U.S. Department of Labor

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

BRB No. 15-0376 BLA

CLAYTON B. DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APPALACHIAN FUELS, LLC	)	
	)	
and	)	DATE ISSUED: 07/12/2016
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

H. Brett Stonecipher and Ryan D. Thompson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5997) of Administrative Law Judge Joseph E. Kane rendered on a miner's claim[1] filed on June 8, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty years of qualifying coal mine employment but found that, because claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that claimant could not establish entitlement pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act 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,

[1] The administrative law judge noted that, while claimant filed a prior claim in December 2009, the claim was subsequently withdrawn and, therefore, is considered not to have been filed. 20 C.F.R. §725.306 (b); Decision and Order at 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Decision and Order at 3; Director's Exhibit 3. Therefore, 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).

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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). We disagree. Prior to analyzing the medical opinions relevant to total disability, the administrative law judge initially found that, as all of the pulmonary function studies of record are non-qualifying, five of the six blood gas studies of record are non-qualifying, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).[4]

Turning to the medical opinions, the administrative law judge correctly noted that Drs. Dahhan[5] and Broudy[6] opined that claimant does not have a totally disabling pulmonary or respiratory impairment. In contrast, Dr. Rasmussen opined that claimant is totally disabled from a pulmonary standpoint.[7] The administrative law judge found that

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has twenty years of qualifying coal mine employment and that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] In an October 4, 2013 report, Dr. Dahhan opined that "[claimant's] respiratory parameters indicate that he retains the respiratory capacity to return to his previous coal mining work or job of comparable physical demand." Employer's Exhibits 1, 4. During an October 31, 2013 deposition, Dr. Dahhan reiterated that claimant is not totally disabled from a pulmonary standpoint. Employer's Exhibit 4 (Dr. Dahhan's Depo. at 11, 18).

[6] In an April 8, 2011 report, Dr. Broudy opined that claimant's pulmonary impairment would not prevent him from performing his last coal mine work as a truck driver. Employer's Exhibit 3. During an October 14, 2013 deposition, Dr. Broudy opined that claimant remains capable of performing his last coal mine work as a loader operator. Employer's Exhibit 3 (Dr. Broudy's Depo. at 22-23).

[7] In a December 30, 2010 report, and during his December 6, 2013 deposition, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform heavy and very heavy manual labor. Director's Exhibit 12; Claimant's Exhibit 1 (Dr. Rasmussen's Depo. at 19-20). Dr. Rasmussen stated that while claimant's objective testing indicated "minimal loss of lung function as reflected principally by his minimal restrictive ventilatory impairment," Director's Exhibit 12, the impairment was

the opinions of Drs. Dahhan and Broudy are well-reasoned and well-documented, and that "[they] do not help the [c]laimant in proving total disability." Decision and Order at 10. The administrative law judge discredited Dr. Rasmussen's opinion as unreasoned and undocumented, however, finding that Dr. Rasmussen diagnosed a disabling respiratory impairment based on his conclusion that the FEV1 portion of claimant's pulmonary function study yielded qualifying values, contrary to the administrative law judge's own finding that the study was non-qualifying. Decision and Order at 10. Alternatively, the administrative law judge found that, even if Dr. Rasmussen's opinion were considered well-reasoned and well-documented, because the preponderance of the medical opinion evidence, and the medical evidence as a whole, did not establish total respiratory disability, this claim "would still fail." *Id.* at 10 n.25. Consequently, the administrative law judge found that claimant did not establish total respiratory disability.

Claimant argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion is unreasoned and undocumented. Specifically, claimant contends that Dr. Rasmussen's opinion was not based solely on the pulmonary function study results, but was based, in part, on the blood gas study evidence. Claimant's Brief at 9-10. Claimant further asserts that, contrary to the administrative law judge's finding, the pulmonary function study upon which Dr. Rasmussen relied, while non-qualifying overall, yielded a qualifying FEV1 value. Claimant's Brief at 11-13. Claimant does not challenge the administrative law judge's alternative, discretionary findings that the opinions of Drs. Dahhan and Broudy are well-reasoned and well-documented and that, even if Dr. Rasmussen's opinion was also well-reasoned and well-documented on this issue, the preponderance of the medical opinion evidence does not establish total respiratory disability. *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). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112. In light of that affirmance, we also 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; Decision and Order at 10.

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nonetheless totally disabling given the rigors of claimant's usual coal mine work. Claimant's Exhibit 1 (Dr. Rasmussen's Depo. at 22).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge