U.S. Department of Labor

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

BRB No. 17-0457 BLA

DORRIS E. CUNNINGHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/27/2018
Employer-Respondent	)	
	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05671) of Administrative Law Judge Colleen A. Geraghty on a subsequent claim[1] filed on February 18, 2014, 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 credited claimant with thirty-nine years of underground coal mine employment,[2] but found that the new evidence did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge therefore found that claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[4] and failed to establish a change in the applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309(c). Accordingly, she denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish that he is totally disabled, and therefore erred in finding that he did not invoke the Section 411(c)(4) presumption or establish a change in the applicable condition of entitlement. Claimant also contends that the administrative law judge erred in finding that he failed to establish that he has clinical pneumoconiosis. Employer

[1] Claimant filed two previous claims, both of which were denied. Director's Exhibit 1. Claimant's most recent prior claim, filed on January 26, 2005, was denied by Administrative Law Judge Pamela Lakes Wood on January 10, 2008, for failure to establish that he had pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *Id*. Claimant's subsequent request for modification was denied by Administrative Law Judge Alice M. Craft on October 29, 2012, for failure to establish total disability. *Id*.

[2] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 14; Director's Exhibit 9. Accordingly, 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).

[3] The administrative law judge also found that the evidence established that claimant has legal pneumoconiosis but not clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more 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(b), (c)(1).

responds in support of the denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

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. 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).

When 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 failed to establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1.

Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(c). Claimant contends that the administrative law judge erred in weighing the new pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5]

We first address claimant's arguments regarding the pulmonary function study evidence. The administrative law judge considered two new pulmonary function studies conducted on March 5, 2014, by Dr. Chavda, and November 20, 2014, by Dr. Selby. Decision and Order at 8-10; Director's Exhibit 12; Employer's Exhibit 1. Claimant was 84 years old and listed as 67 inches tall for the first study; he was 85 years old and listed as 66 inches tall for the second study. Director's Exhibit 12; Employer's Exhibit 1. To weigh the pulmonary function study evidence, the administrative law judge permissibly resolved the height discrepancy by using the average of the two heights, 66.5 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 9. The administrative law judge next noted the Board's holding in *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), that, in the absence of contrary probative

[5] We affirm the administrative law judge's unchallenged determination that claimant failed to establish total disability with arterial blood gas study evidence or evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

evidence, pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying[6] if the values produced by the miner would be qualifying for a 71 year old. Decision and Order at 9.

Applying *Meade*, the administrative law judge determined that both pulmonary function studies were non-qualifying. Decision and Order at 10. Moreover, she found that both studies would also be non-qualifying if assessed for a miner of claimant's age, using qualifying FEV1 values for 84 and 85 year-old miners that Dr. Selby derived using the "Knudson equations." *Id*.; Employer's Exhibit 5 at 10-13, 18. The administrative law judge therefore found that the new pulmonary function study evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Claimant argues that both studies were qualifying. Claimant's Brief at 13. Claimant contends that the March 5, 2014 study was qualifying because, in Dr. Chavda's view, the FEV1 and MVV values are both qualifying. Claimant is incorrect. Dr. Chavda interpreted claimant's results on the assumption that claimant is 67 inches tall. Director's Exhibit 12 at 34. The administrative law judge, however, correctly applied the table values in Appendix B for a claimant 66.5 inches tall and determined that although claimant's FEV1 value met the standard for disability, his FVC, MVV and FEV1/FVC values did not. Decision and Order at 9 & n.4. The administrative law judge therefore properly found that the March 5, 2014 pulmonary function study was not qualifying. *Id*. at 9-10.

Claimant also argues that the November 20, 2014 study was qualifying because the FEV1 value was qualifying and, claimant contends, "[w]e should assume that the miner's MVV value for that test would have been qualifying as well," even though Dr. Selby did not record claimant's MVV value. Claimant's Brief at 13. This argument, along with claimant's general contention that he is totally disabled because "no evidence conclusively shows that the miner can produce pulmonary function test results above the qualifying values," lacks merit because claimant bears the burden of proving that he is totally disabled. *See* 20 C.F.R. §§725.103, 725.202(d); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 297 (6th Cir. 2018).

Finally, claimant argues that the parties stipulated in their Joint Prehearing Statement that both of the pulmonary function studies were qualifying, and that the administrative law judge erred by impermissibly performing her own medical analysis of

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

the evidence instead of accepting the stipulation. Claimant's Brief at 14-15; ALJ Exhibit 2 at 2. Employer contends that it "intended to stipulate" only that the FEV1 values for both tests were qualifying, and that it still contested the issue of total disability. Employer's Brief at 5-6; ALJ Exhibit 2 at 2. We need not determine exactly what the parties stipulated to, however. Although parties may stipulate to facts, such as the results of claimant's pulmonary function studies, they may not stipulate to the legal effect of those facts and prevent the administrative law judge from addressing a legal question, such as whether the results support a finding of total disability. *See Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289-90 (1917); *Navistar, Inc. v. Forester*, 767 F.3d 638, 643-44, 25 BLR 2-659, 2-667-68 (6th Cir. 2014). Therefore, we reject claimant's contention that the administrative law judge erred by not accepting the stipulation.

Because she reasonably determined that the March 5, 2014 and November 20, 2014 studies were not qualifying, we affirm the administrative law judge's finding that the new pulmonary function study evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[7]

Next, claimant contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Chavda and Sood, who agreed that claimant has a totally disabling respiratory impairment, and the opinion of Dr. Selby, who concluded that claimant is not totally disabled. Decision and Order at 11-22; Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 1, 5. The administrative law judge found that Dr. Chavda's opinion was not reasoned or documented because it was based solely upon the incorrect assumption that claimant's March 5, 2014 pulmonary function study was qualifying. Decision and Order at 20. Similarly, the administrative law judge found Dr. Sood's opinion unconvincing because it was based upon generalities and not the specifics of claimant's condition.[8] *Id*. at 20-21. Consequently, the administrative law

[7] The administrative law judge also found that the reliability of the studies in determining total disability was called into question by Dr. Selby's explanation that the tables in Appendix B of 20 C.F.R. Part 718 use the values for a 71 year-old man, and therefore do not reflect claimant's impairment at ages 84 and 85. Decision and Order at 10. Because the administrative law judge reasonably found that neither of the pulmonary function studies was qualifying, we need not address claimant's contention that the administrative law judge erred in crediting Dr. Selby's explanation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985); Claimant's Brief at 15-16.

[8] The administrative law judge also discredited Dr. Sood's opinion because he did not provide a copy of a study he relied on as a source for coal miners' exertional levels, and the administrative law judge did not know "whether [the study] is reliable or not."

judge found that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 22.

Claimant argues that Dr. Chavda's opinion was based upon more than his belief that claimant's pulmonary function study was qualifying. Claimant's Brief at 17-20. We disagree. Dr. Chavda concluded that claimant's reduced FEV1 and MVV values "both meet criteria for pulmonary disability and because of that reason," he is totally disabled. Director's Exhibit 12 at 34. As the administrative law judge noted, Dr. Chavda offered no other explanation for his diagnosis of total disability. Decision and Order at 20; Director's Exhibit 12. The administrative law judge rationally discounted Dr. Chavda's opinion for being based on his erroneous conclusion that the March 5, 2014 pulmonary function study was qualifying. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Claimant also argues that the administrative law judge improperly discredited Dr. Sood's opinion. Claimant's Brief at 20-23. Relying on the FEV1 values from the new pulmonary function studies, and the 2009 American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Sood determined that claimant met the criteria for a "class II impairment of the whole person." Claimant's Exhibit 3 at 11. According to Dr. Sood, peak oxygen consumption levels in people with class II impairments are expected to be between 5.1 and 6.0 metabolic equivalents (METs).[9] *Id*. Furthermore, according to Dr. Sood, under the 1986 American Thoracic Society guidelines for evaluating impairment from chronic respiratory disorders, workers performing manual labor can comfortably work at 40 percent of peak oxygen consumption for prolonged periods of time. *Id*. Dr. Sood therefore determined that claimant could comfortably perform activities that require 2.4 METs or fewer (i.e., 40 percent of 6.0 METs, the peak oxygen consumption for people with class II impairments). *Id*. Although the MET requirements of claimant's job were unknown, Dr. Sood cited a study showing that the median exertion level for coal miners was 3.3 METs and the 90th-percentile exertion level was 6.3 METs. *Id*. Based on those

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Decision and Order at 21. In addition, the administrative law judge discredited Dr. Sood's report for not addressing Dr. Selby's view that the threshold for disability is significantly lower for a man claimant's age, and for not providing "an assessment based on the FEV1 values representative of the Claimant's actual age." *Id*.

[9] Citing the 2009 American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Sood explained that one MET is 3.5 milliliters/kilogram per minute of oxygen uptake. Claimant's Exhibit 3 at 11.

requirements, he concluded that claimant would not be able to perform his usual coal mine employment and thus was totally disabled. *Id*.

The administrative law judge, however, noted that Dr. Sood did not know claimant's peak oxygen consumption or the METs required for claimant's job, but relied instead on "a general range" of peak oxygen consumption for people with class II impairments and "a median exertional level for coal miners" that was extrapolated from a study. Decision and Order at 21. Contrary to claimant's contention, the administrative law judge permissibly discredited Dr. Sood's opinion because it was not based on data specific to claimant.[10] *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (holding that a physician's opinion based on generalities rather than claimant's specific condition may be discredited).

Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because we have affirmed her finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we further affirm both the administrative law judge's finding that claimant failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and the denial of benefits.[11]

[10] Because the administrative law judge provided a valid reason for discrediting Dr. Sood's opinion, we need not address claimant's arguments that her other reasons for discrediting Dr. Sood's opinion were erroneous. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Claimant's Brief at 21-23.

[11] We need not address claimant's arguments that the administrative law judge erred in finding that claimant does not have clinical pneumoconiosis, as any error therein would be harmless. *See Larioni*, 6 BLR at 1-1278; Claimant's Brief at 9-12.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge