U.S. Department of Labor

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

BRB No. 17-0220 BLA

JOHN L. CAMBRON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/31/2018
	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

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

Sean P.S. Rukavina and Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05207) of Administrative Law Judge Colleen A. Geraghty, rendered on a claim filed on January 13, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation and found that claimant had twenty-nine years of underground coal mine employment. Because the administrative law judge determined that the evidence was insufficient to establish total disability, she found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis.[1] The administrative law judge further found that claimant failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that he is not totally disabled and does not have pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal. Claimant has filed a reply brief, reiterating his contentions.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a miner will be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function studies; (ii) arterial blood-gas studies; (iii) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or (iv) the opinion of a physician who, exercising reasoned medical judgment,

[1] Section 411(c)(4) of the Act provides that a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in underground mines, and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has twenty-nine years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Because the record reflects that claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In the present case, the administrative law judge determined that claimant did not establish total disability by any of the methods set forth in 20 C.F.R. §718.204(b)(2). Decision and Order at 16-21. Claimant challenges the administrative law judge's weighing of the pulmonary function study evidence and the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[4]

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains eleven pulmonary function studies performed between August 13, 1995 and April 11, 2016. Director's Exhibit 14; Claimant's Exhibits 1 (at 10 and 69), 6-8; Employer's Exhibit 3. The pre-bronchodilator studies dated August 3, 1995, July 10, 2014 and April 11, 2016, produced non-qualifying values.[5] Claimant's Exhibits 1 (at 10), 8; Employer's Exhibit 3. The post-bronchodilator results from three studies dated March 26, 2013, February 23, 2015, and March 25, 2016 were also non-qualifying. Claimant's Exhibits 1 (at 69), 6, 7; Employer's Exhibit 3. In contrast, the pre-bronchodilator results from four studies dated March 26, 2013, February 10, 2014, February 23, 2015, and March 25, 2016, produced qualifying results. Director's Exhibit 14; Claimant's Exhibits 1 (at 69), 6, 7. Dr. Vuskovich reviewed the March 26, 2013 and February 10, 2014 pre-bronchodilator studies and determined that they were not valid.[6] Employer's Exhibits 10, 15 at 4. Dr.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack*, 6 BLR at 1-711.

[5] A "non-qualifying" pulmonary function study yields values that exceed the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "qualifying" study produces values that are equal to or less than those values. 20 C.F.R. §718.204(b)(2)(i).

[6] Dr. Vuskovich indicated that the March 26, 2013 pre-bronchodilator pulmonary function study showed only one trial for the pre- and post-bronchodilator tracings and that there were no volume-time tracings for either trial. Employer's Exhibit 10. Dr. Vuskovich also invalidated the February 10, 2014 pre-bronchodilator study, stating that the results were not valid because claimant "did not put forth the effort required to generate a valid MVV result." Employer's Exhibit 15 at 4.

Fino reviewed the February 10, 2014 pre-bronchodilator study and invalidated it.[7] Employer's Exhibit 9. Dr. Gaziano validated the February 10, 2014 pre-bronchodilator study. Director's Exhibit 14 at 11. Accepting the opinions of the physicians who invalidated two of the four qualifying pre-bronchodilator studies and according greater weight to the non-qualifying studies, both pre- and post-bronchodilator, the administrative law judge concluded that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i) by a preponderance of the evidence. Decision and Order at 18-19.

Claimant argues that the administrative law judge erred in failing to give greatest weight to the pre-bronchodilator pulmonary function studies. Claimant also alleges that the administrative law judge was required to give determinative weight to Dr. Chavda's validation of the qualifying pre-bronchodilator pulmonary function study he obtained on February 10, 2014, based on his superior qualifications. Claimant further maintains that the administrative law judge mistakenly omitted from consideration Dr. Gaziano's report validating the February 10, 2014 study. We reject claimant's allegations of error.

Contrary to claimant's argument, in evaluating the pulmonary function study results, the administrative law judge focused on whether the pre-bronchodilator results could establish total disability. Decision and Order at 17-19. In doing so, the administrative law judge permissibly credited Dr. Vuskovich's uncontradicted invalidation of the qualifying March 25, 2016 pre-bronchodilator study for failure to record three trials and time-volume tracings because it was "well-reasoned and supported." *Id*. at 18; 20 C.F.R. §718.103(a), (b); Appendix B to 20 C.F.R. Part 718 at (1)(v); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). We also see no error in the administrative law judge's discrediting of Dr. Chavda's determination that the February 10, 2014 qualifying pre-bronchodilator study he obtained was performed "very well," and that claimant's MVV was "reasonably good."[8] Decision and Order at 18; Claimant's Exhibit 6 at 10. The administrative law

[7] Dr. Fino commented: "the patient never stopped exhaling on the volume-time tracings. That means that this is not a valid lung function study because a maximum effort was not given." Employer's Exhibit 9.

[8] At his April 8, 2016 deposition, Dr. Chavda reviewed the report of the February 10, 2014 pulmonary function study and stated: "The comment says good effort and cooperation; the result of this test meets the ATS standard for acceptability and repeatability. In my opinion, the test was done very well; the patient has good effort and cooperation . . . I think, to me, looks [like a] reasonably good MVV." Claimant's Exhibit 6 at 9-10.

judge permissibly found that Dr. Chavda provided only a "summary conclusion" based on "summary notations" by the technician who administered the test. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 18. In contrast, the administrative law judge rationally credited Dr. Fino's opinion invalidating the February 10, 2014 study because "maximum effort was not given," finding it credible and more detailed.[9] *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 18. Based on her weighing of the opinions of Drs. Chavda and Fino, the administrative law judge reasonably concluded that the February 10, 2014 pulmonary function study was "not valid for an assessment of the [c]laimant's respiratory ability."[10] Decision and Order at 18; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Weighing the pre-bronchodilator studies she found valid, of which two were qualifying and three were non-qualifying, the administrative law judge rationally found that the preponderance of the pre-bronchodilator studies was non-qualifying. *See Crisp*, 866 F.2d 185, 12 BLR at 2-129. The administrative law judge also acted rationally in

[9] Dr. Fino explained, "Upon reviewing the lung function study from the Department of Labor on 2/10/14, I noted that the patient never stopped exhaling on the volume-time tracings. That means this is not a valid lung function study because a maximum effort was not given. It is an invalid study and it should not be used in consideration of [claimant's] respiratory status." Employer's Exhibit 9.

[10] Contrary to claimant's allegation, the administrative law judge was not required to give additional weight to Dr. Chavda's opinion based on his superior qualifications, as the administrative law judge correctly observed that, like Dr. Chavda, Dr. Fino is a Board-certified pulmonologist. Decision and Order at 12; Employer's Exhibit 9. In addition, we are not persuaded by claimant's contention that the administrative law judge's failure to weigh Dr. Gaziano's validation of the February 10, 2014 pulmonary function study is error requiring remand. Claimant has not explained how Dr. Gaziano's report, which consists of a check mark indicating "vents are acceptable," would alter the administrative law judge's conclusion, when she discredited Dr. Chavda's summary opinion and gave more weight to Dr. Fino's credible, detailed opinion – findings which claimant does not challenge and which we have affirmed as permissible. Director's Exhibit 14 at 11; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference"); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). We note that Dr. Vuskovitch also found the February 10, 2014 MVV result invalid. Employer's Exhibit 15.

according greater weight to the most recent, non-qualifying pre-bronchodilator study, performed on April 11, 2016, as pulmonary function studies are effort dependent and can produce inaccurate low values, but cannot produce spurious high values.[11] *See Andruscavage v. Director, OWCP*, No. 93-3291, slip op. at 9-10 (3d Cir. Feb. 22, 1994); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). We therefore affirm the administrative law judge's finding that claimant failed to establish total disability by a preponderance of the pulmonary function studies under 20 C.F.R. §718.204(b)(2)(i).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Chavda, Selby, Fino and Jarboe. Decision and Order at 7-14, 19-21; Director's Exhibits 14, 15; Claimant's Exhibits 6, 7; Employer's Exhibits 3, 9, 10, 12. Of these physicians, Dr. Chavda is the only one who diagnosed a totally disabling respiratory or pulmonary impairment. Director's Exhibit 14; Claimant's Exhibit 7. In a report dated February 10, 2014, he opined that claimant is unable to perform his coal mine job from a respiratory standpoint due to a moderate obstructive impairment. Director's Exhibit 14. At his subsequent deposition on April 8, 2016, Dr. Chavda reviewed non-qualifying pulmonary function studies obtained by other physicians and commented that the results tended to show that claimant was not totally disabled and that he gave better effort on the post-bronchodilator studies. Claimant's Exhibit 6 at 12-15, 17, 19, 22. Dr. Chavda submitted a third report dated April 14, 2016, and diagnosed a mild respiratory impairment based on the most recent valid, non-qualifying pulmonary function study, administered on April 11, 2016. Claimant's Exhibit 7. Dr. Chavda stated that claimant could not do his previous job as a mining supervisor because his FEV1 and FVC "could drop" while he was performing his work duties, as he could not sustain his bronchodilator response for twenty-four hours. *Id.*

The administrative law judge found that Dr. Chavda's diagnosis of disability was "poorly reasoned, speculative, and not supported by the objective medical evidence." Decision and Order at 20. She therefore concluded that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 20-21. Claimant argues that the administrative law judge erred in focusing on Dr. Chavda's deposition testimony that most, if not all, of the improvement seen on claimant's post-bronchodilator pulmonary function studies was attributable to better effort. Claimant also alleges that the administrative law judge erred in discrediting Dr. Chavda's opinion because the

[11] It was also within the administrative law judge's discretion to give more weight to the most recent pulmonary function study, which was performed on April 11, 2016, and which produced non-qualifying results. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Coal Co.*, 23 BLR 1-29, 1-35 (2004); Claimant's Exhibit 8.

physician relied on qualifying pulmonary function studies to diagnose a totally disabling respiratory impairment. We disagree.

The administrative law judge permissibly found that the opinion of Dr. Chavda did not establish total respiratory or pulmonary disability because he speculated as to possible reductions in claimant's FEV1 and FVC and the reasons for claimant's strong bronchodilator response. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553. The administrative law judge also reasonably pointed to Dr. Chavda's mistaken belief that the pre-bronchodilator values on the April 11, 2016 pulmonary function study were qualifying to discredit the physician's opinion on total disability. *See Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983); Decision and Order at 19-20. As Dr. Chavda was the only physician to opine that claimant is totally disabled from a respiratory standpoint and his opinion was permissibly discredited, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[12] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 19-20. Moreover, as the administrative law judge properly weighed the evidence supportive of total disability against the contrary probative evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (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 at 21. We further affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(ii); Decision and Order at 21.

Finally, because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we must affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v.*

[12] Because we have affirmed the administrative law judge's discrediting of Dr. Chavda's opinion, the only opinion supporting claimant's burden to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), we need not address claimant's allegations of error regarding the administrative law judge's weighing of the opinions of Drs. Selby, Fino and Jarboe. *See Johnson*, 12 BLR at 1-55; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). In addition, contrary to claimant's argument, the administrative law judge's determination that Dr. Chavda's opinion could not establish total disability precluded her from considering lay testimony from claimant and his wife. 20 C.F.R. §§718.305(b)(3), 718.204(d)(5); *see Matteo v. Director, OWCP*, 8 BLR 1-200, 1-203 (1985).

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 is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge