U.S. Department of Labor

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

BRB No. 15-0513 BLA

DALE R. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ORCHARD COAL COMPANY	)	
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	DATE ISSUED: 07/18/2016
	)	
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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-BLA-05399) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves a claim filed on March 19, 2012.

After crediting the claimant with 7.19 years of coal mine employment,[1] the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence established that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in crediting him with less than ten years of coal mine employment. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Neither employer/carrier 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, and in accordance with applicable law.[2] 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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, she found that claimant was not entitled to consideration under Section 411(c)(4). Decision and Order at 7 n.6. Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

[2] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. 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).

Claimant initially contends that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains two pulmonary function studies conducted on June 6, 2012 and June 24, 2013. The June 6, 2012 pulmonary function study produced non-qualifying values,[3] while the June 24, 2013 pulmonary function study produced qualifying values. Director's Exhibit 8; Claimant's Exhibit 1. The administrative law judge, however, determined that both of the pulmonary function studies were invalid, and therefore insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12-14.

Claimant argues that the administrative law judge erred in finding that the June 24, 2013 qualifying pulmonary function study was invalid.[4] We disagree. The regulations provide that pulmonary function test results developed in connection with a claim for benefits shall include a statement signed by the physician conducting the test setting forth "[c]laimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests." 20 C.F.R. §718.103(b)(5). The administrative law judge accurately found that the June 24, 2013 pulmonary function study lacked any statement from the administering physician, Dr. Kraynak, regarding claimant's effort, comprehension, or cooperation. Decision and Order at 13; 20 C.F.R. §718.103(b)(5). Although Dr. Kraynak subsequently testified during an August 24, 2013 deposition that he observed claimant's effort, cooperation and comprehension during the study, and that it was "good," the administrative law judge found that Dr. Kraynak's description, occurring two months after the study was performed, was cursory and insufficient to provide a reliable description of claimant's cooperation and comprehension. Decision

[3] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[4] Claimant concedes that the administrative law judge permissibly determined that the June 6, 2012 pulmonary function study was invalid. Claimant's Brief at 13.

and Order at 13. Claimant does not specifically challenge the administrative law judge's credibility determination that Dr. Kraynak's deposition testimony, having taken place two months after the administration of the study, was too cursory to satisfy the requirement that claimant's cooperation and comprehension be indicated on the study. Moreover, even if challenged, we hold that the administrative law judge acted within her discretion in determining that Dr. Kraynak's testimony was not credible. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985) (holding that an administrative law judge is charged with determining the credibility of all witnesses and may reject testimony found to be not credible). We, therefore, hold that the administrative law judge permissibly found that the June 24, 2013 pulmonary function study was insufficient to establish total disability.[5] *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"). We therefore affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] The administrative law judge considered the medical opinions of Drs. Talati and Kraynak. Dr. Talati opined that claimant has no pulmonary impairment, Director's Exhibit 8, while Dr. Kraynak opined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2 at 12.

Claimant argues that the administrative law judge erred in her consideration of Dr. Kraynak's opinion. We disagree. The administrative law judge permissibly discounted

[5] Because the administrative law judge provided a valid basis for finding that the June 24, 2013 pulmonary function study was insufficient to support a finding of total disability, any error she may have made in according less weight to the study for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address claimant's contention that the administrative law judge erred in making her own determination that the June 24, 2013 pulmonary function study showed "excessive variation" between the two largest FEV1 values. Claimant's Brief at 12.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

Dr. Kraynak's opinion since it was based, in part, on the June 24, 2013 pulmonary function study, which she had found to be invalid. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 16. Although Dr. Kraynak also based his assessment, in part, on the results of a July 5, 2012 cardiopulmonary stress test, the administrative law judge noted that Dr. Talati interpreted the study as showing improved oxygenation levels with exercise, with no oxygen desaturation or worsening alveolar-arterial oxygen gradient. Decision and Order at 16. The administrative law judge permissibly credited Dr. Talati's assessment of the cardiopulmonary stress test over that of Dr. Kraynak, based upon Dr. Talati's superior qualifications.[7] *See Siegel*, 8 BLR at 1-157 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge, therefore, permissibly determined that Dr. Kraynak's opinion, that claimant is totally disabled from a pulmonary standpoint, was not sufficiently reasoned.[8] *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-233-34 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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

[7] While Dr. Kraynak is Board-eligible in Family Medicine, Claimant's Exhibit 2 at 5, Dr. Talati is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 8.

[8] Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as claimant's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as claimant's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found that his opinion was not sufficiently reasoned. Decision and Order at 15-16; 20 C.F.R. §718.104(d)(5); *see Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

benefits under 20 C.F.R. Part 718.[9] *See Trent*, 11 BLR at1-27; *Perry, OWCP*, 9 BLR at 1-2.

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

[9] Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. We, therefore, need not address claimant's contention that the administrative law judge erred in crediting him with less than ten years of coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).