U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0107 BLA

CHARLES W. FINNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY, formerly known as AMAX COAL COMPANY	)	DATE ISSUED: 01/21/2016
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Cheryl L. Intravaia (Feirich Mager Green Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05654) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on November 5, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C

§§901-944 (2012) (the Act). Based on the filing date of this claim, the administrative law judge considered claimant's entitlement under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge credited the claimant with at least fifteen years of surface coal mine employment and found that claimant worked in conditions that were substantially similar to those in an underground coal mine. However, because the administrative law judge determined that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), she found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). As claimant did not establish total disability, a requisite element of entitlement, the administrative law judge also found that entitlement to benefits was precluded under 20 C.F.R. Part 718. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that he is totally disabled. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Claimant has filed a reply brief, reiterating his arguments. The Director, Office of Workers' Compensation Programs, has not filed a 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.[2] 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 that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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

---

[1] Pursuant to Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability 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.

[2] The record reflects that claimant's coal mine employment was in Indiana. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the three pulmonary function studies, dated December 14, 2009, September 16, 2010, and February 22, 2012, were non-qualifying for total disability under the regulatory criteria.[3] Decision and Order at 7, 19; Director's Exhibit 12; Employer's Exhibit 5; Claimant's Exhibit 1. The administrative law judge also found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as the two arterial blood gas studies, dated December 14, 2009 and September 16, 2010, were non-qualifying. Decision and Order at 19; Director's Exhibit 12; Employer's Exhibit 5. In addition, because there is no evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge determined that claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Houser, Repsher, and Zaldivar. Decision and Order at 11-18, 19-20; Director's Exhibits 12, 19; Employer's Exhibits 5, 6, 9, 10, 18. The record reflects that Dr. Houser examined claimant on behalf of the Department of Labor (DOL) on December 14, 2009, at which time he obtained claimant's medical, work and smoking histories. Director's Exhibit 12. Dr. Houser noted that claimant's last job was operating a dozer, end loader, and haul truck, and stated, "during his last year of employment[,] reclamation work was performed," which required claimant to shovel coal weighing approximately fifty pounds. *Id*. Based on the pulmonary function study he obtained, Dr. Houser reported that claimant has "[m]oderately severe airway obstruction plus mild reduction in the vital capacity." *Id*. Dr. Houser diagnosed moderately severe chronic obstructive pulmonary disease (COPD), and opined that claimant "is physically unable to perform the duties which were required during his last [coal mine employment]." *Id*. Dr. Houser prepared a supplemental report on April 1, 2010, and reiterated his opinion that claimant is totally disabled by COPD. Director's Exhibit 19. Dr. Houser also conducted a pulmonary function study on February 22, 2012, as discussed *infra*, but did not render a conclusion as to whether the results supported a diagnosis of a totally disabling respiratory impairment. Claimant's Exhibit 1.

---

[3] A qualifying pulmonary function or arterial blood gas study yields values that are 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).

Dr. Repsher examined claimant on behalf of employer on September 16, 2010, and noted that claimant last worked as a heavy equipment operator and a coal haul truck driver. Employer's Exhibit 5. The report of the pulmonary function testing obtained by Dr. Repsher contained a statement that:

> Patient was unable to produce Acceptable and Reproducible Spirometry data. PATIENT HAD POOR TOLERANCE, DUE TO COUGHING. PATIENT UNABLE TO DO DCLO, LUNG VOLUMES.

Id. (emphasis in the original). Dr. Repsher opined that the pulmonary function study "comfortably exceed[ed] the DOL Table of Presumed Disability" and that the arterial blood gas studies were normal. *Id*. He concluded that claimant was capable of performing his usual coal mine work as a heavy equipment operator, including arduous labor. *Id*.

Dr. Zaldivar reviewed medical records and prepared a report on October 31, 2011. Employer's Exhibit 9. He indicated that the non-qualifying December 14, 2009 pulmonary function study by Dr. Houser was valid, and that the results of the September 16, 2010 pulmonary function study by Dr. Repsher were much higher, even though the study was technically invalid due to lack of cooperation and poor effort. *Id*. Dr. Zaldivar stated that claimant "is fully capable of performing his usual coal mine work or even arduous manual labor . . . ." *Id*.

In resolving the conflict in the medical opinion evidence, the administrative law judge concluded that Dr. Houser's opinion was "not sufficiently documented or reasoned to be given probative weight," stating:

> Dr. Houser found that the [c]laimant had a moderately severe impairment due to COPD and chronic bronchitis when he examined him in December 2009. He opined that the [c]laimant was unable to perform the duties required for his last coal mine employment based on that finding. The testing he performed in 2012 achieved similar results. But the report of the later testing said it showed only a mild obstructive impairment. Dr. Houser was not asked to explain the inconsistency between these characterizations of the test findings as "moderately severe" in 2009, but "mild" in 2012. Nor was he shown the results of Dr. Repsher's testing, which showed better lung function than either of his own two tests. The absence of any explanation from Dr. Houser whether Dr. Repsher's testing would affect his opinion also undermines its credibility.

Decision and Order at 19-20. Thus, the administrative law judge determined that claimant failed to establish total disability based on the medical opinion evidence. *Id*. at 20. Weighing all of the evidence together, the administrative law judge concluded that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*.

Claimant contends that the administrative law judge erroneously applied her own medical analysis of the evidence in concluding that there is a difference between the two pulmonary function studies obtained by Dr. Houser, and in rejecting his disability opinion in 2009 as being inconsistent with the results from the 2012 pulmonary function study.[4] We disagree.

In the report of the pulmonary function study that he obtained on December 14, 2009, Dr. Houser stated, "[s]pirometry shows mild reduction in the forced vital capacity and moderate reduction in the FEV1. The airflow rates are reduced. No significant bronchodilator response is noted." Director's Exhibit 12 at 14. In the accompanying report, setting forth his opinion as to whether claimant has pneumoconiosis and is totally disabled by it, Dr. Houser characterized claimant's impairment as "moderately severe," and opined that it would prevent claimant from performing his usual coal mine work. *Id*. at 5. However, in the report of the pulmonary function study that he obtained on February 22, 2012, Dr. Houser stated:

> MILD OBSTRUCTIVE PULMONARY IMPAIRMENT. This is indicated by the finding of a mild reduction in the forced expired volume in one second as a [percent] of the forced vital capacity (FVC). The degree of functional impairment reflected by the reduction in forced expired volume in the first second (FEV1) is found to be moderate. The disproportionately low forced expiratory flow during the middle half of the exhalation (FEF

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19. Although claimant alleges that the administrative law judge erred in failing to address the invalidation of Dr. Repsher's September 16, 2010 pulmonary function study when relying on it to discredit Dr. Houser's opinion, he does not allege any specific error with respect to the administrative law judge's finding that the pulmonary function study evidence was non-qualifying for total disability under 20 C.F.R. §718.204(b)(2)(i). Accordingly, we also affirm this finding. *See Sarf v. Director, OWCP,* 10 BLR 1-119 (1987); *Fish v. Director, OWCP,* 6 BLR 1-107 (1983); Decision and Order at 19.

> 25-75) suggests the presence of a significant component of small airway obstruction which may evidence a degree of reversibility.

Claimant's Exhibit 1 (emphasis in the original). In that report, Dr. Houser did not indicate whether claimant was totally disabled from performing his usual coal mine work, nor did he identify any physical restrictions associated with the 2012 pulmonary function study. *Id.*

Contrary to claimant's argument, the administrative law judge acted within her discretion in questioning the reliability of Dr. Houser's 2009 diagnosis of total disability, based on what she perceived to be a change in the classification of claimant's respiratory impairment in 2012. It is the function of the administrative law judge, as the trier-of-fact, to weigh the evidence, draw appropriate inferences, and determine credibility. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893, 13 BLR 2-348, 2-355 (7th Cir. 1990) (a reviewing court may not set aside an administrative law judge's inference merely because it finds another more reasonable or because it questions the factual basis); *see also Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988).

The administrative law judge rationally found an inconsistency in Dr. Houser's pulmonary function study reports regarding the degree of claimant's respiratory impairment, to the extent that Dr. Houser identified a "moderately severe" impairment, based on the December 14, 2009 pulmonary function study, but a "mild obstructive pulmonary impairment," based on the February 22, 2012 pulmonary function study. Director's Exhibit 12 at 5; Claimant's Exhibit 1; *see Poole*, 897 F.2d at 893, 13 BLR at 2-355; *Burns*, 855 F.2d at 501; Decision and Order at 19-20. Because claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of proving total disability based on Dr. Houser's opinion, when considered in light of the record as a whole.[5] *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Young v.*

---

[5] Because the administrative law judge provided a valid basis for according less weight to the opinion of Dr. Houser, it is not necessary that we address claimant's assertion that the administrative law judge erred in giving less weight to Dr. Houser's 2009 diagnosis of total disability because he did not address Dr. Repsher's pulmonary function study. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Barnes & Tucker Co., 11 BLR 1-147, 1-150 (1988). Additionally, as Drs. Repsher and Zaldivar specifically opined that claimant has no respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the weight of the medical opinion evidence fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6]

As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant is unable to invoke the Section 411(c)(4) presumption.[7] In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.

---

[6] Claimant asserts that the administrative law judge failed to properly identify his usual coal mine employment. The administrative law judge, however, summarized claimant's testimony that "his job required him to lift up to 100 pounds, frequently climb stairs and walk up to one mile" and "shovel coal until he was 'wore out.'" Decision and Order at 4. As the administrative law judge permissibly rejected Dr. Houser's 2009 disability opinion, and employer's doctors opined that claimant has no respiratory or pulmonary impairment and could perform even *arduous* manual labor, it was not necessary for the administrative law judge to further discuss the exertional requirements of claimant's usual coal mine employment in conjunction with the medical opinion evidence. *See Killman v. Director, OWCP*, 415 F.3d 716, 719, 23 BLR 2-250, 2-258-59 (7th Cir. 2005).

[7] In summarizing her findings, the administrative law judge stated, "the pulmonary function and arterial blood gas testing results are non-qualifying, and there is no well-documented, well-reasoned medical opinion showing that [claimant] is disabled despite the non-qualifying test results[,]" and, therefore, "[w]eighing all of the available evidence on disability together, I find that the [c]laimant has failed to establish that he is totally disabled by a pulmonary or respiratory impairment." Decision and Order at 20.

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