U.S. Department of Labor

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

BRB No. 17-0374 BLA

DAYTON G. LANE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POCAHONTAS COAL COMPANY	)	
	)	DATE ISSUED: 05/18/2018
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 Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05928) of Administrative Law Judge Theresa C. Timlin rendered a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on April 4, 2012. Director's Exhibit 2.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with thirty-eight years of underground coal mine employment but found that the evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish entitlement under the alternate provisions at 20 C.F.R. Part 718. Accordingly, she denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to address whether claimant established the existence of complicated pneumoconiosis and entitlement to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Claimant also asserts that the administrative law judge erred in evaluating the blood gas study evidence in finding that claimant failed to establish total respiratory disability and entitlement to the Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal. [2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13, 17, 25-26

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 18; Hearing Tr. at 21; Director's Exhibit 3. Therefore, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3), 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption of total disability due to pneumoconiosis if a claimant suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must weigh all of the evidence relevant to the presence or absence of complicated pneumoconiosis together in determining whether claimant has established invocation of the presumption. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Relevant to the existence of complicated pneumoconiosis, claimant asserts that the record contains a 2008 computed tomography (CT) scan that was not considered by the administrative law judge. Claimant's Brief at 9-10. Claimant is correct that the administrative law judge did not make a definitive finding as to the existence of complicated pneumoconiosis. Contrary to claimant's contention, however, the record does not contain any CT scans interpreted as positive for complicated pneumoconiosis. Further, the administrative law judge considered the evidence relevant to the existence of complicated pneumoconiosis in conjunction with her discussion of the medical opinions.

Specifically, the administrative law judge observed that Dr. Manu Patel read a September 22, 2008 x-ray as positive for complicated pneumoconiosis, Category A.[4] Decision and Order at 22; Director's Exhibit 13 at 1. A follow-up CT scan was performed on October 6, 2008, but did not confirm the presence of complicated pneumoconiosis.[5]

[4] Dr. Manu Patel stated that "opacities of 2/2 profusion affect all lung zones in association with category 'A' large opacities in the apices, classifiable as complicated pneumoconiosis. Bilateral apical large opacities are not readily differentiated from lung malignancy." Director's Exhibit 13 at 1.

[5] Dr. Bharat Patel interpreted the October 6, 2008 computed tomography (CT) scan as showing "[c]hanges of chronic obstructive pulmonary disease and chronic parenchymal lung changes due to pneumoconiosis" and "enlarged nodes in [the] subcarinal region and left hilum" measuring up to 2.0 cm. Director's Exhibit 13 at 2. Dr. Bharat did not indicate the nature of the enlarged "nodes."

Director's Exhibit 13 at 2. The administrative law judge also noted that Dr. Zaldivar reviewed both the September 22, 2008 x-ray reading and the October 6, 2008 CT scan interpretation and disagreed that the x-ray was positive for complicated pneumoconiosis.[6] Decision and Order at 21-22; Director's Exhibit 57 at 1; Employer's Exhibit 6 at 18. Further, the administrative law judge considered Dr. Dahhan's correct comment that no physician other than Dr. Manu Patel diagnosed complicated pneumoconiosis.[7] Moreover, claimant does not dispute the accuracy of the administrative law judge's observations, but concedes that "the [September 22, 2008 x-ray] stands against much more recent radiological evidence that only found simple pneumoconiosis or no pneumoconiosis at all." Claimant's Brief at 10. Based on the foregoing, we conclude that claimant has not demonstrated how the administrative law judge's failure to further address the issue of complicated pneumoconiosis constituted reversible error. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). Thus we reject claimant's assertion that a remand is required for the administrative law judge to render a definitive finding at 20 C.F.R. §718.304.

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

Claimant next argues that the administrative law judge erred in finding that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered two blood gas studies dated June 8, 2012 and December 12, 2012. Decision and Order at 14; Director's Exhibits 12,

[6] Dr. Zaldivar explained that in interpreting the October 6, 2008 CT scan, Dr. Bharat Patel did not describe anything that resembled the September 22, 2008 x-ray findings, and that on reviewing the CT scan himself, he "couldn't find any such thing" either. Employer's Exhibit 6 at 18; *see* Decision and Order at 22. Rather, Dr. Zaldivar stated that the October 6, 2008 CT scan showed "an enlarged left hilam with a lymph node measuring 2 cm but . . . no evidence of any lesions within the lungs that were 1 cm or bigger." Director's Exhibit 57 at 1.

[7] Dr. Dahhan stated that "except for Dr. [Manu] Patel, no radiological interpretation found evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis leading me to conclude that this patient's radiological data does not support that possibility." Employer's Exhibit 1 at 2. Dr. Dahhan also observed that Dr. Bharat Patel did not diagnose complicated pneumoconiosis on the October 6, 2008 CT scan, which is a more sensitive diagnostic tool than an x-ray, but instead identified an enlarged lymph node. Employer's Exhibit 5 at 22-23.

57. The June 8, 2012 study, administered by Dr. Rasmussen, produced qualifying[8] values at rest and during exercise, and was validated by Dr. Gaziano. Decision and Order at 14; Director's Exhibit 12. The December 12, 2012 study, administered by Dr. Zaldivar, produced non-qualifying results at rest and during exercise. Decision and Order at 14; Director's Exhibit 57. The administrative law judge gave the greatest weight to the December 12, 2012 blood gas study as it is the most recent and, therefore, "is more reflective of Claimant's true pulmonary ability." Decision and Order at 17. Thus, the administrative law judge found that the blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Claimant argues that in crediting Dr. Zaldivar's study, the administrative law judge improperly "relied on recency alone without fully addressing objections to the conduct of [the study]" that called its accuracy into question. Claimant's Brief at 8. We disagree. The administrative law judge considered at length the circumstances of the respective blood gas studies, as well as the comments of Drs. Rasmussen and Zaldivar,[9] and correctly observed that neither physician could explain why their respective test results are so different. Director's Exhibit 62 at 28, 31, 34; Employer's Exhibit 6 at 29-30. Dr. Rasmussen noted that Dr. Zaldivar's exercise blood gas study was "a little unusual" because claimant began exercising, stopped, and then began exercising again. Director's Exhibit 62 at 28; *see* Decision and Order at 15, 20, 26. Dr. Rasmussen acknowledged, however, that he had "no idea" whether this affected Dr. Zaldivar's results. *Id.* Dr. Rasmussen speculated that he "may have" exercised claimant a little more than Dr. Zaldivar did, based on the bicarbonate levels, but reiterated that if Dr. Zaldivar's blood sample was taken during the exercise, he had "no explanation for the difference" between the two studies.[10] Director's Exhibit 62 at 39-40; *see* Decision and Order at 15, 21, 26. Dr. Rasmussen concluded that Dr. Zaldivar's study appears valid, and indicates that claimant

[8] A "qualifying" blood gas study yields values that are equal to or less than the applicable 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).

[9] The administrative law judge also considered Dr. Dahhan's comment that Dr. Rasmussen's results are not credible because they are "unconfirmed" by other physicians. Because Dr. Dahhan did not explain why he preferred Dr. Zaldivar's results over those of Dr. Rasmussen, the administrative law judge accorded his opinion little weight. Decision and Order at 26, *referencing* Employer's Exhibit 5 at 19-20.

[10] Dr. Zaldivar testified that his blood gas study was performed using an indwelling cannula and that the blood sample was taken during exercise. Employer's Exhibit 6 at 24.

could perform heavy and very heavy labor. Decision and Order at 15, 21, 26; Director's Exhibit 62 at 29, 42.

The administrative law judge noted that in response to Dr. Rasmussen's comments, Dr. Zaldivar explained that during the exercise portion of his study, claimant initially stopped but then said he could go longer, and so they re-started the exercise testing. Decision and Order at 16; Employer's Exhibit 6 at 25. Dr. Zaldivar stated that the reported exercise results were from the second, complete exercise session, and emphasized that stopping and re-starting the testing did not invalidate the results.[11] Decision and Order at 16, 26; Employer's Exhibit 6 at 26. Dr. Zaldivar acknowledged that Dr. Rasmussen's June 8, 2012 blood gas study results were "entirely different" from his own, but stated that he had "no logical explanation" for why this was so and that he still believed that the December 12, 2012 blood gas study results he obtained were "normal." Employer's Exhibit 6 at 29, 30, 32; *see* Decision and Order at 17, 24, 26. Based on the foregoing, and as claimant does not identify any relevant evidence that was not considered, we reject claimant's assertion that the administrative law judge failed to "give[] much consideration to defects in the conduct of the [blood gas] study by Dr. Zaldivar." *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Claimant's Brief at 4.

An administrative law judge may, but need not, credit the more recent medical evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). Here, contrary to claimant's contention, the administrative law judge did not rely solely on the fact that Dr. Zaldivar's December 12, 2012 non-qualifying blood gas study was more recent by six months than Dr. Rasmussen's qualifying study, but appropriately considered the reliability of the studies. Having determined that no physician questioned the validity of Dr. Zaldivar's results, she permissibly accorded greater weight to Dr. Zaldivar's more recent study as "more reflective of claimant's true pulmonary ability."[12] *See Schetroma*, 18 BLR

[11] Dr. Zaldivar explained that claimant only did "a little bit" of exercise during the first session, not "even . . . anything to speak of," and was not fatigued when the second exercise session began. Employer's Exhibit 6 at 27. He reiterated that stopping and re-starting the exercise test was a "perfectly acceptable medical protocol," and that the second test was a "brand new" exercise test that was "independent of anything else that happened that day." *Id.*

[12] Moreover, given the administrative law judge's finding that Dr. Rasmussen's qualifying blood gas study and Dr. Zaldivar's non-qualifying are equally reliable, if the administrative law judge had not credited Dr. Zaldivar's study as the most recent, the studies could only have been found to be in equipoise. Thus, claimant has not explained how according equal weight to the studies would result in a finding that the preponderance

at 1-22; Decision and Order at 17, 26. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 17.

Finally, considering all of the evidence relevant to total disability, the administrative law judge permissibly found that claimant failed to demonstrate that he has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine work pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 26. Thus, we affirm the administrative law judge's finding that claimant failed to invoke the Section 411(c)(4) presumption. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §§718.305. Because we have affirmed the administrative law judge's finding that claimant did not established total disability, a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

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of the blood gas study evidence supports a finding of total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994) (Where the evidence is in equipoise, claimant fails to carry his burden).

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