U.S. Department of Labor

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

BRB No. 18-0432 BLA

KATHY WALKER (Widow of JOHN WALKER) Claimant-Petitioner v. HERITAGE COAL COMPANY and PEABODY INVESTMENTS COMPANY, c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/16/2019 DECISION and ORDER

Appeal of the Decision and Order [on Remand] Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order [on Remand] Denying Benefits (2011-BLA-05510) of Administrative Law Judge Peter B. Silvain, Jr., rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 1, 2010,[2] and is before the Board for the second time.

In a Decision and Order dated September 27, 2016, the administrative law judge credited the miner with fifteen years of underground coal mine employment, but found the new evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4)[3] of the Act, 30 U.S.C. §921(c)(4) (2012), or establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] Accordingly, the administrative law judge denied benefits.

[1] Claimant is the widow of the miner, who died on June 8, 2014. She is pursuing the miner's claim on behalf of his estate. Decision and Order [on Remand] at 2.

[2] This is the miner's fourth claim for benefits. The miner's most recent prior claim, filed on March 12, 2007, was denied by the district director on November 30, 2007 because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. The district director also denied the miner's request for modification on June 10, 2008. The miner took no further action until filing this subsequent claim. Director's Exhibit 5.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes 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); *see* 20 C.F.R. §718.305.

[4] Where 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 "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

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that claimant established at least fifteen years of coal mine employment, but did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). The Board vacated, however, 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). The Board held he improperly substituted his opinion for that of Dr. Chavda to the extent he accorded less weight to the doctor's opinion based on his finding that the underlying pulmonary function study values were not "that borderline" or as "marginal" as the doctor determined. The Board also held the administrative law judge impermissibly questioned whether the miner was disabled in 2006, rather than at the time of Dr. Chavda's examination in 2011 or the hearing in 2013. The Board therefore remanded the case for further consideration. *Walker v. Heritage Coal Co.*, BRB No. 17-0014 BLA (Aug. 15, 2017) (unpub.).[5]

On remand, the administrative law judge found claimant did not establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), and denied benefits. Claimant argues the administrative law judge erred in finding the medical opinion evidence does not establish total disability. 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. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

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conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's crediting of the opinions of Drs. Rosenberg and Repsher that the miner was not totally disabled and his discrediting of the opinion of Dr. Baker that the miner was totally disabled. *Walker v. Heritage Coal Co.*, BRB No. 17-0014 BLA, slip op. at 5 n.13, 6 n.14 (Aug. 15, 2017) (unpub.).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 36; Decision and Order at 3.

Invocation of the Section 411(c)(4) Presumption – Total Disability

The administrative law judge followed the Board's remand instructions to reconsider the opinion of Dr. Chavda[7] in light of his qualifications, his status as the miner's treating physician, and the sophistication of and bases for his opinion. He noted that Dr. Chavda based his total disability assessment on a "physical examination, objective testing, and relevant histories." Decision and Order [on Remand] at 8. He also acknowledged Dr. Chavda is "highly-qualified" as Board-certified in internal medicine with a subspecialty in pulmonary diseases, but determined his status as a treating physician would "warrant[] only minimally more weight than his counterparts." Decision and Order [on Remand] at 8. Finding further that Dr. Chavda's opinion is not well-reasoned, the administrative law judge concluded the medical opinion evidence does not establish total disability.

We reject claimant's argument that the administrative law judge erred in evaluating Dr. Chavda's status as a treating physician. Claimant's Brief at 9. The administrative law judge accurately noted that the miner was Dr. Chavda's patient from February 2007 to February 2011. Decision and Order [on Remand] at 8. Considering the factors at 20 C.F.R. §718.104(d),[8] the administrative law judge observed, however, that the miner "only saw a nurse practitioner from the time he started treatment until March 2008, which was the first time Dr. Chavda personally assessed [him]."[9] *Id*. Noting further that Dr. Chavda did not

[7] In a report dated February 21, 2011, Dr. Chavda diagnosed a moderate obstructive and restrictive impairment. Dr. Chavda opined that while the miner's pulmonary function study did not meet federal disability criteria, he did not have the pulmonary capacity to perform the job of a bulldozer operator. Director's Exhibit 33 at 415. Dr. Chavda reiterated his opinion during his deposition on May 17, 2013. Director's Exhibit 33 at 83-125.

[8] The regulation at 20 C.F.R. §718.104(d) requires the adjudication officer to take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship; (2) duration of relationship; (3) frequency of treatment; and (4) extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[9] Dr. Chavda testified that the miner was seen by a nurse practitioner on February 9, 2007, September 12, 2007, October 11, 2007, February 19, 2008, April 15, 2008, April 21, 2008, and April 30, 2008. Decision and Order [on Remand] at 8; Director's Exhibit 33 at 87-89.

see the miner again until September 2010 and, altogether, saw the miner only four times over four years, the administrative law judge concluded that Dr. Chavda "was not heavily involved" with the miner's treatment. *Id*. Thus, contrary to claimant's argument, the administrative law judge permissibly declined to accord his opinion dispositive weight based on his status as a treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003) (administrative law judge must consider whether the treating physician offered a persuasive opinion entitled to deference); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order [on Remand] at 8.

Nor did the administrative law judge err in discrediting Dr. Chavda's opinion on its merits. Claimant's Brief at 9-10. Dr. Chavda specifically opined that the miner lacked the respiratory capacity to perform his usual coal mine work as a bulldozer operator. Director's Exhibit 33 at 438. At his deposition, he based his conclusions in part on his observations that the miner had a "borderline reduced" FEV1 of 1.94. Director's Exhibit 33 at 103. He acknowledged, however, that "some people [with the same FEV1] might be able to [operate a bulldozer] and some people may not be able to do it."[10] *Id.* Noting that the miner's work environment might involve varying temperatures or dust exposure, Dr. Chavda concluded the miner "may not be able to do it." Decision and Order [on Remand] at 8; Director's Exhibit 33 at 103. The administrative law judge permissibly determined that in stating some people, but not others, would be disabled with an FEV1 of 1.94, Dr. Chavda failed to specifically address the miner's condition. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order [on Remand] at 9. Additionally, the administrative law judge found that to the extent Dr. Chavda addressed the miner's specific condition, he discussed the miner's symptoms but offered no explanation for his opinion that the miner could not perform the work of a bulldozer operator with an FEV1 of 1.94 while others could. Given this testimony, the administrative law judge permissibly discredited Dr. Chavda's opinion as equivocal and unexplained. *See* 20 C.F.R. §718.104(d)(5); *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order [on Remand] at 9. Thus the administrative law judge permissibly found Dr. Chavda's opinion "unpersuasive" and

[10] Claimant maintains that Dr. Chavda was entitled to base his total disability assessment on non-qualifying pulmonary function studies. Claimant's Brief at 10. Contrary to the implication in claimant's argument, the administrative law judge did not discount Dr. Chavda's opinion because it was based on non-qualifying pulmonary function values. Rather, the administrative law judge accorded Dr. Chavda's opinion less weight because it was equivocal and unexplained. Decision and Order [on Remand] at 8-9.

entitled to little probative weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because substantial evidence supports the administrative law judge's determination to discredit the disability opinion of Dr. Chavda, we affirm his finding that the medical opinion evidence fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order [on Remand] at 9.

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). In light of our affirmance of the administrative law judge's finding that claimant did not establish total respiratory disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm his determination that entitlement to benefits is precluded in this case. *Trent Director, OWCP*, 11 BLR 1-26 (1987), *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[11] Because the Board previously affirmed the discrediting of Dr. Baker, Dr. Chavda's was the only opinion remaining which diagnosed total disability. *Walker,* BRB No. 17-0014 BLA, slip op. at 5 n.13, 6 n.14.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge