U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0068 BLA

TONY ENGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY, LLC	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU c/o LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 01/30/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05845) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on February 18, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge accepted the parties' stipulation that claimant has nine years of coal mine employment, insufficient to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] She concluded, however, that claimant established all of the elements of entitlement pursuant to 20 C.F.R. Part 718 and awarded benefits. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c).

On appeal, employer contends that the administrative law judge erred in finding that claimant established clinical and legal pneumoconiosis[3] and total disability. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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,

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[1] Claimant filed a prior claim that was denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of [20 C.F.R.] §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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); 20 C.F.R. §718.305.

[3] Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

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, claimant must establish pneumoconiosis, the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and the totally disabling respiratory or pulmonary impairment was 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

The administrative law judge found that claimant established clinical pneumoconiosis based on the x-rays and medical opinions, 20 C.F.R. §718.202(a)(1), (4), and legal pneumoconiosis based on medical opinions, 20 C.F.R. §718.202(a).

In the conclusion section of its brief, employer generally states that the administrative law judge erred in finding that claimant has legal pneumoconiosis, but it does not explain the alleged error with any specificity. As employer has not sufficiently developed the issue for the Board to review, we affirm the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director,*

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[4] 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 Exhibit 4.

[5] 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). Although the administrative law judge did not make a finding pursuant to 20 C.F.R. §725.309, claimant demonstrated a change in an applicable condition of entitlement, as he established the existence of legal pneumoconiosis. *See White*, 23 BLR at 1-3.

OWCP, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 5.

Because employer does not challenge the administrative law judge's finding that legal pneumoconiosis caused claimant's respiratory disability, Decision and Order at 24, we need not address employer's arguments regarding the existence of clinical pneumoconiosis, as any error in that regard is harmless. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, employer's only viable remaining argument is that the administrative law judge erred in finding claimant totally disabled.

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). Employer contends that the administrative law judge erred in finding that claimant established total disability based on the arterial blood gas studies and medical opinions.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered two arterial blood gas studies dated April 4, 2014 and March 31, 2015. The April 4, 2014 study conducted by Dr. Ajjarapu had qualifying values at rest; claimant was not exercised. Director's Exhibit 11. The March 31, 2015 study conducted by Dr. Dahhan had qualifying values at rest and non-qualifying values with exercise. Director's Exhibit 14.

The administrative law judge observed that arterial blood gas studies are obtained to detect "defects in the process of alveolar blood gas exchange" which "will manifest as a fall in arterial oxygen tension either at rest or during exercise." Decision and Order at 20, *quoting* 20 C.F.R. §718.105(a). She further stated:

> The preponderant arterial blood gas [studies] revealed qualifying values. Notably, both of [c]laimant's resting blood gas [studies] were qualifying for total disability. Claimant's last usual coal mine employment involved both sitting and standing and did not require constant exertion (though I recognize, at times, [c]laimant was required to perform heavy manual labor). Thus, I find that [c]laimant's arterial blood gas [study] results – both at rest and during exercise – are relevant to the discussion of whether [c]laimant is totally disabled from performing the exertional requirements of his last usual

> coal mine employment. The preponderant arterial blood gas test evidence shows that [c]laimant is totally disabled.

Decision and Order at 20.[6]

Employer contends that the administrative law judge mischaracterized the exertional requirements of claimant's job as a shuttle car operator and therefore erred in placing greater weight on the resting blood gas values. We disagree.

The administrative law judge correctly noted that in conjunction with his initial claim for benefits, claimant completed a "Description of Coal Mine Work and Other Employment" (Form CM-913), wherein he explained that his work as a shuttle car driver required him to sit for most of the day. Decision and Order at 4; Director's Exhibit 1-40. The administrative law judge also accurately summarized claimant's hearing testimony regarding the physical demands of his job as a shuttle car operator:

> Claimant's last coal mine employment was located at the face of the mine. ([Hearing Transcript (Tr.)] at 16). As a shuttle car operator, [c]laimant was required to haul loads of coal to the feeder; [c]laimant would also keep the miner-cable clear of the continuous miner, hang curtains and water the roadways. (Tr. at 16). Claimant would also perform dead work, like rock dusting. (Tr. at 31, 34; [Director's Exhibit] 5). The bags of rock dust weighed between 60 and 80 pounds. (Tr. at 35). Claimant worked in low coal, which required him to crawl at times. (Tr. at 31; [Director's Exhibit] 5).

Decision and Order at 4. Taking into consideration this evidence, we see no error in the administrative law judge's finding that claimant's usual coal mine job "generally required sitting in a shuttle car sometimes punctuated with heavy manual labor." Decision and Order at 4; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Although employer challenges the administrative law judge's characterization of the physical demands of claimant's job, the administrative law judge has discretion to weigh the evidence and draw inferences therefrom. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR

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[6] Additionally, the administrative law judge noted that the qualifying resting blood gas studies were "consistent throughout time, considering that almost a year passed between the administration of the two tests." Decision and Order at 20.

1-77 (1988); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990) (administrative law judges "weigh conflicting evidence and draw inferences from it, and a reviewing court may not set aside an administrative law judge's inference merely because it finds another more reasonable or because it questions the factual basis."). We therefore affirm the administrative law judge's finding regarding the exertional requirements of claimant's usual coal mine employment, as supported by substantial evidence. Decision and Order at 20. As employer raises no other error with regard to the resting blood gas studies, we further affirm that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[7] *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited Dr. Ajjarapu's opinion that claimant is totally disabled over the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order at 22-23; Director's Exhibits 11, 13, 14; Employer's Exhibits 1, 2. Employer argues that the administrative law judge erred in crediting Dr. Ajjarapu's opinion because it was based on the qualifying April 4, 2014 resting blood gas study and she did not review the non-qualifying March 31, 2015 exercise blood gas study. Employer's Brief at 4. Because we have affirmed the administrative law judge's reliance on the qualifying blood studies to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), we see no error in the administrative law judge's crediting of Dr. Ajjarapu's opinion as "well-reasoned" and supported by the preponderance of the qualifying blood gas study evidence. Decision and Order at 22; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because employer raises no other error, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's overall finding that claimant established total disability pursuant to 20 C.F.R. 718.204(b)(2), taking into consideration the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; Decision and Order at 24.

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[7] Employer argues that the administrative law judge erred in giving less weight to the March 2015 blood gas study conducted by Dr. Dahhan because it was "not independently verified," whereas the April 4, 2014 study conducted by Dr. Ajjarupu was found "acceptable" by Dr. Gaziano. Decision and Order at 20; Employer's Brief at 4. We consider any error by the administrative law judge to be harmless, however, as she indicated that she would still find that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), even if she had not considered Dr. Gaziano's validation report. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge