U.S. Department of Labor

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

BRB No. 19-0188 BLA

MICHAEL J. MOREY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
	)	
and	)	DATE ISSUED: 02/21/2020
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-06265) of Administrative Law Judge Drew A. Swank on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on November 1, 2016.

The administrative law judge credited claimant with 23.08 years of underground coal mine employment[1] but found the evidence does not establish total disability. 20 C.F.R. §718.204(b)(2). He therefore found claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012)[2] or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues the administrative law judge erred in finding the medical opinion evidence did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv). Employer 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 Denying Benefits must be affirmed if it is rational, supported by substantial evidence, 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, 362 (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

[1] Claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third 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 if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. Statutory presumptions may assist claimants in establishing the elements of entitlement, but 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).

Total Disability

A miner is considered totally disabled if he has a pulmonary or respiratory impairment which, 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).

After finding that claimant's usual coal mine work as a mobile bridge operator required "medium" exertion, Decision and Order at 5, the administrative law judge considered the medical opinions of Drs. Zlupko and Basheda.[4] Dr. Zlupko opined that claimant has a moderate obstructive pulmonary impairment and therefore "should be considered permanently unable to perform coal mine work." Director's Exhibit 12; Claimant's Exhibit 1. Dr. Basheda opined that while claimant has a "Class I/Class II" pulmonary impairment, Employer's Exhibit 3, it would not prevent him from performing coal mine work requiring even heavy labor. Employer's Exhibit 5 at 36.

The administrative law judge found Dr. Zlupko's opinion not well-reasoned because he failed to list or characterize the exertional requirements of claimant's usual coal mine employment. Decision and Order at 21. Conversely, the administrative law judge credited Dr. Basheda's opinion that claimant could perform coal mine work requiring even heavy

[4] The administrative law judge declined to consider two additional medical opinions from Drs. Lenkey and Rosenberg because neither party designated them on their Black Lung Evidence Summary forms. Decision and Order at 20; Claimant's Exhibit 3; Employer's Exhibit 6. Because that ruling is unchallenged, we affirm it. *See Skrack*, 7 BLR at 1-711.

labor as well-reasoned. *Id.* He therefore found the medical opinions did not establish total disability. *Id.*

Claimant contends the administrative law judge erred in characterizing Dr. Basheda's opinion as supportive of a finding that claimant is not totally disabled.[5] Claimant's Brief at 5. We disagree. Dr. Basheda explained that claimant could perform even heavy labor because his FEV-1 value is "in the high 70s." Employer's Exhibit 5 at 36-37. Consequently, contrary to claimant's contention, the administrative law judge permissibly found Dr. Basheda's opinion supportive of a finding that claimant is not totally disabled.[6] *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002).

Claimant also contends the administrative law judge erred by failing to discuss and weigh his testimony that he lacks the respiratory ability to perform his job as a mobile bridge operator. Claimant's Brief at 6; Hearing Transcript at 18. We disagree. In a living miner's claim, "a miner's affidavit or testimony . . . may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(3); *see also* 20 C.F.R. §718.104(d)(5). The administrative law judge found that the medical evidence under 20 C.F.R. §718.204(b)(2) did not establish total disability. Therefore, claimant's testimony could not carry his burden to establish he is totally disabled. 20 C.F.R. §718.305(b)(3); *Madden v. Gopher Mining Co*., 21 BLR 1-122, 1-125

[5] We affirm, as unchallenged, the administrative law judge's findings regarding Dr. Zlupko's opinion. *See Skrack*, 7 BLR at 1-711.

[6] Claimant contends the administrative law judge failed to consider his testimony that his job as a mobile bridge operator required him to carry cable weighing up to 100 pounds. Claimant's Brief at 3, 6. Although claimant testified that he was required to carry "miner cable" that was "real heavy," he testified he did not "know what it would weigh." Hearing Transcript at 16. Moreover, in opining that claimant could perform coal mine work requiring heavy labor, Dr. Basheda assumed that claimant was required to lift "100 pounds on a regular basis." Employer's Exhibit 5 at 36. Claimant has not explained how the administrative law judge's alleged error undermines his assessment of Dr. Basheda's view of claimant's pulmonary capacity. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Claimant also suggests that Dr. Basheda's opinion weighs in favor of a finding of total disability. This assertion lacks evidentiary support. Dr. Basheda testified that a Class II impairment *may* impair someone from a heavy labor job, but he did not, as claimant contends, testify that *claimant's* impairment could preclude him from heavy work. He testified specifically to the contrary. Employer's Exhibit 5 at 36, 38.

(1999) ("[I]n a living miner's case, lay testimony is generally insufficient to establish total disability unless it is corroborated by at least a quantum of medical evidence.").

We affirm the administrative law judge's finding that claimant did not establish total disability. 20 C.F.R. §718.204(b)(2). Because claimant did not establish total disability, 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; Decision and Order at 7, 21.

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