U.S. Department of Labor

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

BRB No. 17-0569 BLA

ROBERT LEE HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEMA COAL COMPANY	)	DATE ISSUED: 07/30/2018
	)	
and	)	
	)	
EMPLOYER'S INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Robert Lee Hall, Topmost, Kentucky.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05689) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on July 30, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established at least seven, but fewer than ten, years of coal mine employment.[2] The administrative law judge determined that the evidence was insufficient to establish complicated pneumoconiosis under 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of his claim. Employer responds, urging affirmance of the administrative law judge's findings and the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant testified that he worked in coal mine employment for 8.5 years. Decision and Order at 3; Hearing Transcript at 13-14. Because claimant is unable to establish at least fifteen years of coal mine employment, he is not eligible for the Section 411(c)(4) presumption.

accordance 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).

In denying benefits, the administrative law judge first found that claimant failed to establish complicated pneumoconiosis. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c), before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 390 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge correctly found that the x-rays of record, dated February 19, 2013, September 25, 2013, April 15, 2015, and December 8, 2015, were read as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 9, 10; Claimant's Exhibit 1; Employer's Exhibits 1-2. We therefore affirm the administrative law judge's finding that claimant is unable to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(c),[4] the administrative law judge considered the CT scan evidence, treatment records and medical opinion evidence. He correctly found that while the CT scans[5] revealed a "pretracheal node" measuring 1.8 centimeters, no physician

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as 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 3.

[4] Because there is no biopsy evidence, claimant is unable to establish complicated pneumoconiosis under 20 C.F.R. §718.304(b).

[5] Dr. Myer read a February 20, 2013 CT scan as negative for coal workers' pneumoconiosis and noted an "airspace opacity … most consistent with aspiration … not a manifestation of coal dust exposure." Employer's Exhibit 3. Dr. Zambos read a January 6, 2016 CT scan as showing: "Stable mild bilateral hilar and mediastinal adenopathy [with a] 1.8 cm pretracheal node." Claimant's Exhibit 7. Dr. Hall read a July 13, 2016 CT scan

who interpreted the CT scans opined that the node was complicated pneumoconiosis or progressive massive fibrosis. Decision and Order at 6.

Considering Dr. Ammisetty's treatment records, the administrative law judge found the physician referenced a CT scan dated May 25, 2015 as showing "minimal interstitial nodular pattern and lung disease primarily upper lobe correlated with clinical pneumoconiosis, bilateral hilar and mediastinal adenopathy 1.8 cm. pretracheal node." Claimant's Exhibit 8. Dr. Ammisetty stated that the CT findings were "most likely pneumoconiosis" or "most likely secondary to pneumoconiosis." *Id.* The administrative law judge permissibly concluded Dr. Ammisetty's opinion was insufficient to satisfy claimant's burden of proof, as Dr. Ammisetty "did not definitively diagnose complicated pneumoconiosis" *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 6; Employer's Exhibit 3, Claimant's Exhibits 7, 8.

With regard to the other medical opinion evidence, the administrative law judge accurately determined that no physician opined that claimant has complicated pneumoconiosis. Decision and Order at 6; Director's Exhibit 10; Employer's Exhibit 4. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). We further affirm the administrative law judge's determination that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See Gray*, 176 F.3d at 390; *Melnick*, 16 BLR at 1-33.

In the absence of complicated pneumoconiosis, claimant must establish all the requisite elements of entitlement under 20 C.F.R. Part 718.[6] The administrative law judge found that claimant failed to establish total disability, one of the requisite elements.

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as showing, *inter alia*, "[S]table appearance of mild upper lung predominant nodular interstitial lung disease." *Id.*

[6] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant may establish total disability based on pulmonary function tests, arterial blood gas studies, evidence of 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988).

We affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as none of the pulmonary function studies of record was qualifying,[7] and there is no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-8; Director's Exhibits 9-13, 10,11; Claimant's Exhibit 6.

Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the two blood gas studies of record. Decision and Order at 8. The September 25, 2013 study produced qualifying values at rest, but had non-qualifying values for total disability with exercise. Director's Exhibit 9. The April 15, 2015 study produced non-qualifying values at rest and no exercise values were reported. Director's Exhibit 10.

In weighing the blood gas study evidence, the administrative law judge permissibly assigned greater weight to the 2015 non-qualifying exercise values, in comparison to the 2013 qualifying resting values, because the administrative law judge considered the exercise values to be more probative of claimant's ability to perform his last coal mine job. Decision and Order at 9; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility). The administrative law judge also permissibly credited the non-qualifying values obtained *at rest* in 2015, over the earlier qualifying values obtained *at rest* in 2013. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (The question of a miner's ability to perform his usual coal mine work is to be assessed at the time of the hearing); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 9. As the administrative law judge rationally explained the weight he accorded the blood gas study evidence, we affirm his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

[7] A "qualifying" pulmonary function 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, C. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Ammisetty, Broudy and Rosenberg. Dr. Ammisetty performed the examination of claimant on behalf of the Department of Labor on September 25, 2013. Director's Exhibit 9. In his report, Dr. Ammisetty diagnosed a "significant pulmonary impairment" and stated that, "[claimant] could not work in the coalmines as a blaster that needs high physical demand. His resting PO2 is 61. He is easily getting out of breath even with small exertion." *Id.*

Employer subsequently deposed Dr. Ammisetty on August 12, 2016. Employer's Exhibit 5. During his deposition, Dr. Ammisetty was given a copy of the results of Dr. Broudy's 2015 blood gas study and agreed that it showed an improvement over the blood gases obtained in 2013. *Id*. at 19. When asked by employer whether he considered claimant to be totally disabled, taking into consideration Dr. Broudy's blood gas study, Dr. Ammisetty stated that if there was "no error" in the administration of the 2015 blood gas study, referring to "the blood gases calibration and the technique," then claimant "did not meet the criteria for pulmonary disability." *Id*. at 20.

The administrative law judge determined that Dr. Ammisetty's deposition testimony undermined the physician's original diagnosis of total disability. Decision and Order at 10. The administrative law judge specifically found that there was no evidence in the record to indicate that the non-qualifying 2015 blood gas study was invalid. *Id*. He further found that because Dr. Ammisetty's original diagnosis of total disability "was based primarily on [claimant's] qualifying resting study," it was now "contradicted" by "the more recent non-qualifying and [valid] resting study."[8] *Id*. at 11; *see Cooley,* 845 F.2d at 624. Because the administrative law judge gave a valid reason for rejecting Dr. Ammisetty's opinion, we affirm the administrative law judge's credibility determination.[9] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 11.

[8] The administrative law judge correctly found that Dr. Ammisetty's treatment notes, dating from January 26, 2015 to July 8, 2016, do not mention whether claimant is totally disabled from a respiratory or pulmonary impairment. Decision and Order at 11; Claimant's Exhibit 8.

[9] Although Dr. Ammisetty is claimant's treating physician, the administrative law judge permissibly determined that Dr. Ammisetty's opinion was not entitled to determinative weight because it was not sufficiently reasoned. *See* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002); Decision and Order at 10-11.

As there are no other medical opinions in the record supportive of claimant's burden of proof,[10] we affirm the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's finding, based on his consideration of all the evidence, that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2). *Defore*, 12 BLR at 1-28-29; Decision and Order at 11. Since claimant failed to establish total disability, an essential element of entitlement, benefits are precluded.[11] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); Decision and Order at 11.

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

RYAN GILLIGAN
Administrative Appeals Judge

[10] Neither Dr. Broudy nor Dr. Rosenberg diagnosed that claimant is totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 10; Employer's Exhibits 4-8.

[11] Because claimant failed to establish total disability, it is not necessary that we address the propriety of the administrative law judge's finding that claimant established less than ten years of coal mine employment. *See* 20 C.F.R. §718.203(b); Decision and Order at 4.