U.S. Department of Labor

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

BRB No. 16-0412 BLA

JIMMY L. CHILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	DATE ISSUED: 05/22/2017
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jimmy L. Chilton, McCalla, Alabama.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe P.C.), Birmingham, Alabama, for employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel, the Decision and Order (2013-BLA-05415) of Administrative Law Judge Adele Higgins Odegard denying claimant's request for modification of 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 June 5, 2008.[1]

In the initial decision dated January 7, 2011, Administrative Law Judge Theresa C. Timlin found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). Judge Timlin, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Timlin's findings and the denial of benefits. *Chilton v. Jim Walter Res., Inc.*, BRB No. 11-0392 BLA (Feb. 24, 2012) (unpub.).

Claimant filed a third claim for benefits On July 9, 2012. Director's Exhibit 55. This claim was filed within one year of the issuance of the last denial of Claimant's 2008 claim, therefore the 2012 claim constituted a timely request for modification pursuant to 20 C.F.R. §725.310. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). The district director denied claimant's request for modification on October 25, 2012. Director's Exhibit 59. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 60.

In a Decision and Order dated April 18, 2016, Administrative Law Judge Adele Higgins Odegard (the administrative law judge) found that the new evidence (*i.e.*, the evidence submitted subsequent to Judge Timlin's 2011 Decision and Order) did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, or a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial

[1] Claimant's initial claim, filed on September 8, 2006, was denied by the district director on April 30, 2007, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1.

evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 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 (1986) (en banc).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the new evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Consequently, the relevant issue before the administrative law judge was whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Timlin's 2011 Decision and Order) was sufficient to establish the existence of pneumoconiosis or total disability. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998); *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered eight pulmonary function studies, three of which were originally submitted in the subsequent claim, and five of which were submitted on modification. The administrative law judge accurately noted that the three originally submitted studies, dated July 15,

[2] The record indicates that claimant's coal mine employment occurred in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

2008, November 19, 2008, and October 23, 2009, are non-qualifying.[3] Decision and Order at 7; Director's Exhibits 13, 15; Employer's Exhibit 1. The administrative law judge next considered the five new pulmonary function studies, dated January 22, 2010, January 26, 2011, January 27, 2012, February 1, 2013, and February 5, 2014, which were contained in Dr. Connolly's treatment records. Claimant's Exhibit 2. The administrative law judge found that these five pulmonary function studies are also non-qualifying. Decision and Order at 9. Because the administrative law judge properly found all eight of the new pulmonary function studies to be non-qualifying, we affirm her finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), we affirm the administrative law judge's accurate finding that the two blood gas studies submitted in the subsequent claim, dated July 15, 2008 and October 23, 2009, are non-qualifying. Decision and Order at 10; Director's Exhibit 13; Employer's Exhibit 1. Because the administrative law judge also accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure, we also affirm her finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. O'Reilly, Connolly, Goldstein, and Fino, originally submitted in the subsequent claim. Dr. O'Reilly, who conducted the Department of Labor-sponsored examination, opined that claimant suffers from a mild to moderate pulmonary impairment, such that claimant is twenty-five to fifty percent impaired. Director's Exhibit 13. Dr. Connolly advised that claimant "should not return to work environments which places [sic] him at risk for exposure to significant coal and rock dust." Director's Exhibit 15. Dr. Goldstein opined that claimant suffers from a "minimal" pulmonary impairment that would not prevent him from returning to his last coal mine job, Employer's Exhibit 1, while Dr. Fino opined that the claimant retains the respiratory capacity to perform his last coal mine job, which required sustained heavy labor. Director's Exhibit 33.

The administrative law judge found that Dr. O'Reilly did not make a determination as to whether claimant could return to his prior coal mine job, that Dr. Connolly "stopped short of indicating that . . . [c]laimant is unable to return to the coal mines," and that Dr. Goldstein opined that claimant is not totally disabled from a

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

pulmonary standpoint. Decision and Order at 15-16. The administrative law judge therefore accorded "sufficient probative weight" to Dr. Fino's opinion that claimant is not disabled, noting that the doctor relied upon the "pulmonary test results in coming to his conclusion." *Id.* at16.

The administrative law judge also considered the medical opinion evidence that claimant submitted in support of his request for modification. Claimant submitted Dr. Connolly's June 24, 2014 deposition testimony, as well as Dr. Connolly's treatment records.[4] Dr. Connolly, claimant's treating physician, testified that claimant suffers from a mild obstructive lung defect/impairment. Claimant's Exhibit 1 at 19, 22, 24. Because Dr. Connolly did not specifically address whether claimant was able to return to his prior coal mine employment, the administrative law judge found that Dr. Connolly's opinion was not entitled to "probative weight" on the issue of total disability. *Id.* at 17. The administrative law judge therefore found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* Consequently, the administrative law judge found that claimant did not establish a change in conditions on the issue of total disability, or a mistake in a determination of fact. *Id.*

Upon review of the administrative law judge's findings, we hold that she erred in her consideration of whether the new medical opinion evidence established total disability. Specifically, the administrative law judge erred in her consideration of the opinions of Drs. O'Reilly and Connolly. A medical opinion need not be phrased in terms of "total disability" before total disability can be established. An administrative law judge may draw an inference of total disability from a physician's report as to the extent of a miner's impairment. *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985). Moreover, even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Dr. O'Reilly opined that claimant suffers from a mild to moderate pulmonary impairment, rendering him twenty-five to fifty percent impaired, and Dr. Connolly opined that claimant suffers from a mild obstructive lung defect/impairment. The administrative law judge erred in not comparing these assessments with the exertional requirements of claimant's usual coal mine employment in order to assess whether

[4] Claimant previously submitted Dr. Connolly's treatment records from his initial evaluation of claimant on November 19, 2008. Director's Exhibit 15. On modification, claimant submitted Dr. Connolly's treatment records from November 19, 2008 to February 5, 2014. Claimant's Exhibit 1.

claimant is totally disabled.[5] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-239 (11th Cir. 2004); *Jim Walters Res., Inc. v. Allen*, 995 F.2d 1027, 1029, 18 BLR 2-237, 2-241-43 (11th Cir. 1993). Consequently, we vacate 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).[6]

On remand, should the administrative law judge find that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[7] *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 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.[8] 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer

[5] On remand, the administrative law judge must identify the employment that was claimant's usual coal mine work, and identify the exertional requirements of that employment.

[6] In light of our decision to vacate the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that claimant failed to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(c) and a basis for modification pursuant to 20 C.F.R. §725.310.

[7] 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) and a change in conditions pursuant to 20 C.F.R. §725.310.

[8] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if the claimant establishes fifteen or more 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. 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. Decision and Order at 3.

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, she must deny benefits.[9] *See Trent,* 11 BLR at 1-27.

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

JONATHAN ROLFE
Administrative Appeals Judge

[9] 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. *See* 20 C.F.R. §718.304; Decision and Order at 18 n.4.

GILLIGAN, Administrative Appeals Judge, concurring:

I concur with the majority's decision to vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The case law clearly provides that an administrative law judge has the discretion to compare a physician's impairment rating with the exertional physical requirements of a miner's usual coal mine employment to determine whether the physician's opinion establishes that the miner is totally disabled. *See Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). However, I write separately in order to set forth my view regarding a flaw in the current state of the law.

In determining whether a miner suffers from a totally disabling pulmonary impairment, an administrative law judge may reasonably compare a physician's opinion, expressed in terms of physical limitations, with the exertional requirements of a miner's usual coal mine employment. However, this is not the case when a physician provides a mere impairment rating. An example clearly illustrates the dilemma facing an administrative law judge. A physician examines a miner and opines that the miner can walk only 500 feet and can carry only 50 pounds. If the miner's usual coal mine employment requires him to walk 1000 feet and carry 100 pounds, the administrative law judge can rationally find that the physician's opinion supports a finding that the miner is totally disabled from a pulmonary standpoint. However, when a physician merely opines that the miner suffers from a "moderate" or a "twenty percent" pulmonary impairment, the administrative law judge is placed in an untenable position. The administrative law judge must make a judgment call, essentially making his own medical assessment. When there is contrary medical evidence, the administrative law judge's assessment becomes even more problematic.

Additionally, where an administrative law judge must assess whether a general impairment finding is totally disabling, his opinion is virtually unreviewable on appeal. Based on the above hypothetical, two administrative law judges might arrive at different conclusions as to whether the physician's assessment of a moderate or twenty percent pulmonary impairment supports a finding of total disability. Which assessment is the reasonable and rational one? Under the same facts, would both findings be affirmable on appeal? The Board is placed in the untenable position of merely assessing whether it agrees with the administrative law judge's ultimate finding. I believe that such an arbitrary outcome should be avoided.

A simple way to avoid such an arbitrary and disparate outcome is to place the assessment of the significance of the pulmonary impairment where it belongs; on the physician. In cases where a physician makes only a general impairment assessment, the administrative law judge can avoid having to make his own medical determination by

requesting that the physician provide clarification of his opinion, *i.e.*, address whether the degree of impairment that he diagnosed renders the miner totally disabled, given the exertional requirements of the miner's usual coal mine employment.

In this case, because two different administrative law judges have already found that Dr. O'Reilly, the physician who conducted the DOL-sponsored examination, did not express his opinion in terms of total disability, I urge the administrative law judge, on remand, to seek clarification from Dr. O'Reilly as to whether he believes that his assessment of a mild to moderate pulmonary impairment renders the miner totally disabled.

I concur in all other respects with the majority's decision.

RYAN GILLIGAN
Administrative Appeals Judge