U.S. Department of Labor

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

BRB No. 16-0221 BLA

RONNIE LEE MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 05/18/2016
	)	
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 Denying Benefits of Alice M. Kraft, Administrative Law Judge, United States Department of Labor.

Ronnie Lee Mosley, Martin, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2011-BLA-05395) of Administrative Law Judge Alice M. Kraft, rendered 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[2] filed on April 20, 2010. The administrative law judge credited claimant with a total of sixteen years, eleven months and fifteen days of coal mine employment performed underground and aboveground at an underground mine. She then considered whether claimant established the existence of a totally disabling respiratory impairment and found the newly submitted evidence insufficient to satisfy claimant's burden of proof on this element of entitlement. Therefore, the administrative law judge determined that claimant did not establish invocation of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012), as implemented by 20

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed three prior claims for black lung benefits. Claimant's initial claim, filed on March 17, 2000, was denied by Administrative Law Judge Joseph E. Kane in a Decision and Order issued on November 21, 2002, because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The Board subsequently affirmed the denial of benefits in *Mosley v. National Mines Corp.*, BRB No. 03-0251 BLA (Sept. 22, 2003). *Id.* Claimant filed the second claim on January 27, 2005, which the district director denied on August 11, 2005, because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant's third claim, filed on August 31, 2007, was denied by the district director on March 20, 2008, because claimant failed to establish any element of entitlement. Director's Exhibit 3. Claimant took no further action until he filed the current claim, his fourth. Director's Exhibit 4. Claimant, through Ron Carson of Stone Mountain Health Services, requested that the administrative law judge cancel the hearing and decide the case on the record. Employer had no objection and the administrative law judge granted claimant's request.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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.

C.F.R. §718.305. The administrative law judge further found that an award of benefits was precluded under 20 C.F.R. Part 718. Accordingly, she denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[4]

In an appeal filed by a claimant who is not represented by counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary 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, 1-2 (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 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);

---

[4] We affirm, as unchallenged on appeal and not adverse to claimant, the administrative law judge's finding that claimant established a total of sixteen years, eleven months and fifteen days of underground coal mine employment and aboveground coal mine employment at an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710. 1-711 (1983); Decision and Order at 7.

[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 (1989) (en banc).

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 any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing at least one of the requisite elements of entitlement. 20 C.F.R. §725.309(c).

The administrative law judge initially considered whether claimant established total disability and, therefore, was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4). Relevant to 20 C.F.R. §718.204(b)(2)(i), (ii), the record contains four newly submitted pulmonary function studies and four newly submitted arterial blood gas studies. Director's Exhibits 15, 17; Claimant's Exhibit 7; Employer's Exhibit 4. We affirm the administrative law judge's finding that this evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), as all of the objective studies were non-qualifying for total disability.[6] Decision and Order at 9-11, 21. We further affirm the administrative law judge's determination that claimant is precluded from proving total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure. *Id*. at 20.

Relevant to 20 C.F.R. 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Alam, Rosenberg, and Jarboe. Decision and Order at 15-22. Dr. Baker examined claimant on May 21, 2010, and reported that, although the blood gas study results were non-qualifying under federal disability standards, the exercise test showed a reduction in oxygenation.[7] Director's Exhibit 15. Dr. Baker opined that the hypoxia on exercise established that claimant has a moderate to severe impairment that "would seriously hamper his ability to perform any type of strenuous manual labor." *Id*.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the 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). A "qualifying" blood gas study yields values that are equal to or less than the values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[7] The resting values from Dr. Baker's May 21, 2010 blood gas study were pO2 78, pCO2 38. Director's Exhibit 15. The exercise values were pO2 66, pCO2 48. *Id*.

Dr. Alam, claimant's treating pulmonologist, prepared two letters in which he offered his opinion as to whether claimant is disabled, and was deposed by employer. In a letter dated April 22, 2013, Dr. Alam indicated that he has treated claimant "for some time" for pulmonary issues, including complaints of cough, congestion, sputum production, and shortness of breath. Claimant's Exhibit 5. Dr. Alam indicated that he has prescribed bronchodilators, inhaled steroids, and antibiotics "for a few years." *Id.* Dr. Alam further reported that claimant's FEV1 "has been stable, around 70% [of] predicted, but it fluctuates," and that claimant "drops his oxygenation" with exertion, "as well as his FEV1." *Id.* He concluded that claimant has a pulmonary disability to which coal dust exposure contributes. *Id.* At his deposition, conducted on April 14, 2014, Dr. Alam reviewed the results of Dr. Baker's May 21, 2010 examination and testified:

> [T]he main reason Dr. Baker gave him disability is not because of his [pulmonary function tests], it's because of his blood gas, you know, and that's the gold standard in the current day and age. It isn't a gold standard all the time that if you have significant development of hypoxemia with desaturation with exercise, that means you are disabled, and Dr. Baker has done this and his pO2 dropped from 78 to 66 and that was the main reason Dr. Baker gave him disability. It was not because of his FEV1 or his [pulmonary function tests] and I totally agree with that, and, you know your [pulmonary function tests] can be normal at rest, and your x-ray may not be as bad, but if you drop your oxygen with exercise, then that's it, you know. This will trump everything else and that's why [claimant] was declared completely disabled from a pulmonary standpoint[.]

Employer's Exhibit 5 at 12-13. In a letter dated June 17, 2015, Dr. Alam reiterated his history of treating claimant and stated:

> [Claimant] is disabled from [a] pulmonary standpoint to go back to his previous mining job. . . . [Claimant] is unable to perform the cardiopulmonary test so we [drew] the conclusion on [the] basis of his treatment over the years, positive chest x-ray, his work history as well as his other differential diagnoses including [congestive heart failure], diabetes and [coronary artery disease] that ha[ve] been addressed in this reasonable medical opinion.

Claimant's Exhibit 8.

In contrast, Dr. Rosenberg, who examined claimant on April 27, 2011, concluded that claimant is not disabled, as his pulmonary function study was normal and his exercise blood gas study showed that his oxygen level was preserved. Employer's

Exhibit 4. Dr. Rosenberg provided a supplemental report in which he reviewed the results of Dr. Baker's examination of claimant. Employer's Exhibit 5. He disputed Dr. Baker's finding that the May 21, 2010 blood gas study revealed hypoxia on exercise[8] and reiterated his determination that claimant is not totally disabled from a respiratory or pulmonary standpoint. *Id*. Dr. Rosenberg testified at his subsequent deposition that "claimant's blood gas studies performed at the time of my evaluation revealed preserved oxygenation, [and] no clinically significant fall of pO2 with exercise. The pO2 had improved over time compared to the evaluations of Drs. Baker and Broudy."[9] Employer's Exhibit 6 at 7. He further stated that claimant retained the respiratory capacity to do his usual coal mine employment, which he characterized as requiring, at times, heavy or very heavy manual labor. *Id*. at 8. In a second supplemental report, Dr. Rosenberg indicated that his review of Dr. Alam's April 22, 2013 medical report did not cause him to change his opinion. Employer's Exhibit 7.

Dr. Jarboe reviewed medical records provided to him by employer's counsel and opined that the results of claimant's pulmonary function studies and blood gas studies did not support the diagnosis of a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 8. Dr. Jarboe acknowledged Dr. Baker's opinion that the blood gas study claimant performed on May 21, 2010, revealed disabling hypoxia on exercise, but attributed it to claimant's cardiac disease. *Id*. At his deposition, Dr. Jarboe reiterated his conclusion that Dr. Baker's blood gas study results were not the result of primary lung disease. Employer's Exhibit 9 at 12. He further testified that claimant retains the physiological capacity to perform arduous manual labor. *Id*. at 14. In a supplemental report, Dr. Jarboe indicated again that the decline in oxygen tension shown on claimant's May 21, 2010 exercise blood gas study was "most likely" due to cardiac disease and that

[8] Dr. Rosenberg stated: "The sums of the pCO2 and pO2 were essentially the same both before (38 + 78 = 116mmHg) and after exercise (48 + 66 = 114mmHg). This indicates that the alveolar capillary bed within his lungs is intact, and any gas exchange abnormality at that time was related to hypoventilation." Employer's Exhibit 5.

[9] As previously indicated, the resting pO2 and pCO2 values from Dr. Baker's May 21, 2010 blood gas study were 78 and 38, respectively. Director's Exhibit 15. The exercise pO2 and exercise pCO2 were 66 and 48, respectively. *Id*. Dr. Broudy's September 21, 2010 blood gas study, which claimant performed only at rest, produced a pO2 of 77.3 and a pCO2 of 40.5. Director's Exhibit 17. The blood gas study performed by Dr. Rosenberg on April 27, 2011, produced a resting pO2 of 102 and a resting pCO2 of 38.1. Employer's Exhibit 4. The exercise pO2 was 88.2, while the exercise pCO2 was 36.8. *Id*. Dr. Alam's blood gas study, which claimant performed at rest on October 8, 2014, produced a pO2 of 75 and a pCO2 of 49. Claimant's Exhibit 7.

the results of the objective studies did not support the diagnosis of a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 10.

The administrative law judge gave "little weight" to the diagnoses of a totally disabling respiratory or pulmonary impairment made by Drs. Baker and Alam on the ground that they were inadequately documented and unexplained. Decision and Order at 21. She credited, as documented and reasoned, the opinions in which Drs. Rosenberg and Jarboe ruled out total respiratory or pulmonary disability, because they "were consistent with the evidence available to them and the objective testing." *Id*. at 22. Therefore, the administrative law judge concluded that claimant did not establish total disability by the newly submitted medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). *Id*.

The determination of whether a medical opinion is adequately reasoned and documented is a matter reserved to the discretion of the administrative law judge as fact-finder. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Although an administrative law judge may accord greater weight to the opinion of a treating physician, he or she must first assess "the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2002) (The opinions of treating physicians "get the deference they deserve based on their power to persuade.").

In this case, we affirm the administrative law judge's weighing of the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), as it is rational and supported by substantial evidence. The administrative law judge acted within her discretion as fact-finder in determining that, in contrast to the opinions of Drs. Baker and Alam, the opinions of Drs. Rosenberg and Jarboe, that claimant is not totally disabled by a respiratory or pulmonary impairment, were better-supported by the underlying objective evidence, all of which was non-qualifying. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). In addition, in light of her determination that Dr. Alam's opinion was not documented, the administrative law judge permissibly found that Dr. Alam's status as claimant's treating physician did not provide a basis for according his opinion determinative weight. 20 C.F.R. §718.104(d)(5); *see Williams*, 338 F.3d at 513, 22 BLR at 2-647; Decision and Order at 21. Therefore, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Based on the administrative law judge's rational findings at 20 C.F.R. §718.204(b)(2)(i)-(iv), we further affirm her overall finding that claimant did not establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). *See Fields*, 10 BLR at 1-21. Thus, because the administrative law judge permissibly determined that the evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment, we also affirm her finding that claimant is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *White*, 23 BLR at 1-3. Finally, as claimant did not establish that he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the denial of benefits.[10] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[10] In claimant's prior claim, none of the pulmonary function or blood gas studies were qualifying and none of the physicians opined that claimant had a totally disabling respiratory impairment. Director's Exhibit 3.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge