U.S. Department of Labor

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

BRB No. 17-0183 BLA

MARLIN D. COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF RUN MINING COMPANY	)	
	)	DATE ISSUED: 01/30/2018
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05078) of Administrative Law Judge Richard A. Morgan 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 miner's subsequent claim filed on February 2, 2012.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with twenty years of underground coal mine employment, but found that the new evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Considering whether claimant could establish any other elements of entitlement without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant also failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability 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 finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Claimant further contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits.

[1] This is claimant's third claim for benefits. His most recent prior claim, filed on November 6, 2001, was denied by the district director on January 22, 2004 because the evidence did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Claimant requested a hearing before the Office of Administrative Law Judges, but subsequently moved to withdraw his request, which was granted on March 17, 2005. *Id*. No further action was taken by claimant until he filed his current claim. Director's Exhibit 4.

[2] 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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[3]

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.[4] 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 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).

When 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 the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, claimant had to establish that he has a totally disabling respiratory or pulmonary impairment in order to obtain a review of his current claim on the merits. 20 C.F.R. §725.309(c); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (en banc), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) or complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-25, 32.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

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

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) a physician's reasoned medical judgment that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge found that none of the new pulmonary function studies or blood gas studies is qualifying,[5] and the record contains no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). The administrative law judge then considered the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that Dr. Allen opined that claimant has a totally disabling respiratory impairment while Drs. Zaldivar and Basheda opined that he does not. Decision and Order at 11-18, 26-28. Considering the physicians' qualifications, the administrative law judge ranked Drs. Zaldivar and Basheda "roughly equally," based on their Board-certifications in pulmonary medicine, "followed by Dr. Allen."[6] Decision and Order at 26. According

[5] 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).

[6] The administrative law judge noted that Drs. Zaldivar and Basheda are Board-certified in internal medicine and pulmonary disease. Decision and Order at 12, 15, 26, *referencing* Employer's Exhibits 1, 4. Both the administrative law judge and claimant stated that Dr. Allen is Board-certified in internal medicine; however, her curriculum vitae indicates that she is Board-certified in family practice. Decision and Order at 11; Claimant's Brief at 16; Director's Exhibit 15. To the extent claimant's assertion regarding Dr. Allen's credentials constitutes an argument that the administrative law judge erred in finding Drs. Zaldivar and Basheda better qualified than Dr. Allen, that argument is rejected. The administrative law judge permissibly accorded less weight to Dr. Allen's opinion because unlike Drs. Zaldivar and Basheda, Dr. Allen is not a Board-certified pulmonologist. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 522, 21 BLR

greater weight to the opinions Drs. Zaldivar and Basheda than to the opinion of Dr. Allen, the administrative law judge found that the new medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Basheda over the opinion of Dr. Allen to conclude that claimant is not totally disabled. Claimant's Brief at 10-11, 13-16. Claimant asserts that Dr. Allen's opinion is well-reasoned and well-documented, and that Dr. Allen "was the only physician of record who considered whether [c]laimant could actually perform [his] last [job] duties." Claimant's Brief at 10-11, 13. Thus, claimant contends that Dr. Allen provided the most probative medical opinion of record. *Id*. at 11. Claimant's contentions lack merit.

The administrative law judge found that claimant's last coal mine employment as a section foreman required heavy manual labor because he had to walk the mine section he was in charge of multiple times every hour, and he had to lift 25 to 50 pounds daily. Decision and Order at 25. Contrary to claimant's assertion, the administrative law judge found that Drs. Zaldivar and Basheda each considered the exertional requirements of claimant's last coal mine employment in rendering their opinions on total disability. Decision and Order at 11, 12, 15. Dr. Zaldivar stated that claimant's job as an underground section foreman required him to "lift up to 50 pounds" and "walk through the mines," inspecting operating conditions. Decision and Order at 12, *citing* Employer's Exhibit 1 at 1. Dr. Zaldivar also opined that claimant could do even "very heavy labor" with his "mild airway obstruction" and is fully capable of performing his usual coal mine work from a respiratory standpoint. Decision and Order at 13-14; Employer's Exhibits 1, 7 at 45-46. Dr. Basheda similarly reported that claimant's last job as a section foreman required him to walk through the mines performing physical inspections, and lift as much as 50 pounds, among other duties. Decision and Order at 15, *citing* Employer's Exhibit 4 at 2. Further, Dr. Basheda opined that claimant is capable of performing his last coal mine employment because he had "close to zero percent impairment." Decision and Order at 16, *quoting* Employer's Exhibit 4 at 16.

The administrative law judge further found that, in addition to being the most highly qualified experts, Drs. Zaldivar and Basheda based their opinions on their review of the medical evidence of record, and their conclusions are consistent with the recent uniformly non-qualifying objective testing. Decision and Order at 12, 14-16, 28;

2-323, 2-325 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 11-18, 26-28.

Employer's Exhibits 1, 4, 6, 7. Thus, contrary to claimant's argument, the administrative law judge permissibly concluded that the opinions of Drs. Zaldivar and Basheda are "well documented, well-reasoned, and consistent with the pulmonary function and arterial blood gas studies."[7] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 27-28.

Turning to Dr. Allen's opinion, the administrative law judge noted that she stated that claimant is "unable to walk the required amount to perform foreman duties" due to "multiple causes[,] most notably shortness of breath from COPD," but also from coal workers' pneumoconiosis.[8] Decision and Order at 11-12, 27, *quoting* Director's Exhibit 15. Contrary to claimant's argument, the administrative law permissibly discounted Dr. Allen's opinion because she is not as well-qualified as Drs. Zaldivar and Basheda, and because her opinion is "fairly conclusory" and unsupported by the objective evidence of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2- 323, 2-335 (4th Cir. 1998); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); Decision and Order at 27.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Anderson*, 12 BLR at 1-113. In asserting that Dr. Allen "provided the most probative medical opinion of record," claimant is seeking a reweighing of the evidence, which the Board is not empowered to do. Claimant's Brief at 11; *see Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the weight of the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

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[7] We reject claimant's assertion that because Dr. Basheda did not examine claimant, it was error for the administrative law judge to accord weight to his opinion. *See Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993) ("[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."); Claimant's Brief at 15-16.

[8] Dr. Allen stated that mobility problems also contributed to claimant's inability to perform his usual coal mine work. Director's Exhibit 15.

Finally, considering all of the new evidence relevant to total disability, the administrative law judge permissibly found that it failed to establish that claimant has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine employment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 28. Thus, we affirm the administrative law judge's findings that claimant failed to establish a change in the applicable condition of entitlement, or invoke the Section 411(c)(4) presumption. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §§718.305, 725.309(c); *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235; Decision and Order at 28. Because we have affirmed the administrative law judge's finding that claimant did not established total disability, a necessary element of entitlement under 20 C.F.R. Part 718, claimant cannot establish entitlement to benefits under the regulatory criteria of Part 718.[9] *Anderson*, 12 BLR at 1-112.

[9] Therefore we need not address claimant's arguments regarding the administrative law judge's consideration of the medical evidence, including that contained in claimant's medical treatment records, relevant to the existence of pneumoconiosis and disability causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Claimant's Brief at 17-22.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge