U.S. Department of Labor

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

BRB No. 16-0586 BLA

PATRICIA CURRY (o/b/o ARVIS L. CURRY, JR., deceased)	)	
Claimant-Petitioner	)	
v.	)	
EAGLE ENERGY, INCORPORATED	)	DATE ISSUED: 07/31/2017
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2013-BLA-5265) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed on

[1] Claimant is the widow of the miner, Arvis L. Curry, Jr., who died on April 1, 2014. Employer's Exhibit 6. Claimant is pursuing the miner's claim on his behalf.

January 5, 2012,[2] pursuant to 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 that the miner had at least fifteen years of underground coal mine employment, but found that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge concluded that claimant was unable to invoke the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(4) of the Act.[3] Because the administrative law judge found that the newly submitted evidence was insufficient to establish any of the requisite elements of entitlement, the administrative law judge further determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] Accordingly, the administrative law judge denied benefits on the miner's subsequent claim.

On appeal, claimant contends that the administrative law judge erred in finding that the miner was not totally disabled and that she was therefore unable to invoke the Section 411(c)(4) presumption.[5] Employer has not filed a brief.[6] The Director, Office of

[2] The miner filed a prior claim on July 29, 1996, which was denied by the district director on February 13, 1997, by reason of abandonment. Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if the miner had fifteen or more 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(b).

[4] 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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the [miner] has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that the miner had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.

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.[7] 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 or prevented 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 tests showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; (ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; (iii) evidence that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or (iv) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 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 Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii),[8] the administrative law judge considered two newly submitted arterial blood-gas studies. Dr. Rasmussen conducted a study on

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[6] By letter dated August 22, 2016, Kathy L. Synder (Jackson Kelly PLLC), counsel for employer, filed a Notice of Withdrawal as Counsel, stating that Alpha Natural Resources (Alpha) and its subsidiaries, including Eagle Energy, Incorporated, filed for protection under Chapter 11 of the Federal Bankruptcy Code, and that its bankruptcy plan has been confirmed. Counsel further states that she was instructed by Alpha to withdraw as counsel in claims where Alpha was self-insured, and was specifically instructed to withdraw as counsel in this claim.

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

[8] The administrative law judge found that pulmonary function tests were insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R.

February 7, 2012, which produced non-qualifying values at rest but had qualifying values with exercise.[9] Director's Exhibit 14. Dr. Zaldivar conducted a study on July 18, 2012, which produced non-qualifying values both at rest and with exercise. Director's Exhibit 26. The administrative law judge initially found that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), observing that "neither of the resting arterial blood[-]gas studies and one of the two exercise studies produced qualifying results." Decision and Order at 26. The administrative law judge later noted, when weighing all of the evidence together on the issue of total disability, that "exercise blood[-]gas studies are more significant than resting studies in determining whether an individual can perform strenuous work." *Id*. at 30. The administrative law judge observed that while the "two exercise study results were numerically in equipoise, the more recent [arterial blood-gas study] produced non-qualifying results." *Id*.

Claimant generally states that exercise blood-gas studies should be given the greatest weight, and that Dr. Rasmussen's qualifying exercise study is sufficient to establish that the miner was totally disabled. Claimant contends that the administrative law judge improperly "made his finding concerning total disability under 20 C.F.R. §718.204(b)(2)(ii) by merely counting heads." Claimant's Brief at 5.

Contrary to claimant's characterization, the administrative law judge gave a different rationale than numerical superiority for the weight accorded the blood-gas study evidence. The administrative law judge specifically determined that the two *exercise* blood[-]gas studies, one qualifying and one non-qualifying, were more probative in determining whether the miner was totally disabled than the two resting studies. Decision and Order at 30. The administrative law judge determined that Dr. Zaldivar's non-qualifying exercise study was entitled to greater weight than Dr. Rasmussen's qualifying exercise study because Dr. Zaldivar's study was more recent. *Id*. Because claimant does not explain why the administrative law judge's reliance on the more recent non-qualifying exercise study was improper, we affirm the administrative law judge's

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§718.204(b)(2)(i). Decision and Order at 25. He also found that there was no evidence in the record indicating that the miner had cor pulmonale with right-sided congestive heart failure, which would allow claimant to establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 26. We affirm these findings as they are not challenged by claimant on appeal. *See Skrack*, 6 BLR at 1-711.

[9] A "qualifying" blood-gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

finding that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 26.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered five medical opinions. Drs. Rasmussen and Cohen opined that the miner was totally disabled, based on the qualifying exercise blood-gas study obtained by Dr. Rasmussen. Director's Exhibit 14; Claimant's Exhibits 4, 7, 12. Conversely, Drs. Zaldivar and Spagnolo opined that the miner was not totally disabled, relying on Dr. Zaldivar's non-qualifying exercise study. Director's Exhibit 36; Employer's Exhibits 11, 14, 15. Dr. Sood did not offer a specific opinion as to whether either study showed that the miner was totally disabled. Claimant's Exhibit 1.

The administrative law judge observed correctly that there is a conflict among the physicians as to whether the miner was adequately exercised during Dr. Zaldivar's testing. Decision and Order at 29. The administrative law judge noted that "Drs. Rasmussen, Sood and Cohen provided convincing explanations for why Dr. Rasmussen's exercise blood[-]gas study was more strenuous" but he concluded that there is "nothing in the record establish[ing] that Dr. Zaldivar's exercise blood[-]gas study is inadequate [under the regulatory criteria] or otherwise invalid." *Id*. The administrative law judge determined that the opinions of Drs. Rasmussen and Cohen were "poorly reasoned" to the extent they discounted Dr. Zaldivar's non-qualifying exercise blood-gas study. *Id*. Thus, the administrative law judge found that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Claimant raises no specific allegations of error with regard to the administrative law judge's weighing of the medical opinion evidence, and states only that the opinions of Drs. Rasmussen and Cohen should have been given greater weight. The Board is not empowered, however, to engage in a de novo proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. We therefore affirm the administrative law judge's finding that claimant did not establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 29.

Because claimant has failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's determination that claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b). We further affirm the administrative law judge's determination that claimant did not establish a change in an applicable

condition of entitlement pursuant to 20 C.F.R. §725.309(c).[10] *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

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

[10] With regard to 20 C.F.R. §725.309, claimant argues only that if total disability is established, she has satisfied her burden of proving a change in an applicable condition of entitlement. Claimant's Brief at 13. As we affirm the administrative law judge's finding that the evidence did not establish that the miner was totally disabled, claimant's argument is moot.