U.S. Department of Labor

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

BRB No. 16-0364 BLA

JOHN C. BRIEL Claimant-Petitioner v. ANTHRACITE ENERGY, INCORPORATED and STATE WORKERS' INSURANCE FUND (PENNSYLVANIA) Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/30/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-06191) of Administrative Law Judge Theresa C. Timlin, rendered on a miner's claim filed on November 10, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established 8.80 years of coal mine employment and the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge found that the evidence was insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the pulmonary function tests and medical opinion of Dr. Kraynak to find that claimant failed to establish total disability. Claimant also argues that the administrative law judge erred in weighing Dr. Kraynak's opinion relevant to the issue of disability causation. Neither employer/carrier nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.[1]

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.[2] 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

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 8.80 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant established less than fifteen years of coal mine employment, claimant is not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, which requires establishment of at least fifteen years of coal mine employment, in underground mines, or surface coal mine employment in conditions that are substantially similar to underground mines, 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.

[2] As claimant's coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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).

I. Total Disability

The regulations provide that a miner will be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents or prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function tests showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; (ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; (iii) evidence that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or (iv) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *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).

A. Pulmonary Function Tests

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three pulmonary function tests. The April 4, 2012 test, by Dr. Talati, and the October 23, 2012 test, by Dr. Cali, each had values that were non-qualifying for total disability, both before and after administration of a bronchodilator.[3] Decision and Order at 28; Director's Exhibit 11; Employer's Exhibit 5. The June 17, 2013 test had qualifying values and no bronchodilator was administered. Decision and Order at 29; Claimant's Exhibit 4. The administrative law judge determined that the qualifying June 17, 2013 test was "not valid because the two greatest FEV1 values (1.34 and 1.21) vary by more than 100 [milliliters (ml)] and by eight percent of the largest value." Decision and Order at 29. The

[3] A "qualifying" pulmonary function test yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

administrative law judge concluded that because the qualifying June 17, 2013 test did not satisfy the quality standards it was entitled to "no weight." *Id*. Finding that "the only valid pulmonary function test on April 4, 2012 did not reveal qualifying values,"[4] the administrative law judge concluded that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *Id*.

Claimant argues that the administrative law judge "exceeded her role in invalidating a pulmonary function [test] where no physician did so, and where the administering physician found it to be a valid [test]." Claimant's Brief at 5. We disagree.

The regulation at 20 C.F.R. §718.103(c) specifically states that "no results of a pulmonary function study shall constitute evidence for the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B." 20 C.F.R. §718.103(c). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must determine whether pulmonary function tests are in substantial compliance with the quality standards. *See 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).

In this case, the administrative law judge correctly observed that the report of the June 17, 2013 pulmonary function test identified a variance between the FEV1 values of 110 ml,[5] rendering the test non-conforming under the quality standard. Claimant's Exhibit 4. The applicable quality standard states:

> Effort shall be judged unacceptable when the patient:
>
> * * *
>
> (G) Has an excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater.

[4] The administrative law judge credited Dr. Simelaro's opinion that the October 23, 2012 non-qualifying pulmonary function test was invalid. Decision and Order at 28; Claimant's Exhibit 14.

[5] The report of the June 17, 2013 pulmonary function test includes the following notation: "FEV1 Pre/Post Var: 110 ml (8%)." Claimant's Exhibit 4.

20 C.F.R. Part 718 Appendix B(2)(ii)(G).

Because it is clear from the face of the report that the June 17, 2013 pulmonary function test does not satisfy the quality standard, and there is no medical evidence in the record that validates the test,[6] we affirm the administrative law jude's finding that the June 17, 2013 qualifying pulmonary function test is not reliable to establish that claimant is totally disabled. *See* 20 C.F.R. §718.103(c); *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Mangifest*, 826 F.2d at 1327, 10 BLR at 2-233. Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as it is supported by substantial evidence.[7]

B. Medical Opinion Evidence

[6] In *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1983), the Board held that interpretation of the factors provided by Appendix B requires medical expertise. Unlike the facts of *Schetroma*, where an administrative law judge discredited two pulmonary function tests based on the quality standards, despite the fact that the tests were validated by one physician, here, there is no medical opinion that specifically validates the June 17, 2013 test. Contrary to claimant's characterization, there is no technician's name or physician's name identified on the report of the June 17, 2013 test; there is no statement pertaining to claimant's effort and cooperation on the report; and the "test interpretation" states that it is an "UNCONFIRMED REPORT." Claimant's Exhibit 4. Although Dr. Kraynak indicated during his deposition that he was present during the June 17, 2013 test and observed claimant's effort and cooperation, which he described as "good," Dr. Kraynak did not address the fact that the test showed a variance of more than five percent in the FEV1 values. Claimant's Exhibit 8 at 11. Thus, we reject claimant's assertion that the administrative law judge improperly substituted her opinion for that of a medical expert in finding that the June 17, 2013 pulmonary function test did not satisfy the quality standards.

[7] The administrative law judge found that the one arterial blood-gas study in the record did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence in the record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 30-31. We affirm the administrative law judge's findings under these subsections as they are unchallenged. *See Skrack*, 6 BLR at 1-711.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Talati, Cali, and Kraynak. Decision and Order at 31-34; Director's Exhibit 11; Claimant's Exhibits 6, 8, 16; Employer's Exhibit 4. The administrative law judge gave less weight to Dr. Talati's opinion because she found it was equivocal as to whether claimant is totally disabled.[8] Decision and Order at 31-32. The administrative law judge also gave less weight to Dr. Cali's opinion, because Dr. Cali did not characterize the exertional requirements of claimant's usual coal mine work or discuss the objective evidence underlying his conclusion that claimant is not totally disabled. *Id*. at 32. Additionally, the administrative law judge rejected Dr. Kraynak's opinion that claimant is totally disabled, finding it not-well reasoned and insufficient to satisfy claimant's burden of proof. *Id*. at 33.

Claimant asserts that the administrative law judge failed to give valid reasons for rejecting Dr. Kraynak's opinion. We disagree. The administrative law judge correctly found that Dr. Kraynak based his diagnosis of total disability, in part, on the June 17, 2013 qualifying pulmonary function test. Because we have affirmed the administrative law judge's determination that the June 17, 2013 qualifying test was invalid, we see no error in the administrative law judge's finding that Dr. Kraynak's diagnosis of total disability, relying in part on that invalid test, is not credible.[9] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law judge's finding that claimant did not establish total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's finding that the evidence overall is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

II. Disability Causation

[8] Dr. Talati performed the examination of claimant on behalf of the Department of Labor and on the Form CM-988 wrote the following: "Mild pulmonary impairment that precludes performing last coal mine job, so that [claimant] will not get further exposure to dusty environment. Not total disability." Director's Exhibit 11.

[9] Because the administrative law judge gave a valid reason for rejecting Dr. Kraynak's opinion that claimant is totally disabled, it is not necessary that we address claimant's remaining arguments with regard to the weight accorded Dr. Kraynak's opinion on the issue of total disability. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

The administrative law judge concluded that claimant was unable to prove that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), "as the medical evidence contained in the record does not support a finding of total disability." Decision and Order at 34. Because we have affirmed the administrative law judge's finding that claimant is not totally disabled, we also affirm the administrative law judge's finding that claimant is unable to establish disability causation at 20 C.F.R. §718.204(c). As claimant failed to establish all of the requisite elements of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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