U.S. Department of Labor

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

BRB No. 18-0349 BLA

WAYNE H. GANN Claimant-Petitioner v. NATIONAL COAL OF ALABAMA, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/25/2019 DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

James C. King (King, Wiley & Williams), Jasper, Alabama, for claimant.

John C. Webb and Aaron D. Ashcroft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2017-BLA-05990) of Administrative Law Judge Larry W. Price, denying benefits 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 claim filed on June 8, 2015.

After crediting claimant with twenty-nine years of qualifying coal mine employment,[1] the administrative law judge found claimant failed to establish total disability and thus did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, claimant contends the administrative law judge erred in finding he did not establish total disability.[3] Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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,

[1] Claimant's coal mine employment was in Alabama. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[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. The administrative law judge also found there is no evidence of complicated pneumoconiosis to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

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).

To be entitled to benefits under the Act, claimant must establish 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).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge determined claimant's usual coal mine employment was as a heavy equipment operator and that, during the last year of his employment, this work required only light manual labor. Decision and Order at 9. He then considered Dr. Hawkins's medical opinion that claimant has a moderate obstructive respiratory impairment with moderate ventilatory insufficiency. Decision and Order 13. Dr. Hawkins concluded claimant's respiratory impairment would prevent him from returning to his usual coal mine employment or from performing manual labor. Director's Exhibits 20, 26. In a supplemental report, he stated, "with this degree of airflow obstruction, there is likely air trapping which would further exacerbate limitation from obstructive lung disease during any kind of exertional activity especially mining."[4] Director's Exhibit 26.

[4] The administrative law judge also considered Dr. Johnson's medical opinion. Decision and Order at 13. Although Dr. Johnson stated claimant has a "significant pulmonary dysfunction," Claimant's Exhibit 1, the administrative law judge accorded his opinion no weight because he did not offer an opinion as to whether claimant's "pulmonary dysfunction" was disabling. Decision and Order at 12 n.10. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711. The record also contains the medical opinions of Drs. Goldstein and Rosenberg that claimant is not totally disabled by a respiratory or pulmonary impairment. Decision and Order at 12-13; Director's Exhibit 22; Employer's

The administrative law judge assigned no weight to Dr. Hawkins's opinion for two reasons. Decision and Order at 13. He first found Dr. Hawkins did not have an adequate understanding of the exertional requirements of claimant's usual coal mine employment. *Id*. He also found Dr. Hawkins did not adequately explain why claimant was totally disabled by a respiratory or pulmonary impairment.[5] *Id*. Thus he found claimant failed to establish total disability based on the medical opinion evidence, as Dr. Hawkins is the only physician of record to diagnose total disability.

Claimant contends the administrative law judge erred in finding his most recent coal mining job was "light duty" and therefore erred in rejecting Dr. Hawkins's medical opinion at 20 C.F.R. §718.204(b)(2)(iv) because he assumed claimant's job required greater physical exertion.[6] Claimant's Brief at 2-6 (unpaginated). Contrary to claimant's argument, the administrative law judge considered claimant's testimony that his last year in the coal mines was as an equipment operator which required only that he sit in a vehicle with no physical lifting. Decision and Order at 9. The administrative law judge compared claimant's description with the Dictionary of Occupational Titles' (DOT) definition for "medium duty" work, but permissibly found claimant's duties less strenuous and thus concluded claimant's work was "light duty." *Id*.; *see Jim Walter Res., Inc. v. Allen*, 995 F.2d 1027, 1029 (11th Cir. 1993); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Claimant's counsel suggests that claimant's testimony "may not have reflected [all of the essential tasks of a motor-grader operator] out of, perhaps, an unsafe assumption that the [administrative law judge] had a prior understanding of such activities." Claimant's Brief at 6 (unpaginated). The Board's scope of review, however, is limited to considering whether the administrative law judge's decision is supported by substantial evidence in the record. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 984 (11th

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Exhibit 1. Because the administrative law judge found claimant did not meet his burden of establishing total disability, he did not indicate the weight he assigned the opinions of Drs. Goldstein and Rosenberg.

[5] The administrative law judge acknowledged that Dr. Hawkins opined that claimant's "airflow obstruction would be exacerbated by 'any kind of exertional activity especially mining,'" but found he "did not opine whether this exacerbation would reach the level of disability." Decision and Order at 13, *quoting* Director's Exhibit 26.

[6] 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)-(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1459 (11th Cir. 1989). We cannot fault the administrative law judge based on an argument that he did not consider evidence which claimant did not make part of the record. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990). Claimant also does not challenge the administrative law judge's additional finding that Dr. Hawkins "did not thoroughly explain" why claimant's objective tests, although non-qualifying, nevertheless rendered him unable "to work as a heavy equipment operator." *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Decision and Order at 13. We thus affirm his finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7]

Because we have affirmed the administrative law judge's determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm his finding that the evidence as a whole does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). As claimant has failed to prove total disability, an essential element of entitlement under both Section 411(c)(4) and 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[7] Claimant argues that the administrative law judge should have adopted the district director's findings because they are "more thorough and consistent" with the Act. Claimant's Brief at 6 (unpaginated). Contrary to claimant's argument, the administrative law judge is not bound by the district director's findings. 20 C.F.R. §725.455(a).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge