U.S. Department of Labor

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

BRB No. 17-0476 BLA

TOMMY CAUDILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G S & M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 05/30/2018
AMERICAN BUSINESS & MERCANTILE	)	
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Tommy Caudill, Kite, Kentucky.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2014-BLA-05175) of Administrative Law Judge Christopher Larsen, 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 miner's claim filed on December 17, 2012.

The administrative law judge found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 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

[1] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting that the Board review the decision of Administrative Law Judge Christopher Larsen, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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.

evidence, and in accordance with law.[3] 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).

Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies dated February 6, 2013, May 14, 2013, February 17, 2014, April 24, 2014, and December 9, 2015.[4] Decision and Order at 5-7;

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 16.

[4] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's average reported height was 74.2 inches and he would use the closest table height of 74.4 inches for purposes of assessing the pulmonary function studies for total disability. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6.

Director's Exhibit 11; Claimant's Exhibit 2; Employer's Exhibits 5, 6. The administrative law judge noted that the February 6, 2013 and the May 14, 2013 studies administered by Dr. Habre yielded qualifying[5] values both before and after the administration of a bronchodilator.[6] The administrative law judge noted that the technicians who conducted both studies reported that claimant's cooperation and understanding were "good." Decision and Order at 7; Director's Exhibit 11. Drs. Habre and Gaziano reviewed the results of the February 6, 2013 study, however, and opined that claimant gave suboptimal effort. *Id.* Drs. Habre, Gaziano, and Vuskovich similarly opined that the May 14, 2013 pulmonary function study reflected suboptimal effort. Decision and Order at 7; Director's Exhibit 11; Employer's Exhibit 7. The administrative law judge properly credited the invalidation reports by Drs. Gaziano and Vuskovich to conclude that neither the February 6, 2013 nor the May 14, 2013 study accurately represented claimant's respiratory capacity.[7] *See Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885, 16 BLR 2-129, 2-135 (7th Cir. 1992) (technicians' notations of good cooperation do not amount to substantial evidence that they succeeded in producing a valid test in the face of competent opinions that the results show the contrary); Decision and Order at 7; Director's Exhibit 11; Employer's Exhibit 7.

The February 17, 2014 study administered by Dr. Rosenberg yielded qualifying values pre-bronchodilator and non-qualifying values post-bronchodilator. Dr. Rosenberg noted, however, that the study was "performed with incomplete and inconsistent efforts," and opined that it "cannot be used to gauge an accurate level of impairment." Employer's Exhibit 5 at 3, 4. As no physician offered an opinion contradicting Dr. Rosenberg's

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Dr. Habre conducted the Department of Labor-sponsored pulmonary evaluation and, as part of that evaluation, administered the February 6, 2013 pulmonary function study. Director's Exhibit 11. Because Drs. Habre and Gaziano both concluded that the study was deficient due to suboptimal effort, Dr. Habre administered a second pulmonary function study on May 14, 2013. *See* 20 C.F.R. §725.406(c) (providing that "[w]here the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result."); Director's Exhibit 11.

[7] Dr. Gaziano is Board-certified in internal medicine and chest diseases. Director's Exhibit 11. Dr. Vuskovich is Board-certified in occupational medicine. Employer's Exhibit 9.

assessment, the administrative law judge found that the February 17, 2014 study was not probative of claimant's respiratory capacity. Decision and Order at 6, 7.

The April 24, 2014 study conducted by Dr. Jarboe yielded non-qualifying values both before and after the administration of a bronchodilator. The technician who administered the study indicated that the results were inconsistent after many attempts, and Dr. Jarboe agreed that "the numerical output does show that the claimant gave inconsistent effort." Employer's Exhibit 6 at 4. Dr. Jarboe further stated that it is difficult to be absolutely certain that claimant's spirogram represents his best ventilatory function, and that although the highest FEV_1 and FVC values were matching, it did not prove the validity of the study. *Id*. at 6, 7. In light of Dr. Jarboe's "equivocal" comments about its validity, the administrative law judge permissibly found that the April 24, 2014 study was not entitled to significant probative weight. Decision and Order at 7.

Finally, the December 9, 2015 study conducted by Dr. Sammons yielded non-qualifying values both before and after the administration of a bronchodilator. Noting that Dr. Vuskovich validated this most-recent study, the administrative law judge found it to be probative evidence of claimant's respiratory capacity. Decision and Order at 7; Employer's Exhibit 12. Having found that the record contains no valid, probative study that yielded qualifying values, the administrative law judge permissibly found that the pulmonary function study evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984). As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge correctly found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as there are no qualifying blood gas studies of record, and there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-8.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that all of the physicians of record concluded that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.[8] Decision and Order at 9-13; Director's Exhibit 11; Employer's Exhibits 5, 6. The administrative law judge also considered

[8] Dr. Habre stated that there is no disabling lung disease present. Director's Exhibit 11. Drs. Rosenberg and Jarboe opined that from a pulmonary perspective, claimant is not disabled from performing his previous coal mine employment or similar type labor. Employer's Exhibits 5 at 4; 6 at 7.

claimant's treatment records and noted that while they list various medical conditions, they do not contain a reasoned medical opinion regarding the level of claimant's pulmonary disability. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984) (treatment for respiratory issues is insufficient, by itself, to establish a disabling pulmonary impairment); Decision and Order at 13; Claimant's Exhibits 2, 3. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 13. Consequently, we affirm the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), and therefore has failed to prove an essential element of entitlement pursuant to 20 C.F.R. Part 718.[9] Consequently, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[9] We note that in his letter received on November 7, 2017, claimant references a report dated January 9, 2013 "where it showed that I had black lung 1/1," and seeks to submit to the Board a chest x-ray of that date conducted by Dr. Michael Alexander. Claimant's Letter at 2, 4-5, 8. That x-ray was properly submitted by claimant's representative and is already contained in the record at Director's Exhibit 12. Also, an x-ray classified as "1/1" only shows the existence of simple pneumoconiosis. We observe that unless a chest x-ray demonstrates the existence of complicated pneumoconiosis, that is, shows an opacity greater than one centimeter in diameter which would be classified as Category A, B, or C in accordance with the ILO classification system, a chest x-ray does not establish total disability under the Act. It is necessary to establish the existence of pneumoconiosis *and* total disability in order to be entitled to benefits and, here, the administrative law judge found that claimant did not establish total disability.

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