U.S. Department of Labor

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

BRB No. 16-0298 BLA

HAROLD DEWAIN LAMBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY/PITTSTON	)	
	)	
	)	DATE ISSUED: 03/07/2017
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 of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-BLA-06105) of District Chief Administrative Law Judge Paul C. Johnson, Jr. denying benefits 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 filed on April 11, 2011.[1]

After crediting claimant with 28.5 years of qualifying coal mine employment,[2] the administrative law judge found that the new evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant therefore argues that the administrative law judge erred in finding that claimant did not invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's decision is "fundamentally flawed," because

[1] Claimant filed four previous claims, which were all finally denied. Director's Exhibits 1-4. Claimant's most recent prior claim was filed on March 26, 2009, and was denied by the district director on February 2, 2010, because claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 4.

[2] Claimant's coal mine employment was in Virginia. Director's Exhibit 8. 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

the administrative law judge mischaracterized the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). Employer/carrier has not filed a response brief.[4]

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).

Total Disability

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability, because "all of the physicians who have drafted medical reports in this case agree [that] [c]laimant suffers from a totally disabling respiratory impairment." Claimant's Brief at 7. The administrative law judge considered the new medical opinions of Drs. Gallai, Castle, Green, and Silman. Although the administrative law judge acknowledged that all of these physicians opined that claimant is totally disabled from a pulmonary standpoint,[5] he discredited their opinions because he found that none of the physicians had an accurate understanding of the exertional requirements of claimant's usual coal mine employment. The administrative law judge specifically found that none of the physicians was aware that claimant's usual coal mine work was as a plant operator, work that the administrative law judge found "required [claimant] to sit at a desk and operate a computer, with 'occasional' repair work (which was never specifically described)." Decision and Order at 17.

Claimant neither challenges the administrative law judge's characterization of the exertional requirements of his usual coal mine work, nor the administrative law judge's

[4] Because no party challenges the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Dr. Gallai opined that claimant does not have the pulmonary endurance to return to his former coal mine position. Director's Exhibit 14. Dr. Castle opined that claimant is disabled from "a purely pulmonary point of view." Director's Exhibit 16. Dr. Green opined that claimant is fully disabled from a pulmonary standpoint and is not able to perform his last coal mine job. Claimant's Exhibit 1. Dr. Silman also opined that claimant's pulmonary impairment would prevent him from performing the exertional requirements of his last coal mine employment. *Id.*

determination that the physicians did not have an accurate understanding of those exertional requirements. Because claimant does not challenge the administrative law judge's basis for discrediting the opinions of Drs. Gallai, Castle, Green, and Silman, it is affirmed. *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). We therefore 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).

We agree with the Director, however, that the administrative law judge made a fundamental error in his consideration of the new pulmonary function study evidence. In determining whether claimant was totally disabled, the administrative law judge considered eight new pulmonary function studies conducted on July 22, 2011, November 21, 2011, March 20, 2012, August 22, 2012, February 25, 2013, August 26, 2013, December 2, 2014, and May 21, 2015. Director's Exhibits 14, 16; Claimant's Exhibits 1, 5, 6. The administrative law judge found that that none of the new pulmonary function studies produced qualifying values.[6] Decision and Order at 15. The administrative law judge therefore found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Contrary to the administrative law judge's characterization, the pulmonary function studies conducted on July 22, 2011, December 2, 2014, and May 21, 2015 produced qualifying values, both before and after the administration of a bronchodilator. Director's Exhibits 14, 16; Claimant's Exhibits 1, 5. Moreover, the pre-bronchodilator values from the pulmonary function studies conducted on November 21, 2011, March 20, 2012, and August 22, 2012 are also qualifying. Claimant's Exhibit 6. The administrative law judge thus mischaracterized the pulmonary function study evidence. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We therefore vacate the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration.

On remand, should the administrative law judge find that the new pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). If the administrative law judge finds that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge would then be required to consider claimant's 2011 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[7] 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). If the administrative law judge finds that the evidence does not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), however, he must deny benefits.[8] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[7] The administrative law judge found that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 15. Because employer does not challenge this determination, it is affirmed. *Skrack*, 6 BLR at 1-710.

[8] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; Decision and Order at 14-15.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge