U.S. Department of Labor

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

BRB No. 17-0180 BLA

JOSEPH J. YERMALOVICH (o/b/o JOSEPH A. YERMALOVICH, deceased)	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 01/16/2018
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (2014-BLA-05767) of Administrative Law Judge Adele Higgins Odegard denying benefits 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 miner's claim filed on October 29, 2013.[2]

The administrative law judge credited the miner with 1.03 years of coal mine employment,[3] and accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that the miner had pneumoconiosis. The administrative law judge, however, found that the evidence did not establish that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that, even assuming the miner was totally disabled, the evidence did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding of 1.03 years of coal mine employment. Claimant further contends that the administrative law judge erred in finding that the evidence did not establish total disability and disability causation. The Director responds, urging affirmance of the denial of benefits.

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. 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).

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[1] The miner died on June 12, 2014. Claimant's Exhibit 11. Claimant, the miner's son, is pursuing the claim on behalf of the miner's estate. Hearing Transcript (Tr.) at 7, 16.

[2] The district director noted that the miner filed a prior claim on July 31, 1980, which was administratively closed and unavailable for inclusion in the record. Director's Exhibit 15 at 5. In his current application for benefits, the miner indicated that the prior claim was withdrawn. Director's Exhibit 2 at 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). At the hearing, the parties agreed that the administrative law judge should consider the current claim to be the miner's initial claim. Tr. at 13.

[3] The miner's coal mine employment was in Pennsylvania. Director's Exhibit 5; Tr. at 22. 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).

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).

The administrative law judge found that the evidence failed to establish that the miner had a totally disabling respiratory or pulmonary impairment. Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge considered the only pulmonary function study and arterial blood gas study of record, conducted on January 20, 2014, and accurately found that they were non-qualifying[4] for total disability. Claimant agrees that neither study establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii). Claimant's Brief at 10-13. Claimant, however, contends that the administrative law judge erred in relying "solely . . . upon comparison of the [study] values to the governing tables" without considering "the significance of the reduced values." *Id.*

Claimant's contention lacks merit. The regulations specify the criteria that a miner's pulmonary function studies and blood gas studies must meet to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge properly applied the regulations to determine that neither the pulmonary function study nor blood gas study of January 20, 2014 was qualifying. Contrary to claimant's contention, because the administrative law judge was not authorized to interpret medical data, she could not make her own assessment of the significance of the study values.[5] *See Marcum v. Director,* OWCP, 11 BLR 1-23, 1-24 (1987). Therefore, we reject claimant's allegation of error and affirm the administrative law judge's findings that the pulmonary function study and blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii).

[4] A "qualifying" pulmonary function study or 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] When considering the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that Dr. Talati, the only physician to review the results of the January 20, 2014 pulmonary function study and blood gas study, concluded that the miner was not totally disabled. Decision and Order at 11, 14; Director's Exhibit 10.

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge considered that the miner's treatment records contained diagnoses of cor pulmonale and heart failure, but found that no physician diagnosed the miner with cor pulmonale with right-sided congestive heart failure, as required by the regulation. Decision and Order at 10. Claimant does not dispute that the treatment records lacked a diagnosis of cor pulmonale with right-sided congestive heart failure, but contends that the administrative law judge "solely looked at the governing regulations while failing to consider the full impact of the records which diagnosed [c]or [p]ulmonale." Claimant's Brief at 14. Contrary to claimant's contention, the administrative law judge did not err in following the standard set forth in 20 C.F.R. §718.204(b)(2)(iii). *See Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989) (holding that "a medical opinion diagnosing cor pulmonale but not right[-]sided congestive heart failure is insufficient to demonstrate total disability" under the regulation), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Chakrabarty, Simelaro, and Talati, and the miner's medical treatment and hospitalization records. Dr. Chakrabarty, the miner's treating physician, opined that the miner was totally and permanently disabled due to a respiratory impairment. Claimant's Exhibit 1. Dr. Simelaro opined that the miner was totally disabled from a respiratory standpoint, based upon his pulmonary function and blood gas studies. Claimant's Exhibit 10. Dr. Talati, who examined the miner on behalf of the Department of Labor, opined that the miner was not totally disabled. Director's Exhibit 10. As summarized by the administrative law judge, the miner's medical treatment and hospitalization records covering the period between October 2008 and May 2015 included diagnoses of tracheobronchitis, exertional dyspnea, cough, wheezing, COPD, asthma, and heart failure. Decision and Order at 15-21; Director's Exhibit 9; Claimant's Exhibits 5-9.

The administrative law judge found that Dr. Chakrabarty's opinion was not well-reasoned because her two-sentence letter "did not include any rationale" for its conclusion, and because Dr. Chakrabarty did not indicate an awareness of the exertional requirements of the miner's usual coal mine employment. Decision and Order at 12-13. The administrative law judge found that Dr. Simelaro's opinion was not well-documented because Dr. Simelaro did not indicate what medical evidence he relied upon, other than referencing a February 18, 2014 pulmonary function study that was not of record. *Id*. at 13. The administrative law judge further found that Dr. Simelaro's opinion was not well-reasoned because the physician did not indicate his understanding of the miner's "specific job in the mines." *Id.* In contrast, the administrative law judge found that Dr. Talati's opinion that the miner was not totally disabled was well-reasoned and supported by the objective evidence.

Further, the administrative law judge found that the miner's treatment records indicated that the miner had a respiratory impairment, but did not address the severity of the impairment or whether it would have precluded the miner from performing his usual coal mine employment. Decision and Order at 21. Consequently, the administrative law judge found that the treatment records neither established nor refuted the existence of a totally disabling respiratory impairment. *Id*. at 22. The administrative law judge therefore found that the medical opinion evidence and treatment records did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that the administrative law judge erred in discrediting the opinions of Drs. Chakrabarty and Simelaro. Claimant's Brief at 20-23. We disagree. The administrative law judge permissibly discounted Dr. Chakrabarty's opinion because the physician provided no rationale for her diagnosis of total disability. *See* 20 C.F.R. §718.104(d)(5); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997). Further, the administrative law judge permissibly discounted Dr. Simelaro's opinion because he did not indicate the bases for it, other than his reference to a pulmonary function study that was not of record. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc). Additionally, the administrative law judge permissibly discounted the opinions of both Drs. Chakrabarty and Simelaro because neither physician indicated any knowledge of the exertional requirements of the miner's usual coal mine employment.[6] *See Budash v. Bethlehem Mines Corp*, 16 BLR 1-27, 1-29 (1991)

Claimant contends that the administrative law judge erred in her consideration of the treatment records, noting that such records typically do not "discuss the degree of disability as it relates to . . . coal mine work." Claimant's Brief at 23-24. Claimant, however, points to no evidence in the treatment records that would establish total disability, and raises no specific allegations of error in the administrative law judge's determination that the treatment records did not address the extent or severity of the

[6] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Chakrabarty and Simelaro, we need not address claimant's remaining arguments challenging the administrative law judge's weighing of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Additionally, because we have affirmed the administrative law judge's reasons for discounting the disability opinions of Drs. Chakrabarty and Simelaro, we need not address claimant's arguments that the administrative law judge erred in crediting Dr. Talati's opinion that the miner was not totally disabled. Any error by the administrative law judge in crediting Dr. Talati's opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

miner's impairment. Consequently, we affirm the administrative law judge's determination that the treatment records did not establish total disability. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Therefore, we affirm the administrative law judge's determination that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Finally, the administrative law judge considered claimant's testimony that his father had breathing problems, used a nebulizer, and wore an oxygen mask at the time of his death. Decision and Order at 22; Hearing Transcript at 18-20. The administrative law judge determined that the lay testimony supported a finding of total disability, but was outweighed by the medical evidence that the miner was not totally disabled. Consequently, the administrative law judge determined that the evidence as a whole did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Claimant contends that the administrative law judge did not adequately explain her determination that the lay testimony was outweighed by the medical evidence of record. Claimant's Brief at 24. We disagree. In a case involving a deceased miner, lay evidence may establish total disability only "if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition." 20 C.F.R. §718.204(d)(3). Consequently, because medical evidence was submitted that addressed the miner's pulmonary or respiratory condition, the administrative law judge could not have found that the lay testimony alone established total disability. *Id*.

Therefore, we affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Because the evidence did not establish total disability, an essential element of entitlement under 20

C.F.R. Part 718, we affirm the denial of benefits.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

[7] Thus, we need not address claimant's arguments that the administrative law judge erred in finding only 1.03 years of coal mine employment established, and in finding that, assuming the miner was totally disabled, the evidence did not establish that the total disability was due to pneumoconiosis.