U.S. Department of Labor

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

BRB No. 17-0516 BLA

ELVIN WEBSTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 07/11/2018
	)	
and	)	
	)	
WALTER ENERGY, INCORPORATED	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Elvin Webster, Hueytown, Alabama.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2014-BLA-05257) of Administrative Law Judge Adele Higgins Odegard with respect to claimant's request for modification of the denial of a subsequent claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with nine years of coal mine employment, and found that the evidence submitted subsequent to the denial of his prior claim is insufficient to establish total respiratory or pulmonary disability.[2] The administrative law judge therefore found that claimant did not establish a change in an applicable condition of entitlement or a mistake in a determination of fact on the issue of total disability, an essential element of entitlement, and he denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge's Decision

[1] Claimant's initial claim, filed on May 23, 2006, was denied by the district director on January 8, 2007, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed a subsequent claim on July 27, 2012. Director's Exhibit 3. On April 3, 2013, the district director issued a Proposed Decision and Order denying benefits because claimant failed to establish any element of entitlement. Director's Exhibit 15. On May 16, 2013, claimant requested modification, which the district director denied on August 23, 2013, because claimant did not establish a mistake in a determination of fact. Director's Exhibits 17, 19. Claimant filed another request for modification, along with new evidence, on August 28, 2013. Director's Exhibit 20. On November 5, 2013, the district director denied the request for modification because claimant failed to establish a change in conditions. Director's Exhibit 23. Claimant requested a hearing, and the case was referred to the Office of Administrative Law Judges. Director's Exhibit 27.

[2] Based on these findings, claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, which requires clamant to establish at least fifteen years of underground coal mine employment, or 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)(1).

and Order must be affirmed if it is rational, supported by substantial evidence, and consistent 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).

To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of these elements to obtain a review of the merits of his subsequent claim. 20 C.F.R. §725.309(c). Additionally, because claimant sought modification of the denial of his subsequent claim, the administrative law judge was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence submitted in the subsequent claim, is sufficient to establish a change in conditions. 20 C.F.R. §725.310; *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

In the absence of contrary probative evidence, a miner's disability is established by: pulmonary function studies, arterial blood gas studies, evidence that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies postdating the denial of claimant's 2006 claim. The

[3] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

administrative law judge accurately found that the September 10, 2012 study submitted with claimant's subsequent claim is non-qualifying for total disability.[4] Decision and Order at 8; Director's Exhibit 9. The administrative law judge also correctly determined that the three pulmonary function studies submitted in conjunction with claimant's request for modification, dated April 10, 2014, October 8, 2015, and March 4, 2016, are non-qualifying. Decision and Order at 7-8; Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge then considered the FEV1 value from a pulmonary function study dated July 28, 2011, which appears in a Social Security Administration disability decision claimant submitted on modification. Decision and Order at 8. She permissibly found that it is entitled to "no weight," because the FVC, MVV, and FEV1/FVC values were not reported[5] and she could not assess "whether the test was conducted in accordance with the requirements of Part 718[.]" *Id*.; *see DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). Based on the administrative law judge's appropriate weighing of the pulmonary function studies, and the fact that none of the studies produced qualifying values, we affirm her finding that this evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge accurately found that the September 10, 2012 blood gas study submitted in the subsequent claim, and the April 10, 2014 blood gas study submitted on modification, are non-qualifying and therefore insufficient to establish total disability. Decision and Order at 9; Director's Exhibit 9; Employer's Exhibit 2. Because it is supported by substantial evidence, that finding is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Further, because the administrative law judge accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure, we also affirm her finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinion of Dr. O'Reilly, submitted in the 2012 subsequent claim, and the opinions of Drs.

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

[5] Whether a pulmonary function study qualifies for total disability depends on the reported FEV1 value in conjunction with either the FVC, MVV, or FEV1/FVC values. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Because the latter three values are not reported for the July 28, 2011 study, the administrative law judge could not determine whether it is qualifying.

Goldstein, Fino, and Rollins, submitted on modification. Dr. O'Reilly conducted the Department of Labor-sponsored examination in conjunction with the subsequent claim and opined that claimant's pulmonary capacity is normal. Director's Exhibit 9. Dr. Goldstein stated that claimant suffers from an airway abnormality with significant improvement following bronchodilators and concluded that claimant's pulmonary symptoms were consistent with asthma. Employer's Exhibit 2. He did not specifically state whether claimant could perform his last coal mine job. *Id*. Dr. Fino opined that claimant has no respiratory impairment and "is neither partially nor totally disabled from returning" to his last coal mine job. Employer's Exhibit 4. Dr. Rollins stated that claimant's pulmonary function studies "are slightly abnormal" and that claimant has "some [dyspnea on exertion]." Claimant's Exhibit 1. Dr. Rollins "suspect[ed]" that claimant "could do some light work," but that underground coal mine work would "likely" be beyond his capabilities. *Id*.

Because Drs. O'Reilly and Fino did not diagnose a totally disabling impairment, and Dr. Goldstein did not offer an opinion on the issue, we affirm the administrative law judge's finding that their opinions do not support claimant's burden to establish total disability at 20 C.F.R. §718.204(b). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. Further, the administrative law judge permissibly found Dr. Rollins's opinion that claimant was "likely" totally disabled to be "not well reasoned" and therefore entitled to "little weight," because the physician "did not discuss the exertional requirements of the [c]laimant's last coal mine employment in relation to whether he could perform that work." *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-239 (11th Cir. 2004); Decision and Order at 14. Consequently, 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).[6]

[6] The administrative law judge also considered a June 21, 2011 hospital discharge summary prepared by Dr. Purdy. Decision and Order at 15-16. Dr. Purdy reported that claimant was admitted with severe bronchospasm and exacerbation of chronic obstructive pulmonary disease. Director's Exhibit 22. The administrative law judge rationally concluded that the discharge summary did not support a finding of total disability, as "Dr. Purdy did not opine as to whether the [c]laimant was totally disabled from performing his last coal mine employment from a pulmonary perspective." Decision and Order at 16; *see Jim Walters Res., Inc. v. Allen*, 995 F.2d 1027, 1029, 18 BLR 2-237, 2-241-43 (11th Cir. 1993).

In light of the administrative law judge's rational determination that the evidence developed after the denial of claimant's initial claim is insufficient to prove total disability, an essential element of entitlement, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; Decision and Order at 16.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge