U.S. Department of Labor

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

BRB No. 14-0373 BLA

KENNETH F. STARKEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
and	)	
	)	
U.S. STEEL & CARNEGIE PENSION FUND	)	DATE ISSUED: 06/23/2015
	)	
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.

Kenneth F. Starkey, Beckley, West Virginia, *pro se*.

Howard G. Salisbury, Jr., (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2012-BLA-05222) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on December 7, 2010.[1] Director's Exhibit 2.

Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-six years and nine months of underground coal mine employment,[3] but found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant did not invoke the rebuttable presumption, under Section 411(c)(4) of the Act, that he is totally disabled due to pneumoconiosis, or establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

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 supported by substantial evidence, are rational, and

[1] Claimant's previous claim for benefits, filed on May 23, 2003, was denied by the district director on May 5, 2004 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which 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). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

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

are in accordance with applicable law. 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 order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 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 did not establish any element of entitlement. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(c)(3), (4).

The Existence of Pneumoconiosis

The administrative law judge correctly found that there are no new positive x-ray interpretations in the record.[4] Decision and Order at 17. Consequently, we affirm the administrative law judge's finding that the new x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Because there is no biopsy evidence of record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Moreover, claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304,

[4] The record contains five interpretations of three new x-rays taken on May 3, 2011, September 21, 2011, and September 28, 2011. Dr. Rasmussen, a B reader, and Dr. Willis, a B reader and Board-certified radiologist, interpreted the May 3, 2011 x-ray as negative for pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 3. Dr. Barrett interpreted this x-ray for quality purposes only. Director's Exhibit 14. Dr. Castle, a B reader, interpreted the September 21, 2011 x-ray as negative for pneumoconiosis, and Dr. Zaldivar, a B reader, interpreted the September 28, 2011 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 2.

718.305, 718.306 and, therefore, cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[5]

A finding of either clinical pneumoconiosis,[6] or legal pneumoconiosis,[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that there are no new medical opinions in the record supportive of a finding of clinical pneumoconiosis. Decision and Order at 7; Director's Exhibit 12; Employer's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that the existence of clinical pneumoconiosis was not established pursuant to Section 718.202(a)(4), as supported by substantial evidence. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

With respect to the existence of legal pneumoconiosis, the administrative law judge considered the new medical opinions of Drs. Rasmussen, Zaldivar, and Castle. Dr. Rasmussen examined claimant, and performed objective testing, including resting and exercise blood gas studies. Director's Exhibit 12. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of a gas exchange impairment during light to moderate exercise, reflected by hypoxemia, due to a combination of claimant's obesity and coal mine dust exposure.[8] Director's Exhibit 12 at 3-4. Dr. Rasmussen acknowledged that obesity can cause resting hypoxia, because of the upward pressure of the diaphragm on the lungs while a person is seated, but explained that the hypoxia will diminish when a person stands up. *Id.* Dr. Rasmussen noted that this was exemplified in claimant's case,

[5] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. Because, as will be discussed below, the administrative law judge found that claimant failed to establish the existence of a totally disabling respiratory impairment, the Section 718.305 presumption is inapplicable. *See* 20 C.F.R. §718.305. Because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[8] Dr. Rasmussen also diagnosed a reduced diffusing capacity, which he attributed to claimant's obesity. Director's Exhibit 12 at 3.

because while his resting blood gas study showed distinct hypoxia, his arterial oxygenation was entirely normal when he stood on the treadmill, prior to starting the exercise portion of the blood gas test. *Id.* Dr. Rasmussen explained, however, that when claimant began to exercise, his arterial oxygen tension again dropped significantly, which was a pattern of impairment that was consistent with coal mine dust-induced disease, and not obesity. *Id.*

Dr. Zaldivar examined claimant and performed objective testing, including resting and exercise blood gas studies, and reviewed Dr. Rasmussen's report. Employer's Exhibit 1. Dr. Zaldivar opined that, based on claimant's "normal resting and exercise blood gases with a mild drop of the PO2 during exercise and an oxygen consumption of 13.8ml/kg/min." claimant has "no pulmonary impairment and therefore . . . no legal pneumoconiosis." *Id.* at 2. Dr. Zaldivar concluded that claimant's mildly abnormal vital capacity and diffusing capacity are entirely due to obesity. *Id.* at 2-3.

Finally, Dr. Castle examined claimant and performed objective testing, including resting blood gas studies, and reviewed the reports of Drs. Rasmussen and Zaldivar. Employer's Exhibit 2. Dr. Castle noted that claimant had transient hypoxemia during Dr. Rasmussen's blood gas studies, but demonstrated normal oxygenation on other occasions. *Id.* at 5, 9-10. In addition, Dr. Castle noted that his own testing revealed normal resting blood gas study results, and no significant desaturation with exercise during a six minute walk test. *Id.* at 3, 9. Dr. Castle explained that "significant" variability in oxygenation during the various blood gas studies is inconsistent with pneumoconiosis, and concluded that claimant does not have legal pneumoconiosis, but suffers from mild restrictive lung disease secondary to obesity, and transient hypoxemia that is unrelated to coal mine dust exposure. Employer's Exhibit 2 at 4, 9-10.

The administrative law judge permissibly credited Dr. Rasmussen's opinion as well-reasoned and entitled to "some weight," finding that Dr. Rasmussen thoroughly explained his conclusions, that claimant's impairment is due in part to coal mine dust, and not obesity, in light of the objective testing he performed. *Milburn v. Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1998); Decision and Order at 13-14, 19. Additionally, the administrative law judge acted within her discretion in according little weight to Dr. Zaldivar's opinion, because Dr. Zaldivar did not adequately explain how his review of Dr. Rasmussen's qualifying resting and exercise blood gas study results, or his own blood gas study results, which demonstrated a sixteen point drop in PO2 during modest exercise, supported his conclusion that claimant had no impairment, and thus did not have legal pneumoconiosis. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 14, 19. Finally, the administrative law judge credited Dr. Castle's opinion as well-reasoned, noting that

Dr. Castle addressed all of the objective test results of record, and explained how the variability of claimant's hypoxemia over time supported a conclusion that claimant's impairment is not related to coal mine dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 15, 19. Weighing the credible medical opinions together, the administrative law judge noted that while Dr. Rasmussen's opinion was supported by the testing he performed, his conclusions were inconsistent with the evidence as a whole. *See Clark*, 12 BLR at 1-155; Decision and Order at 19-20. In contrast, the administrative law judge found, as was within her discretion, that Dr. Castle's opinion was more consistent with the overall spectrum of the evidence, and entitled to the greatest weight. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 20. Thus the administrative law judge permissibly concluded that the new medical opinion evidence did not establish the existence of legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Wetzel*, 8 BLR at 1-141; Decision and Order at 20. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

We further affirm, as supported by substantial evidence, the administrative law judge's finding that all of the evidence of record, when weighed together, did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d at 207-8, 211, 22 BLR at 2-168, 2-174; Decision and Order at 19-20.

Total Disability

The administrative law judge correctly noted that all of the new pulmonary function studies, conducted on May 3, 2011, September 21, 2011, and September 28, 2011, are non-qualifying.[9] Decision and Order at 6-7; Director's Exhibit 12; Employer's Exhibits 1, 2. Consequently, we affirm the administrative law judge's finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge further found, as was within her discretion, that as only Dr. Rasmussen's May 3, 2011 blood gas studies produced qualifying results, while the results of the September 21, 2011, and September 28, 2011, blood gas studies are uniformly non-qualifying, the preponderance of the new blood gas study evidence does

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); Decision and Order at 7-8; Director's Exhibit 12; Employer's Exhibits 1, 2.

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that while Dr. Rasmussen's opinion supports a finding of total disability, Drs. Zaldivar and Castle opined that claimant does not suffer from a totally disabling pulmonary impairment.[10] Decision and Order at 9-13; Director's Exhibit 12; Employer's Exhibits 1, 2.

The administrative law judge permissibly credited Dr. Rasmussen's opinion as well-reasoned and well-documented, and entitled to "significant weight," finding that Dr. Rasmussen's conclusion, that claimant suffers from a totally disabling gas exchange impairment, is supported by the qualifying resting and exercise blood gas study results he obtained. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 13-14. The administrative law judge again accorded little weight to Dr. Zaldivar's opinion, as was within her discretion, because Dr. Zaldivar did not adequately explain how his review of Dr. Rasmussen's qualifying resting and exercise blood gas study results, or his own blood gas study results, which demonstrated a sixteen point drop in PO2 during modest exercise, supported his conclusion that claimant's test results were "normal" and reflected no impairment. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 14. Finally, the administrative law judge credited Dr. Castle's opinion as well-reasoned and well-documented, noting that Dr. Castle explained his conclusion that claimant does not have a disabling gas exchange impairment, in light of all of the resting and exercise blood gas studies of record, as well as the results of his own six minute walking test, which showed no significant desaturation with exercise. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335;

[10] Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his usual coal mine work. Director's Exhibit 12. Dr. Zaldivar stated that claimant has "no pulmonary impairment" and that he is capable, from a pulmonary standpoint, of performing his previous coal mine employment. Employer's Exhibit 1. Dr. Castle opined that claimant retains the respiratory capacity to perform his previous coal mine employment. Employer's Exhibit 5.

Akers, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 15, 19. Weighing the credible opinions of Drs. Rasmussen and Castle together, the administrative law judge noted that, while Dr. Rasmussen's opinion was supported by the testing he performed, his opinion was entitled to less weight because he did not have the opportunity to review the blood gas study results obtained by Drs. Zaldivar and Castle, or address their conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Stark*, 9 BLR at 1-37; Decision and Order at 19-20. The administrative law judge permissibly accorded the greatest weight to Dr. Castle's opinion, as better supported by the evidence of record as a whole. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Wetzel*, 8 BLR at 1-141; Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of the our affirmance of the administrative law judge's findings that the new evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement has changed since the date of the denial of claimant's prior claim. 20 C.F.R. §725.309(c). We, therefore, affirm the denial of benefits.[11]

[11] In light of our affirmance of the administrative law judge's finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), claimant is unable to invoke the Section 411(c)(4) rebuttable presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 5.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge