U.S. Department of Labor

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

BRB No. 18-0361 BLA

BRADLEY SMITH Claimant-Petitioner v. TRYLEK OF KENTUCKY and NATIONAL UNION FIRE/CHARTIS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/22/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Kyle L. Johnson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05941) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on August 8, 2014.[1]

The administrative law judge credited claimant with twenty-five years of underground coal mine employment, as stipulated by the parties, but found the new evidence did not establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and he denied benefits.[3]

On appeal, claimant argues that the administrative law judge erred in finding he did not establish total disability. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[4]

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[1] The current claim is claimant's sixth. Director's Exhibits 1-3, 20. Claimant's most recent prior claim, filed on December 14, 2010, was denied by the district director on November 22, 2011 because he did not establish total respiratory disability. Director's Exhibit 3. Claimant took no further action until filing this subsequent claim. Director's Exhibit 5.

[2] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be 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); *see* 20 C.F.R. §718.305(b).

[3] The administrative law judge also found the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304 and, therefore, claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 14.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4. We also affirm, as unchallenged, his finding that there is no evidence of complicated

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).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his totally disabling impairment 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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 did not establish total respiratory disability. Director's Exhibit 3. Consequently, to obtain a review on the merits of his current claim, claimant had to submit new evidence establishing total respiratory disability. 20 C.F.R. §725.309(c).

Invocation of the Section 411(c)(4) Presumption – Total Disability

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). 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). If the administrative law judge finds that total disability has been

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pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13, 14.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 no subsection established total disability. Decision and Order at 13-17.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two new pulmonary function studies dated November 20, 2014 and August 15, 2015. Decision and Order at 8, 15-16; Director's Exhibit 11; Claimant's Exhibit 1. The November 20, 2014 study[6] yielded non-qualifying values before and after the use of bronchodilators. Director's Exhibit 11. The August 15, 2015 study yielded qualifying values before and after the use of bronchodilators. Claimant's Exhibit 1. Finding the August 15, 2015 qualifying study invalid, the administrative law judge concluded that the preponderance of the new pulmonary function study evidence does not establish total disability. Decision and Order at 15-16.

Claimant asserts the administrative law judge erred in finding the August 15, 2015 pulmonary function study invalid. Claimant's Brief at 3. We disagree. When considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of claimant's pulmonary function. *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *see Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-5 (1987) (Levin, J., concurring). In accomplishing this task, the administrative law judge must evaluate the reasoning and credibility of the

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[6] The administrative law judge noted that the November 20, 2014 pulmonary function study recorded claimant as seventy-two years old. Decision and Order at 15 n.47; Director's Exhibit 11. He found that because claimant's birth date is July 21, 1940, his age when the study was administered was seventy-four years old. Decision and Order at 15 n.47; *see* Director's Exhibits 5, 11. Remand is not required on this basis, however, because the administrative law judge properly noted that, absent contrary probative evidence, the values for a seventy-one year-old miner listed in Appendix B of the regulations should be used to determine if miners over the age of seventy-one qualify as totally disabled. Decision and Order at 15 n.47, *citing K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Thus the age discrepancy does not affect whether the study is qualifying.

medical opinions as to the reliability of the testing, but cannot substitute his opinion for that of the medical experts. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Contrary to claimant's argument, the administrative law judge did not "automatically deem" the August 15, 2015 study to be invalid because it did not strictly comply with the quality standards. Claimant's Brief at 3. The administrative law judge correctly observed that, contrary to the quality standards outlined in the regulations, the August 15, 2015 pulmonary function study lacked three tracings of flow versus volume and did not indicate the name of the administering technician[7] or claimant's ability to understand instructions, follow directions and cooperate. *See* 20 C.F.R. §718.103(b); Decision and Order at 16. He also considered, however, that the study contained the notation: "'Caution: Only One Acceptable Maneuver – Interpret With Care.'" Decision and Order at 8, 16, *quoting* Claimant's Exhibit 1. Additionally, there is no medical opinion validating the study. Rather, Dr. Broudy reviewed the study and opined it is "invalid due to variable effort." Decision and Order at 15, *quoting* Employer's Exhibit 1 at 2. At his deposition Dr. Broudy explained the basis for his conclusion:

> Well, when one looked at the tracings, the results are variable. There's quite a bit of difference between the best vital capacity and FEV1, and the second best vital capacity and FEV1, but, typically, in order to be valid, we would like to see variation of [five] percent or less between the best results, and this was certainly not the case in this individual both on the pre- and post-bronchodilation studies, and when one looks at the tracings, one can see that it's not a forced effort. . . .

Employer's Exhibit 3 at 21. Noting Dr. Broudy's opinion is supported by the quality standards provision that "[t]he variation between the two largest FEV1's of the three acceptable tracings should not exceed [five] percent of the largest FEV1 or 100 ml, whichever is greater," the administrative law judge found the August 15, 2015 study invalid. *See* 20 C.F.R. Part 718 Appendix B(2)(ii)(G); Decision and Order at 15-16.

As the administrative law judge rationally found, after considering all the relevant evidence, that the August 15, 2015 pulmonary function study does not constitute reliable evidence of total disability, we affirm his findings that it is entitled to no weight and that the pulmonary function study evidence overall is insufficient to demonstrate total disability

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[7] The August 15, 2015 pulmonary function study is signed by Amanda L. Ramey, who is a Doctor of Osteopathic Medicine. Claimant's Exhibits 1, 2.

under 20 C.F.R. §718.204(b)(2)(i).[8] *See* 20 C.F.R. §718.103(c); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178-79 (1986); *Robinette v. Director, OWCP*, 9 BLR 1-154, 1-156 (1986); *Casella v. Kaiser Steel Corp*., 9 BLR 1-131, 1-134 (1986); *Estes v. Director, OWCP*, 7 BLR 1-414, 1-415 (1984); Decision and Order at 16.

We also reject claimant's contention that the administrative law judge did not consider "the totality of the evidence" in finding he failed to establish total disability at 20 C.F.R. §718.204(b)(2). Claimant's Brief at 3. The administrative law judge correctly determined that as the sole new blood gas study, dated November 20, 2014, produced non-qualifying values and the record contains no evidence of cor pulmonale with right-sided congestive heart failure, total disability cannot be demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Martin*, 400 F.3d at 305; *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-40 (1987); Decision and Order at 9, 14, 16; Director's Exhibit 11.

The administrative law judge next considered the new medical opinions of Drs. Forehand[9] and Broudy[10] and accurately found that neither diagnosed claimant with a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc).

Finally, the administrative law judge found that the new evidence considered as a whole does not establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 17. We affirm this

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[8] The administrative law judge did not resolve the height discrepancy recorded on the pulmonary function studies. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *Meade*, 24 BLR at 1-44; *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8, 15-16. The administrative law judge's error is harmless, however, as the only valid new pulmonary function study, dated November 20, 2014, produced non-qualifying values at both of claimant's recorded heights of 68 and 72 inches. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] Dr. Forehand opined claimant has a respiratory impairment but found that "sufficient residual ventilatory capacity remains [for him] to return to [his] last coal mining job." Director's Exhibit 11.

[10] Dr. Broudy agreed with Dr. Forehand that claimant "retains sufficient residual ventilatory capacity to return to his previous coal mine employment." Employer's Exhibits 1, 3 at 22.

finding as supported by substantial evidence. *See Martin*, 400 F.3d at 305. Consequently, we affirm the administrative law judge's findings that claimant failed to invoke the Section 411(c)(4) presumption, or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and therefore failed to establish entitlement to benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

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