16, 2016, April 11, 2016, and December 19, 2017.[6] 20 C.F.R. §718.304(a); Decision and Order at 10-11. He correctly found that the interpreting physicians agree claimant has simple pneumoconiosis, but disagree as to whether he has complicated pneumoconiosis. Decision and Order at 11. The administrative law judge found the February 16, 2016 x-ray negative for complicated pneumoconiosis because Dr. DePonte, dually-qualified as a B reader and Board-certified radiologist, did not identify any large opacities of complicated pneumoconiosis and as there are no other interpretations of this x-ray. Decision and Order at 11; Director's Exhibit 21. Drs. Adcock, Miller, and Seaman, all dually-qualified radiologists, read the April 11, 2016 x-ray negative for complicated pneumoconiosis while only Dr. DePonte determined it was positive for complicated pneumoconiosis.[7] Decision and Order at 11; Director's Exhibits 13, 45; Claimant's Exhibit 3; Employer's Exhibit 2. The administrative law judge found this x-ray negative based on the preponderance of readings from dually-qualified readers. Finally, he found the December 19, 2017 x-ray "inconclusive" based on the conflicting interpretations from two dually-qualified radiologists, as Dr. DePonte read it as positive and Dr. Adcock did not identify any large opacities of complicated pneumoconiosis. Decision and Order at 11-12; Claimant's Exhibit 6; Employer's Exhibit 4. Having found two x-rays negative for complicated pneumoconiosis and one x-ray inconclusive, the administrative law judge

[6] The administrative law judge also considered a May 31, 2016 x-ray contained in the treatment records from Pikeville Medical Center. Decision and Order at 12. Dr. Perme, whose qualifications are not in the record, found that the May 31, 2016 x-ray showed multiple small round nodules, the majority less than 1.5 mm in diameter, and an overall impression of parenchymal findings consistent with coal workers' pneumoconiosis and a "left upper lobe 1 centimeter large opacity versus possible lung cancer versus costochondral junction superimposed shadow." Claimant's Exhibit 5. Dr. Broudy, who is Board-certified in internal medicine and pulmonary medicine and is a B-reader, reviewed the x-ray and stated its quality cannot be assessed, which would make a determination of complicated pneumoconiosis more difficult. Employer's Exhibit 1. The administrative law judge rationally found the May 31, 2016 x-ray did not weigh either for or against a finding of complicated pneumoconiosis and merits little weight. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 12.

[7] Dr. Lundberg, dually-qualified as a B reader and Board-certified radiologist, reviewed the April 11, 2016 x-ray to assess it for quality purposes only and found it was quality 2 ("contrast"). Director's Exhibit 16.

determined claimant did not meet his burden to prove the x-rays established the existence of complicated pneumoconiosis. Decision and Order at 12.

Because he performed both a qualitative and quantitative review of the x-rays, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the x-ray readings, we affirm the administrative law judge's finding that the x-ray evidence does not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a).[8] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993); *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); Decision and Order at 12.

Relevant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether claimant could establish he has complicated pneumoconiosis by "other means." Decision and Order at 12. The administrative law judge considered two computed tomography (CT) scans dated October 11, 2013 and July 22, 2014 contained in treatment records from Pikeville Medical Center. *Id.* The October 11, 2013 CT scan showed nodularity with nonspecific findings that "may be related to silicosis or coal workers' pneumoconiosis." Claimant's Exhibit 5 at 8-9. The July 22, 2014 CT scan showed nodularity described as "predominantly subcentimeter in size" that was "most suspicious for changes of occupational pneumoconiosis." *Id.* As the administrative law judge observed, Dr. Broudy opined this reading "contradicts the finding of complicated [coal workers' pneumoconiosis]" but did not explain his opinion. Decision and Order at 13; Employer's Exhibit 1. Based on the lack of any definitive diagnoses, the administrative law judge permissibly found the CT scans do not weigh for or against a finding of complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 13; Claimant's Exhibit 5 at 8-9.

He next considered claimant's treatment notes, correctly noting that while they contain diagnoses of pneumoconiosis and chronic obstructive pulmonary disease, they do not assist claimant in proving he has complicated pneumoconiosis, an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C, or a massive lesion in the lung. 20 C.F.R. §718.304; Decision and Order at 13; Claimant's Exhibits 4, 5.

[8] We also affirm the administrative law judge's finding that claimant could not establish he has complicated pneumoconiosis under 20 C.F.R. §718.304(b), because the record contains no biopsy evidence. Decision and Order at 12.

Finally the administrative law judge considered the opinions of Drs. Broudy and Ajjarapu. He correctly found that Dr. Broudy did not diagnose complicated pneumoconiosis. Decision and Order at 15; Employer's Exhibit 1. In contrast, Dr. Ajjarapu diagnosed complicated pneumoconiosis based on Dr. DePonte's positive reading for complicated pneumoconiosis of the April 11, 2016 x-ray. Decision and Order at 13-14; Director's Exhibit 19 at 2. Having found the April 11, 2016 x-ray and the x-ray evidence as a whole insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge permissibly discredited Dr. Ajjarapu's opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003) (an administrative law judge ALJ may not rely on a doctor's opinion that a patient has medical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence the administrative law judge has already discredited); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 14-15; Director's Exhibits 13, 19. Thus, we affirm the administrative law judge's finding that the relevant evidence under 20 C.F.R. §718.304(c) does not establish claimant has complicated pneumoconiosis as supported by substantial evidence. We also affirm the administrative law judge's finding, based on his consideration of all the relevant evidence, that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304 as supported by substantial evidence. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 15. Therefore, we affirm the finding that claimant did not invoke the irrebuttable presumption at Section 411(c)(3).

Section 411(c)(4) Presumption - Total Disability

A miner is 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 miner with more than fifteen years of qualifying coal mine employment is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he also has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4). A claimant may establish total disability based on pulmonary function studies, 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).

The administrative law judge correctly found that none of claimant's pulmonary function[9] and blood gas studies[10] are qualifying[11] and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6-7; Director's Exhibits 13, 21. We therefore affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii).

The administrative law judge considered the medical opinions of Drs. Broudy and Dr. Ajjarapu.[12] 20 C.F.R. §718.204(b)(2)(iv). Dr. Broudy opined claimant could perform his usual coal mine work from a respiratory or pulmonary standpoint. Decision and Order at 7; Director's Exhibit 19; Employer's Exhibit 1. Although Dr. Ajjarapu initially opined that claimant is completely disabled based on the April 11, 2016 chest x-ray finding of complicated pneumoconiosis, she subsequently explained that "without [the x-ray positive for complicated pneumoconiosis], due to other objective data being normal, one would consider this miner not disabled." Decision and Order at 7; Director's Exhibits 13, 19. Having found the April 11, 2016 x-ray negative for complicated pneumoconiosis, the administrative law judge permissibly credited the opinions of Drs. Broudy and Ajjarapu as documented and reasoned and supportive of the conclusion that claimant is not disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because there are no other medical opinions supportive of a finding that claimant is totally disabled, we affirm the administrative law judge's finding that the medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Zimmerman v. Director, OWCP*, 871 F. 2d 564 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

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[9] The record contains two pulmonary function studies dated February 16, 2016 and April 11, 2016. The administrative law judge correctly found that although the treatment records noted "[pulmonary function studies] in 2010 showed FEV1 55% and FEV1 ratio [] greater than 50," those pulmonary function studies are not in the record. Decision and Order at 7; Claimant's Exhibit 4 at 3.

[10] The record contains one resting and one exercise blood gas study conducted on April 11, 2016.

[11] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[12] Claimant's treatment records do not make reference to any respiratory or pulmonary impairment. Claimant's Exhibits 4, 5.

We also affirm the administrative law judge's finding that the weight of the evidence fails to establish total disability under 20 C.F.R. §718.204(b)(2) as supported by substantial evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198; Decision and Order at 20. As claimant failed to establish a totally disabling respiratory or pulmonary impairment, an essential element of entitlement, we affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) or establish entitlement to benefits under 20 C.F.R. Part 718.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge