U.S. Department of Labor

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

BRB No. 15-0220 BLA

A. J. THORNSBERRY Claimant-Petitioner v. WHEELWRIGHT MINING, INCORPORATED and METLIFE INSURANCE OF CONNECTICUT Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Clayton Daniel Scott (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2007-

BLA-05698) of Administrative Law Judge Joseph E. Kane, rendered on a miner's subsequent claim filed on June 19, 2006[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In his initial Decision and Order, the administrative law judge credited claimant with 16.25 years of coal mine employment, and found that the medical evidence developed since the denial of claimant's prior claim established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Subsequent to the issuance of the administrative law judge's Decision and Order, while this case was on appeal to the Board, Congress enacted amendments to the Act, affecting pending claims filed after January 1, 2005. Relevant to this claim, Congress reinstated 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] By Order dated June 8, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the amendments to the Act. The Director, Office of Workers' Compensation Programs (the Director), and employer responded, requesting that the case be remanded for further consideration of the applicability of Section 411(c)(4). On September 7, 2010, the Board

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[1] Claimant filed his initial application for benefits on June 1, 1994. Director's Exhibit 1. On November 1, 1994, the district director issued a proposed decision and order denying benefits, finding that the miner failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. *Id.* Claimant appealed the denial and the case was transferred to the Office of Administrative Law Judges on October 27, 1995. *Id.* By Order dated November 25, 1997, Administrative Law Judge Robert L. Hillyard dismissed the claim for claimant's failure to undergo an independent medical examination requested by employer. Director's Exhibit 1 at 2. Claimant took no further action until he filed his current claim on June 19, 2006. Director's Exhibit 3.

[2] Under Section 411(c)(4), if a miner 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 the existence of a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden shifts to employer to disprove the existence of pneumoconiosis, or to establish that no part of the miner's disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

vacated the administrative law judge's Decision and Order, and remanded the case for the administrative law judge to determine whether claimant is entitled to invocation of the Section 411(c)(4) presumption. *Thornsberry v. Wheelwright Mining, Inc.*, BRB No. 09-0825 BLA (Sept. 7, 2010) (unpub.). Additionally, the Board stated that, on remand, the administrative law judge should allow the parties to submit additional evidence to address the change in law. *Id*. at 3.

On remand, the administrative law judge provided the parties the opportunity to submit additional evidence addressing the change in law. In response, employer submitted a supplemental report by Dr. Jarboe, admitted as Employer's Exhibit 3, as well as a supplemental deposition by Dr. Jarboe, admitted as Employer's Exhibit 4. Claimant did not submit any additional evidence. Adjudicating the claim, the administrative law judge again credited claimant with 16.25 years of coal mine employment, and found that the conditions of claimant's coal mine employment were substantially similar to those in underground coal mining.[3] The administrative law judge, therefore, found that claimant established at least fifteen years of qualifying coal mine employment. However, weighing the medical evidence submitted since the last denial, including the medical evidence submitted on remand, the administrative law judge found that claimant failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, was not entitled to invocation of the Section 411(c)(4) presumption. Because claimant failed to establish total respiratory disability, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge found that an award of benefits was precluded. Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant challenges the administrative law judge's finding that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2). Claimant also maintains that the administrative law judge erroneously failed to reconsider the relevant evidence and render findings on the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a). In response, employer urges affirmance of the administrative law judge's denial of benefits as within a reasonable exercise of his discretion. The Director has not filed a substantive response to claimant's appeal.[4]

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[3] The administrative law judge also found that the current claim was timely filed, that claimant is a miner as defined by the Act, and that employer is the properly designated responsible operator.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 16.25 years of qualifying coal mine employment, and his finding that the evidence is insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) and (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[5] 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).

Claimant initially challenges the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b), arguing that this finding is inconsistent with the finding of total disability in his 2009 Decision and Order. Claimant's Brief at 3. Claimant argues that because employer, on remand, only submitted supplemental medical opinions and did not submit any new objective studies, the administrative law judge's erroneous reweighing of the evidence subjected claimant "to varying and inconsistent results." *Id.*

When the Board vacates an administrative law judge's decision, the effect is to return the parties to the status quo ante, with all of the rights, benefits and/or obligations that they had prior to the issuance of the decision. Consequently, the administrative law judge is free to reconsider the weight to be accorded the evidence. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). In its 2010 Decision and Order, the Board did not affirm any of the administrative law judge's findings, but held that "the administrative law judge's Decision and Order – Denial of Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion." *Thornsberry*, 09-0825 BLA, slip op. at 4. Thus, the administrative law judge acted within his discretion in revisiting the medical opinion evidence on the issue of total respiratory disability and render new findings. *Id.*

Claimant further challenges the administrative law judge's weighing of the medical opinion evidence in finding that total respiratory disability was not established at Section 718.204(b)(2)(iv). Claimant maintains that the administrative law judge erroneously accorded determinative weight to the opinion of Dr. Jarboe, that claimant is not disabled, because it was based on the most recent non-qualifying pulmonary function studies and blood gas studies of record. Claimant asserts that the contrary opinions of Drs. Forehand and Dahhan, that claimant is totally disabled, are reasoned and supported

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[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1, 4.

by their underlying documentation, and should have been credited over the opinion of Dr. Jarboe. Employer's Brief at 4-5.

At Section 718.204(b)(2)(iv), the administrative law judge accurately summarized the conflicting medical opinions of record, and acknowledged that the opinions of Drs. Forehand and Dahhan were reasoned to the extent that they comported with their own respective test results. Decision and Order on Remand at 11-14, 16. The administrative law judge determined, however, that Dr. Jarboe's opinion was entitled to greater probative weight, as he found that Dr. Jarboe had the benefit of reviewing more extensive medical evidence, including the most recent non-qualifying tests; that he had an accurate understanding of the exertional requirements of claimant's usual coal mine job; and that his opinion was more consistent with the overall weight of the objective medical evidence of record. Decision and Order on Remand at 16-17; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

The Board is neither empowered to reweigh the evidence nor to substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As claimant essentially seeks a reweighing of the evidence, but has failed to substantiate or adequately brief his allegations of error by showing any specific error in the administrative law judge's conclusions, claimant has not provided the Board with a specific basis upon which to review the administrative law judge's findings. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Since claimant has failed to establish a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement pursuant to 20 C.F. R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-113. Thus, we need not reach claimant's arguments regarding the issue of the existence of pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge