U.S. Department of Labor

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

BRB No. 17-0176 BLA

DANNY SPENCE Claimant-Petitioner v. EXCEL MINING, LLC and self-insured through MAPCO, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/10/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Danny Spence, Ulysses, Kentucky.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits on Remand (2011-BLA-05992) of Administrative Law Judge Alice M. Craft, 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 subsequent claim filed on September 13, 2010,[2] and is before the Board for the second time.

Previously, pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment for purposes of invoking 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] The Board further affirmed the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). *Spence v. Excel Mining, LLC*, BRB No. 15-0371 BLA, slip op. at 5 n.6, 6 n.8 (Apr. 27, 2016) (unpub.). The Board vacated, however, the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Spence*, BRB No. 15-0371 BLA, slip op. at 5. The Board held that the administrative law judge misapplied the "later evidence" rule in resolving the conflict in that evidence. *Id*. Because the administrative law judge's evaluation of the new medical opinion evidence was based, in part, on her weighing of the new pulmonary function study evidence, the Board also vacated the administrative law judge's finding

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

[2] This is claimant's second claim. Director's Exhibit 3. His first claim was filed on December 10, 2002. Director's Exhibit 1. On June 8, 2005, Administrative Law Judge Thomas F. Phalen, Jr. dismissed the claim because claimant failed to appear at a scheduled hearing and respond to an order to show cause why the claim should not be dismissed. *Id*. An order of dismissal has "the same effects as a decision and order disposing of the claim on its merits." 20 C.F.R. §725.466(a). Claimant took no further action on the claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes 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.

that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. Consequently, the Board further vacated the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption, and remanded the case for further consideration.[4] *Spence*, BRB No. 15-0371 BLA, slip op. at 6.

On remand, the administrative law judge found that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) or (iv). The administrative law judge therefore found that claimant failed to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) and failed to establish an essential element of entitlement. Accordingly, the administrative law judge again denied benefits.

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, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law 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).

[4] The Board advised the administrative law judge that if the evidence established total disability pursuant to 20 C.F.R. §718.204(b), claimant would have established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). In that instance, the Board instructed the administrative law judge that she should consider whether employer rebutted the presumption. However, if the administrative law judge, on remand, found that the evidence did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), a requisite element of entitlement, the Board instructed that she must deny benefits. *Spence v. Excel Mining, LLC*, BRB No. 15-0371 BLA, slip op. at 6 (Apr. 27, 2016) (unpub.), *citing Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(c)(3); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies dated March 24, 2008, February 15, 2010, November 16, 2010, December 20, 2010, February 14, 2011, and December 6, 2011. The administrative law judge correctly found that the first three studies, performed by Drs. Forehand, Craven, and Rasmussen, respectively, produced entirely qualifying results.[6] Decision and Order on Remand at 15; Director's Exhibits 13, 15, 16. In contrast, the subsequent three studies, performed by Drs. Thorarinsson, Craven, and Rosenberg, respectively, produced entirely non-qualifying results.[7] Decision and Order on Remand

[6] 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). Here, the March 24, 2008 and November 16, 2010 pulmonary function studies produced qualifying values both before and after administration of a bronchodilator. Decision and Order on Remand at 5; Director's Exhibits 13, 15. The February 15, 2010 pulmonary function study produced qualifying pre-bronchodilator values, but did not include post-bronchodilator values. Decision and Order on Remand at 5; Director's Exhibit 16.

[7] The December 20, 2010 and December 6, 2011 pulmonary function studies produced non-qualifying values both before and after administration of a bronchodilator. Decision and Order on Remand at 5; Claimant's Exhibit 4; Employer's Exhibit 4. The February 14, 2011 pulmonary function study produced non-qualifying pre-bronchodilator

at 15; Director's Exhibit 16; Claimant's Exhibit 4; Employer's Exhibit 4. The administrative law judge also found that there was no evidence in the record to suggest that the later non-qualifying pulmonary function studies did not accurately reflect claimant's respiratory condition at the times the studies were performed. Decision and Order on Remand at 16. Rather, the evidence supported the conclusion that even if claimant had been disabled at some point, his pulmonary function had improved more recently.[8] *Id.* Because disability is measured by the miner's physical condition at the time of the hearing, the administrative law judge reasonably relied on the more recent pulmonary function studies as being more probative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988), *citing Coffey v. Director, OWCP*, 5 BLR 1-404 (1982) (the evidence must address the relevant inquiry, *i.e.*, the miner's respiratory or pulmonary status at the time of the hearing). As substantial evidence supports the administrative law judge's finding that the pulmonary function study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i), it is affirmed.

The administrative law judge next considered the new medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Nelson[9] and Rasmussen[10] opined that claimant is

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values, but did not include post-bronchodilator values. Decision and Order on Remand at 5; Director's Exhibit 16.

[8] In her evaluation of the new pulmonary function study evidence, the administrative law judge stated that claimant's testing had "improved to a non-qualifying level in February and December 2012." Decision and Order on Remand at 16. However, the most recent pulmonary function studies were administered in February and December 2011. As this typographical error would not alter the administrative law judge's ultimate conclusion, it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] In a report dated November 6, 2012, Dr. Nelson opined that claimant "is disabled from the perspective of obstructive disease." Claimant's Exhibit 8. Dr. Nelson's report is a part of claimant's treatment records. *Id.* The administrative law judge determined, however, that Dr. Nelson's report constituted a medical report, rather than a treatment record, as Dr. Nelson provided a diagnosis of coal workers' pneumoconiosis and an assessment of total disability. Decision and Order on Remand at 8.

[10] In a report dated November 23, 2010, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his regular coal mine employment. Director's Exhibit 13.

totally disabled, while Drs. Rosenberg[11] and Castle[12] opined that claimant is not totally disabled. Claimant's Exhibit 8; Director's Exhibit 13; Employer's Exhibits 4, 5, 6, 7. The administrative law judge acknowledged that as claimant's treating physician, Dr. Nelson has "extensive familiarity" with claimant's condition "over time." Decision and Order on Remand at 16. The administrative law judge noted, however, that Dr. Nelson did not reference any objective testing in support of his conclusion that claimant is disabled. *Id*. Consequently, the administrative law judge stated that she could not determine whether Dr. Nelson considered the non-qualifying objective testing in forming his opinion. *Id*. The administrative law judge also stated that while Dr. Nelson noted that claimant worked for more than thirty years in deep mining and has "quite poor" exertional tolerance, the doctor never demonstrated an understanding of the actual demands of claimant's last coal mining job. Decision and Order on Remand at 17; Claimant's Exhibit 8. For these reasons, the administrative law judge permissibly concluded that Dr. Nelson's opinion is neither reasoned nor documented, and is entitled to little weight on the issue of disability. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 17.

The administrative law judge also noted, correctly, that while Dr. Rasmussen's opinion was supported by the objective evidence available to him at the time he reached his conclusions, including the November 16, 2010 qualifying pulmonary function studies, he did not review the subsequent, non-qualifying pulmonary function studies. Decision and Order on Remand at 17. The administrative law judge therefore permissibly found that Dr. Rasmussen's opinion is not entitled to probative weight on the issue of total disability. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *see also Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health); Decision and Order on Remand at 17.

[11] In reports dated December 20, 2011 and February 5, 2015, and in an April 25, 2014 deposition, Dr. Rosenberg opined that from a pulmonary perspective claimant is not disabled from performing his previous coal mine job or similarly arduous types of labor. Employer's Exhibits 4, 5, 6.

[12] In reports dated April 20, 2012 and December 16, 2014, Dr. Castle opined that claimant retains the respiratory capacity to perform his previous coal mine work. Employer's Exhibits 5, 7.

By contrast, the administrative law judge found that the opinions of Drs. Rosenberg and Castle are based on a comprehensive review of claimant's relevant histories, medical reports and objective tests. Decision and Order on Remand at 17. The administrative law judge further determined that their opinions "were consistent with the evidence available at the time of their exams and the most recent objective testing." *Id*. Thus the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Castle, that claimant is not totally disabled, are documented and reasoned and entitled to greater weight than the contrary opinions of Drs. Nelson and Rasmussen. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order on Remand at 17.

The determination of whether a medical opinion is documented and reasoned is for the administrative law judge, and we may not substitute our judgment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Moseley v. Peabody Coal Co*., 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). *See Fields*, 10 BLR at 1-21; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 17.

In light of our affirmance of the administrative law judge's finding that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. 30 U.S.C. §921(c)(4); *see 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, 1-2 (1986) (en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge