U.S. Department of Labor

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

BRB No. 18-0215 BLA

FLOYD S. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXCEL MINING, LLC	)	
	)	
and	)	DATE ISSUED: 11/26/2018
	)	
MAPCO, INCORPORATED	)	
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2016-BLA-05864) of Administrative Law Judge Richard A. Morgan, denying benefits 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 claim filed on November 24, 2014.

The administrative law judge credited claimant with 14.66 years of coal mine employment,[1] and therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).[2] The administrative law judge further found that claimant did not establish the existence of complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Turning to whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He further found that the evidence did not establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge's erred in finding that the evidence did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant argues further that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Employer/carrier responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant has 14.66 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this affirmance, we also affirm the administrative law judge's finding that claimant could not invoke the rebuttable

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. 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).

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary probative evidence. See *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.,* 9 BLR 1-236 (1987) (en banc).

Claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[4] Claimant's Brief at 4. The administrative law judge considered four pulmonary function studies conducted on January 7, 2015, April 1, 2015, May 8, 2015, and July 13, 2015. The January 7, 2015 pulmonary function study, conducted by Dr.

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presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), as the miner did not establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the presumption. We similarly affirm, as unchallenged on appeal, the administrative law judge's finding that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *Skrack*, 6 BLR at 1-711.

[4] We affirm, as unchallenged, the administrative law judge's determination that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). *Skrack*, 6 BLR at 1-711; Decision and Order at 25, 27.

Ammisetty, was non-qualifying[5] before the administration of a bronchodilator and qualifying after the administration of a bronchodilator. Director's Exhibit 12. The April 1, 2015 pulmonary function study, also conducted by Dr. Ammisetty, was qualifying both before and after the administration of a bronchodilator. Claimant's Exhibit 5. The May 8, 2015 pulmonary function study, conducted by Dr. Broudy, was also qualifying both before and after the administration of a bronchodilator. Director's Exhibit 24. Finally, the July 13, 2015 pulmonary function study, conducted by Dr. Rosenberg, was non-qualifying both before and after the administration of a bronchodilator. Employer's Exhibit 1.

The administrative law judge found that the January 7, 2015 and April 1, 2015 pulmonary function studies were invalid based upon Dr. Vuskovich's review of the results.[6] Decision and Order at 25; Director's Exhibit 26; Employer's Exhibit 4. The administrative law judge further found that the non-qualifying, July 13, 2015 study was more reliable than the qualifying, May 8, 2015 pulmonary function study.[7] Decision and Order at 25. Consequently, the administrative law judge found that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant generally asserts that, on remand, the administrative law judge will "have to review whether the qualifying breathing studies from Drs. Ammisetty and Broudy constitute total disability caused by coal mine employment." Claimant's Brief at 4. However, the Board is not empowered to engage in a de novo proceeding, and must limit

[5] A "qualifying" pulmonary function study 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" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] Dr. Vuskovich opined that claimant did not put forth the effort required to generate valid FEV1 and FVC values during the January 7, 2015 pulmonary function study. Director's Exhibit 26. Dr. Vuskovich also indicated that claimant's FEV1, FVC, and MVV values from the April 1, 2015 pulmonary function study were not acceptable. Employer's Exhibit 4.

[7] Dr. Broudy, who performed the May 8, 2015 pulmonary function study, opined that claimant's effort was suboptimal and he noted excessive variability in the FEV1 results. Director's Exhibit 24. He further opined that claimant may be able to return to his usual coal mine employment. *Id*. The administrative law judge found that the results of the May 8, 2015 study were "significantly lower" than the July 13, 2015 study's results. Decision and Order at 25. Noting that "a [c]laimant cannot artificially increase his [pulmonary function study] results," the administrative law judge gave greater weight to the July 13, 2015 pulmonary function study. *Id*.

its review to specific contentions of error raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Because claimant does not explain with specificity how the administrative law judge erred in his weighing of the pulmonary function study evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *see also Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987) (holding that unless the party identifies errors and briefs its allegations of error in terms of the relevant law and evidence, the Board has no basis for review).

Because we have affirmed the administrative law judge's determination that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we also affirm his finding that the evidence as a whole does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[8] Because claimant failed to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[8] Because we have affirmed the administrative law judge's determination that claimant did not establish total disability, an essential element of entitlement, we need not address his arguments regarding the administrative law judge's weighing of the evidence relevant to pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge