U.S. Department of Labor

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

BRB Nos. 17-0444 BLA
and 17-0444 BLA-A

RICHARD CRUM	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ENERGY COAL INCOME PARTNERSHIP	)	DATE ISSUED: 06/28/2018
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jennifer L. Conner (Law Office of John C. Collins), Salyersville, Kentucky, for claimant.

Bradley A. Crouser and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer/carrier (employer) cross-appeals, the Decision and Order Denying Benefits (2012-BLA-05739) of Administrative Law Judge Patrick M. Rosenow, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on September 26, 2011.

The administrative law judge determined that the claim was timely filed and that claimant established eighteen years of coal mine employment that was either underground or in conditions substantially similar to those in an underground mine. He further found that claimant proved that he has legal pneumoconiosis and, therefore, established a change in an applicable condition of entitlement. However, the administrative law judge concluded that the newly submitted evidence is insufficient to demonstrate total respiratory or pulmonary disability, thereby precluding invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Based on claimant's failure to establish total disability, an essential element of entitlement, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he did not establish total disability. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed. Claimant responds, urging affirmance of the administrative law judge's timeliness determination. The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.[3]

[1] Claimant's initial claim, filed on May 3, 2002, was denied by the district director on August 19, 2003, because the evidence did not establish that claimant had pneumoconiosis arising from his coal mine employment or that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant did not take any further action prior to filing the current claim.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Timeliness of the Claim

Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the presumption of timeliness, employer must show that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-283 (6th Cir. 2013); *Tennessee Consol. Coal Co. v. Kirk,* 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001).

The administrative law judge initially stated that the statute of limitations applies only to claimant's first claim, filed on May 3, 2002. Decision and Order at 3, *citing Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (en banc). He noted employer's position that "claimant's hearing testimony establishes that he was told by physicians for the last ten years that he was disabled due to black lung disease." Decision and Order at 3. The administrative law judge stated, "[g]iven the variety of dates mentioned in [claimant's] testimony, the initial filing in 2002, and the presumption of timeliness, I do not find [claimant's] testimony sufficient to establish a medical determination of total disability due to coal workers' pneumoconiosis was clearly communicated to him three years before his initial claim." *Id*. Accordingly, the administrative law judge concluded that employer failed to rebut the presumption of timeliness under 20 C.F.R. §725.308(c).

Employer argues that the administrative law judge erred in stating that the statute of limitations does not apply to subsequent claims like the present one. Employer also contends that the administrative law judge erred in finding claimant's hearing testimony insufficient to establish that Dr. Lafferty began advising claimant that he is totally disabled due to pneumoconiosis in 2005, more than three years prior to claimant filing this current

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

claim in 2011. Employer is correct that the administrative law judge misstated that the statute of limitations applies only to claimant's initial claim, but this error is harmless on the facts of this case.[5] *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

At the hearing, held by telephone on June 17, 2016, claimant testified as follows:

Q. [Employer's counsel] Why was it you filed that first claim in 2002, did a doctor tell you you had pneumoconiosis?

A. [Claimant] Yes he did.

Q. What doctor told you that?

A. Atler.

Q. I'm sorry I didn't hear the name.

A. Dr. Atler.

Q. And did Dr. Atler tell you that you were totally disabled by pneumoconiosis?

A. He told me I was totally disabled from work. He tried his best to make me quit work and I told him I had to work because I had a family to support.

Q. Okay, but your last job was in 1988?

A. Yes it was.

Q. Okay. You started seeing Dr. Lafferty then after 2002?

[5] The administrative law judge cited the Board's decision in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (en banc), in support of the proposition that the three-year statute of limitations at 20 C.F.R. §725.308 does not apply to subsequent claims. However, the Board subsequently held that the three-year statute of limitations is applicable to the filing of both an initial claim by a miner and any subsequent claims, and overruled any previous holdings to the contrary. *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-122 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

A. Yes, [a]fter Atler passed away I started seeing Lafferty.

Q. Do you have any idea when that was?

A. Around ’78 or something like that.

Q. But Dr. Atler told you early on in your mining career you had pneumoconiosis?

A. Yes.

Q. Did Dr. Lafferty ever tell you that you were totally disabled by pneumoconiosis?

A. Yes.

Q. When did Dr. Lafferty first tell you that?

A. When he first told me that I was disabled it was in the first part of the 80’s.

Q. First part of the 1980’s? Did he tell you that you were disabled by pneumoconiosis or just disabled?

A. Black lung.

Q. Black lung. So he told you you were disabled by black lung disease?

A. That’s what he told me.

Q. Did he tell you that you were disabled by black lung disease in 2005?

A. I guess.

Q. He’s pretty much told you that you were disabled by black lung disease the entire time he’s been seeing you?

A. Yes.

Q. And you see him every six months or once a year?

A. About every three months.

Q. Okay. And to the best of your recollection, he's been telling you you are disabled by black lung disease for the last ten years?

A. Yes.

Hearing Transcript at 26-28.

The administrative law judge rationally found claimant's testimony "very inconsistent," noting that claimant stated "at various points that he was told he was totally disabled by black lung in the 1980's, in 2005, and often over the last ten years."[6] Decision and Order at 3; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). The administrative law judge also observed correctly that employer "has not introduced any written record from [claimant's] physicians" establishing that a physician informed him "that he is totally disabled due to pneumoconiosis in the 1980's, in 2005, and often over the last ten years." Decision and Order at 3. As such, there is no credible evidence to rebut the presumption of timeliness under 20 C.F.R. §725.308(c). Thus, employer cannot demonstrate that claimant received a medical determination of total disability due to pneumoconiosis more than three years before he filed this claim in 2011.[7] Decision and Order at 3; *see Larioni*, 6 BLR at 1-1278. We therefore affirm the administrative law judge's finding that the current subsequent claim is timely pursuant to 20 C.F.R. §725.308. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

[6] Claimant initially stated that he began seeing Dr. Lafferty after 2002, but subsequently stated that he started seeing Dr. Lafferty in 1978 after Dr. Atler died. Hearing Transcript at 26-27. Claimant also provided three different responses when asked when Dr. Lafferty told him he was disabled: 1) in the first part of the 1980's; 2) in 2005, "I guess"; and 3) for the last ten years. *Id*. at 27-28. In treatment notes dated August 4, 2015, and March 22, 2016, Dr. Lafferty stated that he has been claimant's treating physician for "many years." Claimant's Exhibits 1-2. Dr. Lafferty's additional treatment records are dated September 21, 2011 and January 16, 2015. Claimant's Exhibit 1. There are no medical reports from Dr. Atler in the record and no documentary evidence indicating when he treated claimant or when he died.

[7] Additionally, as employer concedes, any medical determination of total disability due to pneumoconiosis communicated to claimant prior to the denial of his 2002 claim is deemed a misdiagnosis in view of the superseding denial of benefits. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006); Employer's Brief at 5.

II. Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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: pulmonary function studies; 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[8] the administrative law judge considered the medical opinions of Drs. Lafferty, Ammisetty, Forehand,[9] Rosenberg, and Castle. Decision and Order at 14-15; Director's Exhibit 10; Claimant's Exhibits 1-3; Employer's Exhibits 3, 5, 12, 16. Dr. Lafferty diagnosed a totally disabling respiratory impairment, while Dr. Ammisetty indicated that although the results of the objective studies did not meet the federal standards for total disability, claimant's respiratory impairment would prevent him from performing duties with a "high physical demand." Claimant's Exhibit 3; Director's Exhibit 10. Drs. Forehand, Rosenberg, and Castle opined that claimant does not have a totally disabling respiratory or pulmonary impairment. Employer's Exhibits 3, 5, 12, 16. The administrative law judge gave diminished weight to the opinions of Drs. Lafferty and Ammisetty, and found that the opinions of Drs. Rosenberg and Castle are entitled to greater weight. Decision and Order at 14-15. He therefore concluded that claimant did not prove that he is totally disabled by the medical opinion evidence. *Id*. at 15.

Claimant generally argues that the administrative law judge erred in failing to find the diagnoses made by Drs. Lafferty and Ammisetty sufficient to establish total disability. In addition, claimant contends that the administrative law judge erred in failing to give

[8] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), and (iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 13-14.

[9] The administrative law judge noted that Dr. Forehand found that claimant does not have a totally disabling respiratory or pulmonary impairment, but the administrative law judge did not render a finding on the credibility of Dr. Forehand's opinion when determining whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14. This error is harmless, however, as Dr. Forehand's opinion does not assist claimant in establishing total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)

controlling weight to Dr. Lafferty's opinion, based on his status as claimant's treating physician.[10] We disagree.

The administrative law judge permissibly found that Dr. Ammisetty's opinion[11] is entitled to diminished weight because he relied on an invalid pulmonary function study to diagnose a totally disabling pulmonary impairment, and did not consider the results of a non-qualifying pulmonary function study performed six months later, or any other pulmonary function study. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839, 1-841 (1985); Decision and Order at 14.

In addition, contrary to claimant's contention, the administrative law judge considered whether Dr. Lafferty's opinion is entitled to greater weight on the ground that he is claimant's treating physician. Decision and Order at 14-15. The regulation at 20 C.F.R. §718.104(d) requires the administrative law judge to consider the credibility of the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole," before giving it controlling weight. The

[10] Claimant also notes that the administrative law judge credited the opinions of Drs. Rosenberg and Castle that claimant is not totally disabled, but discredited their opinions that claimant does not have legal pneumoconiosis. Claimant's Brief at 12. Claimant further observes that after the administrative law judge discredited the opinions of Drs. Ammisetty and Lafferty on total disability, he relied on them, and the opinion of Dr. Forehand, to find legal pneumoconiosis established. *Id*. Claimant does not, however, allege any specific error in the administrative law judge's differential weighing of these medical opinions on the separate issues of the existence of legal pneumoconiosis and total disability. Because the Board is not empowered to engage in de novo proceedings or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986). Consequently, we decline to address the significance of claimant's observations.

[11] Relying on the results of a qualifying pulmonary function study, which the administrative law judge determined is invalid, Dr. Ammisetty diagnosed a respiratory impairment and stated that claimant "could not work as [a] loader, heavy equipment that needs high physical demand." Claimant's Exhibit 3. Dr. Ammisetty also observed that claimant "has pulmonary impairment due to coal dust exposure[,] however[, he] did not meet the federal standards for total disability." *Id*. Claimant does not contest that the pulmonary function study on which Dr. Ammisetty relied is invalid. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

administrative law judge rationally determined that Dr. Lafferty's opinion is not entitled to greater weight because it is not well reasoned, based on the physician's failure to adequately explain his diagnosis of a totally disabling respiratory impairment.[12] *See 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, 2-646 (6th Cir. 2003); Decision and Order at 15.

We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv).[13] We further affirm the administrative law judge's determination that, weighing the evidence as a whole, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 17-18. Because claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment, an essential element of entitlement,[14] we affirm the denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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[12] On October 7, 2011, Dr. Lafferty diagnosed "mild restrictive airway disease" based on a September 21, 2011 pulmonary function study. Claimant's Exhibit 1. In a report dated August 4, 2015, Dr. Lafferty stated that claimant "remains disabled from gainful employment." *Id*. On March 22, 2016, Dr. Lafferty opined, "[r]egarding [claimant's] [s]hortness of breath, it is my opinion that he [cannot] perform his previous work as a coal miner or other arduous manual labor." Claimant's Exhibit 2.

[13] Because the administrative law judge provided valid rationales for discrediting the medical opinions supportive of claimant's burden to establish total respiratory or pulmonary disability, we need not address claimant's allegations of error regarding the administrative law judge's weighing of the contrary opinions of Drs. Rosenberg and Castle. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983).

[14] Establishing total disability is a prerequisite to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §411(c)(4); 20 C.F.R. §718.305(b)(iii). Where no statutory presumptions apply, 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).

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

RYAN GILLIGAN
Administrative Appeals Judge