U.S. Department of Labor

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

BRB No. 19-0020 BLA

RALPH L. LAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LITTLE DAVID COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 11/26/2019
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ralph L. Lawson, Coeburn, Virginia.

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

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits in an Initial Claim (2016-BLA-05479) of Administrative Law Judge Larry S. Merck rendered on a claim filed on January 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 15.53 years of underground coal mine employment, but found the evidence does not establish total disability under 20 C.F.R. §718.204(b)(2). Thus, he determined claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] or establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge also found that while claimant has simple clinical pneumoconiosis, he does not have complicated pneumoconiosis and therefore did 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). Accordingly, the administrative law judge denied the claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board addresses whether substantial evidence supports the decision and order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are 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 Associates, Inc.*, 380 U.S. 359 (1965).

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he 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); *see* 20 C.F.R §718.305.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *See Shupe v.*

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. *See, e.g., Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Statutory presumptions may assist claimants to establish the elements of entitlement.

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

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity 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 reveal a result equivalent to (a) or (b). The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge addressed seven interpretations of four x-rays taken on November 7, 2013, February 5, 2014, July 13, 2015, and February 23, 2017. 20 C.F.R. §718.304(a); Decision and Order at 12-15. He correctly found that all interpreting physicians agree claimant has simple pneumoconiosis, but not whether he has complicated pneumoconiosis. Decision and Order at 14. The administrative law judge found the November 7, 2013 x-ray "inconclusive" as it was read both positive and negative for complicated pneumoconiosis by two dually-qualified B readers and Board-certified radiologists, Drs. DePonte and Shipley. *Id.* He found the February 5, 2014 x-ray positive for complicated pneumoconiosis as two of the three dually-qualified radiologists, Drs. DePonte and Alexander, determined it was acceptable for interpretation and positive for complicated pneumoconiosis, while Dr. Shipley found the film "unreadable" and did not

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Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 10; Hearing Transcript at 18; Director's Exhibit 5.

interpret it.[4] *Id.* The administrative law judge found the July 13, 2015 x-ray negative for complicated pneumoconiosis because although Dr. Shipley interpreted it as positive for simple pneumoconiosis, he did not identify any large opacities of complicated pneumoconiosis. *Id.* at 15. Finally, the administrative law judge found the February 23, 2017 x-ray negative for complicated pneumoconiosis based on the reading of Dr. Fino, a B reader. *Id.*

The administrative law judge accorded greater weight to the readings by dually-qualified radiologists Drs. DePonte, Shipley, and Alexander. Decision and Order at 15. Moreover, he was unpersuaded that Dr. Fino's negative interpretation of the most recent x-ray favors an overall negative finding as he is a B reader, but not a Board-certified radiologist. *Id*. Upon weighing the interpretations of the remaining 2013, 2014 and 2015 x-rays by the dually-qualified radiologists, the administrative law judge found them inconclusive and therefore insufficient to establish complicated pneumoconiosis. *Id.* The administrative law judge performed both a qualitative and quantitative review of the conflicting x-ray readings and permissibly determined claimant did not meet his burden to prove that the x-rays established the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); Decision and Order at 15. Therefore, we affirm the administrative law judge's finding that the x-ray evidence does not establish complicated pneumoconiosis under 20 C.F.R. §718.304(a).[5]

Relevant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether claimant could establish he has complicated pneumoconiosis by "other means." Decision and Order at 15. The administrative law judge accurately summarized the interpretations by Drs. Mullens and Adcock of the May 1, 2014 CT scan and properly found that neither physician opined that the nodule each described as greater than one centimeter is consistent with complicated pneumoconiosis[6] or would show as a greater-than-one-centimeter opacity if seen on a chest x-ray. *Scarbro*, 220 F.3d at 255-56; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999); Decision and Order at 16; Claimant's

[4] Dr. Gaziano, a B reader, reviewed the February 5, 2014 x-ray to assess it for quality purposes only and found it was "quality 2, underexposed." Director's Exhibit 12.

[5] We also affirm the administrative law judge's finding that claimant could not establish he has complicated pneumoconiosis under 20 C.F.R. §718.304(b), because the record contains no biopsy evidence. Decision and Order at 15.

[6] Drs. Mullens and Adcock determined that the 16 mm nodule in the right lung was either a granuloma or hamartoma. Claimant's Exhibit 3; Employer's Exhibit 1.

Exhibit 3; Employer's Exhibit 1. Further, although claimant's treatment notes reference a May 1, 2014 CT scan,[7] the administrative law judge correctly found the treatment notes addressing this CT scan do not state that it indicates that claimant has complicated pneumoconiosis, an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C, or a massive lesion in the lung. 20 C.F.R. §718.304; Decision and Order at 17; Claimant's Exhibits 6, 7. Furthermore, as Dr. Ajjarapu's opinion[8] and the treatment notes from Stone Mountain Health Services relied on x-rays to diagnose complicated pneumoconiosis, and the administrative law judge found the x-ray evidence inconclusive in regard to diagnosing complicated pneumoconiosis, he permissibly found a diagnosis of complicated pneumoconiosis not supported by the preponderance of the evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17; Director's Exhibits 11, 14; Claimant's Exhibit 6. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the relevant evidence under 20 C.F.R. §718.304(c) does not establish claimant has complicated pneumoconiosis. We also affirm the administrative law judge's finding, based on his consideration of all the relevant evidence, that claimant failed to established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 as supported by substantial evidence. *See Cox*, 602 F.3d at 283; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33-34; Decision and Order at 17. Therefore, we affirm the finding that the irrebuttable presumption of Section 411(c)(3) is not applicable.

Section 411(c)(4) Presumption—Total Disability

A miner with more than fifteen years of qualifying coal mine employment is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he also has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4). 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

[7] Claimant's March 24, 2015 and December 21, 2015 treatment notes reference a May 1, 2014 CT scan and state that the CT scan showed "ILD c/w CWP and findings of 16 mm RUL nodule. Similar findings on CXR 11/7/13 with Complicated CWP and 2/1 all zones and R mid lung 1-1.5 cm nodule." Claimant's Exhibit 6 at 1, 10. Claimant's June 12, 2014 treatment note indicates that a "CT chest showed granuloma." *Id.* at 18.

[8] The administrative law judge correctly found that Drs. McSharry and Fino did not diagnose complicated pneumoconiosis. Decision and Order at 17; Director's Exhibit 24; Employer's Exhibits 1, 2.

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 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).

The administrative law judge correctly found that none of claimant's pulmonary function and blood gas studies,[9] dated February 5, 2014, July 13, 2015, and February 23, 2017, are qualifying[10] and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 19-20; Director's Exhibits 11, 24; Employer's Exhibit 2. We therefore affirm the administrative law judge's finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii).

In accordance with 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately summarized the opinion of Dr. Ajjarapu that claimant has a totally disabling pulmonary impairment and the contrary opinions of Drs. McSharry and Fino that claimant could perform his usual coal mine work from a respiratory or pulmonary standpoint.[11] Decision and Order at 20-28; Director's Exhibits 13, 14, 24; Employer's Exhibits 2, 3. Dr. Ajjarapu performed the Department of Labor (DOL)-sponsored examination and submitted a report dated February 5, 2014 and a supplemental report dated April 14, 2015. Director's Exhibits 11, 14. Dr. Ajjarapu acknowledged that claimant's pulmonary function and blood gas study results are non-qualifying, but opined that claimant's blood gas study showed moderate resting hypoxemia and mild exercise-induced hypoxemia that prevent claimant

[9] The administrative law judge correctly found the treatment records dated January 8, 2014, December 21, 2015 and March 24, 2016 report only partial results of undated pulmonary function studies which are insufficient to establish total disability. Decision and Order at 29, 31; Claimant's Exhibit 6.

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

[11] The administrative law judge correctly found that the treatment records do not specifically address total disability. Decision and Order at 32. Because Dr. Cole's qualifications are unknown, the administrative law judge declined to credit as evidence of total disability his treatment notes that claimant's May 20, 2014 sleep study showed oxygen saturation between 80% and 89%, for 35% of claimant's total sleep time. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 32; Claimant's Exhibit 4.

from doing exertional activities. Director's Exhibit 14. Dr. McSharry examined claimant on July 13, 2015. Director's Exhibit 24. His report dated August 4, 2015, states claimant's pulmonary function and blood gas studies he administered and the 2014 blood gas study obtained from Dr. Ajjarapu are "outside" the DOL's standard for disability and that claimant had a normal response to exercise. *Id.* Dr. Fino examined claimant on February 23, 2017. Employer's Exhibit 2. In his March 6, 2017 report, Dr. Fino interpreted claimant's pulmonary function and resting blood gas studies he administered as normal and noted claimant declined exercise testing due to back and leg problems. *Id.* Dr. Fino acknowledged Dr. Ajjarapu's 2014 blood gas study showed "mild" resting hypoxemia that improved with exertion and that Dr. McSharry's 2015 blood gas study was normal at rest and with exertion. *Id* at 7. He opined "there is no ventilatory impairment or oxygen transfer impairment. From a functional standpoint, [claimant] is not disabled from returning to his last mining job or a job requiring similar effort." *Id.* at 8. In a supplemental report dated March 24, 2017, Dr. McSharry opined that Dr. Fino's examination and test results support Dr. Fino's conclusions and are consistent with his own. Employer's Exhibit 3. Dr. McSharry did not alter his opinion there is "no evidence of any respiratory impairment" and that, "[f]rom a pulmonary perspective alone, [he saw] no reason that this claimant would be prevented from performing his usual coal mine work." Director's Exhibit 24 at 3; *see* Employer's Exhibit 3 at 1.

The administrative law judge found that unlike Drs. McSharry and Fino, Dr. Ajjarapu is not a Board-certified pulmonary specialist, nor did she review their subsequent opinions or test results. Decision and Order at 27. In contrast, the administrative law judge found that Drs. McSharry and Fino reviewed the results of the 2014, 2015, and 2017 pulmonary function and blood gas studies, as well as Dr. Ajjarapu's opinion, and were aware that claimant's usual coal mine job involved heavy labor. *Id.* at 28. Based on their qualifications and their opportunity to conduct subsequent testing and review Dr. Ajjarapu's conclusions, the administrative law judge found the opinions of Drs. McSharry and Fino well-reasoned and documented, and outweigh Dr. Ajjarapu's opinion. He thus concluded the preponderance of the medical opinion evidence fails to establish total disability. *Id.*; *see* 20 C.F.R. §718.204(b)(2)(iv).

It is the administrative law judge's prerogative to weigh the conflicting evidence, and the Board may not reweigh it. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000). The administrative law judge provided rational reasons for giving greater weight to the opinions of Drs. McSharry and Fino that claimant is not totally disabled. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability under 20 C.F.R. §718.204(b)(2)(iv). 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 disability under 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198; Decision and Order at 20. As claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, an essential element of entitlement, we affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) or establish entitlement to benefits under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in an Initial Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge