U.S. Department of Labor

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

BRB No. 17-0089 BLA

RICKY L. LUCAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEST POINT COAL MINING, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 01/05/2018
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean P. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05133) of Administrative Law Judge Theresa C. Timlin 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 claim filed on January 9, 2014.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited the parties' stipulations that claimant worked in underground coal mine employment for 26.77 years and that claimant has pneumoconiosis arising out of coal mine employment. The administrative law judge found, however, that claimant failed to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge concluded that claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis or establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the pulmonary function study and medical opinion evidence in finding that claimant failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Thus, claimant maintains that he is entitled to invocation of the Section 411(c)(4) presumption and an award of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established more than fifteen years of underground coal mine employment and that the medical evidence is insufficient to 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 3, 7-8; Claimant's Brief in Support of Appeal at 10, 11.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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).

Claimant first argues that the administrative law judge erred in finding that the pulmonary function studies did not establish total disability. The studies dated April 2, 2014 and September 30, 2014 yielded non-qualifying results,[4] and were therefore insufficient to demonstrate total disability. The study dated May 6, 2015 produced qualifying values both before and after bronchodilation, but the administrative law judge invalidated it because it did not meet the regulatory criteria set forth in 20 C.F.R. §718.103. Hence, she found that claimant failed to demonstrate total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7.

Claimant asserts that the administrative law judge should have credited the May 6, 2015 study because neither the administering technician nor the interpreting physician indicated that the test contained any deficiencies. While acknowledging that the April 2, 2014 and September 30, 2014 pulmonary function studies are non-qualifying, claimant notes that they still produced reduced values, and maintains that the May 6, 2015 pulmonary function study is a "credible indicator of [claimant's] respiratory disability." Claimant's Brief at 6-7. Claimant's argument lacks merit.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

When considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of claimant's pulmonary function. *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *see Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring). In accomplishing this task, the administrative law judge must rely upon the medical evidence and cannot substitute his or her opinion for that of the medical experts. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Here, the administrative law judge rationally found that the May 6, 2015 pulmonary function study did not constitute reliable evidence of total disability because "the test results were not accompanied by three flow-volume loops, did not list the separate values for the three trials, and did not indicate [c]laimant's degree of cooperation." Decision and Order at 7. Additionally, the administrative law judge noted that Dr. Hertz, a Board-certified pulmonologist, testified that the test was invalid for failure to include three separate flow volume loops.[5] *Id.*; Employer's Exhibit 1 at 20-21. As the administrative law judge permissibly found that the May 6, 2015 test was not in substantial compliance with the quality standards set forth in 20 C.F.R. §718.103, we affirm her findings that it was entitled to no weight and that the pulmonary function study evidence overall is insufficient to demonstrate total disability under 20 C.F.R. §718.204(b)(2)(i). *See Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Orek*, 10 BLR at 1-54; Decision and Order at 7.

We next address claimant's challenge to the administrative law judge's evaluation of the medical opinion evidence. The administrative law judge considered the opinions of Drs. Burlew, Kraynak, and Simelaro that claimant has a totally disabling respiratory impairment and Dr. Hertz's contrary opinion that claimant is not disabled. Decision and Order at 14-17; Director's Exhibit 16; Claimant's Exhibits 2, 5, 6; Employer's Exhibit 2.

[5] While Dr. Kraynak also reviewed the May 6, 2015 pulmonary function study and testified that the tracings were uniform, consistent, highly reproducible, and in compliance with the quality standards, the administrative law judge determined that he was only Board-eligible in family medicine and, thus, was less qualified than Dr. Hertz. Decision and Order at 11; Claimant's Exhibit 8 at 11; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

The administrative law judge found that Drs. Burlew, Simelaro, and Hertz were "well-qualified," but that Dr. Kraynak's qualifications, i.e., Board-eligible in family medicine, "render[ed] him only minimally qualified." *See* Decision and Order at 14-16. The administrative law judge further found the opinions of Drs. Burlew, Kraynak, and Simelaro not well-reasoned. Decision and Order at 14-16. In contrast, she found that Dr. Hertz's opinion that claimant is not disabled from a respiratory standpoint was well-documented, adequately explained, and entitled to dispositive weight. *Id.* at 16-17. Thus, the administrative law judge concluded that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 17.

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Burlew, Kraynak, and Simelaro not sufficiently reasoned and documented to satisfy claimant's burden of proof. Claimant's Brief at 18-22. Claimant asserts that Dr. Burlew's opinion is well-reasoned, notwithstanding the physician's reliance on non-qualifying objective testing, and that the administrative law judge mischaracterized the opinion as equivocal. *Id.* at 18-19. Claimant's arguments lack merit.

The administrative law judge found that Dr. Burlew's report contained an "internal ambiguity" because he indicated that claimant was not able to perform his last job due to "increased dyspnea associated with respiratory use and intercurrent coronary artery disease," but then stated that claimant was "not disabled" based on pulmonary function study and arterial blood gas study criteria. Decision and Order at 15; Director's Exhibit 16. As Dr. Burlew failed to resolve this inconsistency, she rationally discounted his assessment. *See Justice v. Island Creek Coal Co.*, 11 BLR 1- 91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 14. The administrative law judge further determined that "increased dyspnea," coupled with pulmonary function testing demonstrating a "mild restrictive lung disease," was not tantamount to a reasoned opinion that claimant has a respiratory impairment precluding him from performing his usual coal mine employment. Hence, the administrative law judge permissibly found Dr. Burlew's opinion entitled to little weight. Decision and Order at 15; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant next maintains that the administrative law judge selectively analyzed Dr. Kraynak's opinion, arguing that it merited greater weight in light of his status as claimant's treating physician. Claimant's Brief at 20-22. We disagree. The administrative law judge determined that Dr. Kraynak began treating claimant on February 5, 2015, but only saw him on three occasions between that date and Dr. Kraynak's deposition on August 8, 2015. Decision and Order at 11; Claimant's Exhibit 8 at 8, 25. As Dr. Kraynak testified that his treatment consisted of prescribing two inhalers for claimant, the administrative law judge permissibly concluded "[s]uch short and

minimal treatment did not permit Dr. Kraynak to develop a superior understanding of [c]laimant's condition." Decision and Order at 15; Claimant's Exhibit 8 at 25-26; *see* 20 C.F.R. §718.104(d); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The administrative law judge also found that Dr. Kraynak failed to adequately explain how the medical evidence supported his disability assessment, as he testified that the exercise portion of the non-qualifying blood gas studies did not approximate the exertional requirements of claimant's job, but did not "explain how the results obtained comport with his finding of impaired pulmonary function." Decision and Order at 15; Claimant's Exhibit 8 at 18; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, the administrative law judge noted that although Dr. Kraynak testified that claimant's valid pulmonary function studies demonstrated a moderate obstructive defect overall, he agreed that they revealed only a mild obstruction under the Global Initiative for Chronic Obstructive Lung Disease (GOLD) standard criteria. Decision and Order at 15; Claimant's Exhibit 8 at 24. As Dr. Kraynak failed to persuasively explain how those studies, taken as a whole, supported his conclusion, the administrative law judge permissibly found that his opinion was inadequately reasoned. *Id.*; *see Clark*, 12 BLR at 1-155. Additionally, Dr. Kraynak testified that the May 6, 2015 pulmonary function study invalidated by the administrative law judge was reliable. Decision and Order at 15; Claimant's Exhibit 8 at 10. Thus, the administrative law judge rationally concluded that Dr. Kraynak's opinion merited little weight. Decision and Order at 16; *see Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-106 (1994).

Lastly, claimant contends that the administrative law judge erred in discounting Dr. Similaro's opinion for failure to review the entire record, when Dr. Similaro is highly qualified in pulmonary medicine, reviewed the two valid pulmonary function tests, and was aware of the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 22. We disagree. The administrative law judge acknowledged that Dr. Similaro reported the exertional requirements of claimant's work and was well-qualified, but determined that Dr. Similaro based his opinion solely upon his review of the April 2, 2014 and September 30, 2014 pulmonary function studies. As Dr. Similaro neither explained how these non-qualifying tests demonstrated "the presence of a disabling respiratory impairment that would prevent [claimant] from returning to his former coal mine employment," nor reviewed claimant's medical history, findings on physical examination, or other test results, the administrative law judge permissibly found that his opinion was insufficiently reasoned and documented. Decision and Order at 16, *referencing* Claimant's Exhibits 5, 6; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Hall v. Director*, OWCP, 8 BLR 1-193 (1985). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R.

§718.204(b)(2)(iv).[6] *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Finally, considering all of the evidence relevant to total disability, *see Fields*, 10 BLR at 1-21; *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 permissibly found that claimant failed to establish that he is unable to perform his usual coal mine work from a respiratory standpoint. 20 C.F.R. §718.204(b)(2); Decision and Order at 17. In light of our affirmance of the administrative law judge's finding that claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm her determination that entitlement to benefits is precluded in this case.[7] *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

[6] Because the administrative law judge permissibly discounted all of the medical opinions supportive of claimant's burden, we need not address claimant's arguments regarding the administrative law judge's weighing of Dr. Hertz's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] Because we have affirmed the administrative law judge's finding that claimant failed to establish that he is totally disabled, we also affirm her finding that claimant cannot establish invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305; Decision and Order at 17. We therefore need not address claimant's general allegation of error regarding disability causation at 20 C.F.R. §718.204(c).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge