U.S. Department of Labor

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

BRB No. 15-0011 BLA

ROGER D. HINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOLA COAL COMPANY, LLC	)	DATE ISSUED: 10/29/2015
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5123) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed on August 23, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). The administrative law judge found that claimant established thirty-six years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially considered whether claimant established the existence of pneumoconiosis and determined that, although claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), he established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge then found that claimant did not establish total disability, based on the evidence as a whole, at 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge also determined that claimant did not establish disability causation at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that claimant did not establish that he has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Therefore, claimant contends that the administrative law judge should have determined that he invoked the rebuttable presumption at amended Section 411(c)(4) and that employer is unable to rebut it. Employer responds, urging affirmance of the administrative law judge's disability finding and asserting that, even if claimant invoked the presumption, employer would rebut it. In support of the latter argument, employer alleges that the administrative law judge committed several errors when

[1] The administrative law judge did not address whether claimant's coal mine employment was underground or in conditions substantially similar to underground coal mine employment. *See* Decision and Order at 3. In the record, claimant notes employment at strip mines, coal plants, and "mine sites" but does not indicate the frequency or severity of the coal dust exposure at these locations. Director's Exhibit 4; *see also* Director's Exhibits 5, 22.

[2] Under amended Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had 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), as implemented by 20 C.F.R. §718.305(a).

weighing the evidence relevant to the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

The regulations provide that a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work, and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established when: 1) pulmonary function studies show values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies show values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) when total disability is not established under the preceding subsections, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv).

Claimant appears to argue that it is employer's burden to rebut the existence of a totally disabling respiratory or pulmonary impairment once claimant has satisfied one of the subsections of 20 C.F.R. §718.204(b)(2). In doing so, claimant relies, in part, on the administrative law judge's notation that:

> Once it is demonstrated that the miner is unable to perform his usual coal mine work[,] a *prima facie* finding of total disability is made and the

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 4, 6. Accordingly, 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, 1-202 (1989) (en banc).

[4] The administrative law judge found correctly that claimant is unable to establish entitlement to benefits based on the invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as none of the physicians who interpreted the chest x-rays indicated that there was evidence of complicated pneumoconiosis. Decision and Order at 5-7, 15-16; Director's Exhibits 11, 26, 28; Employer's Exhibit 1, 4.

> burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. §718.204(b)(2).

Decision and Order at 19, *citing Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *see* Claimant's Brief at 5 (unpaginated). Claimant's interpretation of the law, and the administrative law judge's statement, are not accurate, as claimant bears the burden of proof of establishing, based on the evidence as a whole, that he is totally disabled by a respiratory or pulmonary impairment from performing his usual coal mine work. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); 20 C.F.R. §§718.204(b)(1)(i), (ii); 718.305(b)(1)(iii); 725.103. As explained *infra*, the administrative law judge determined that claimant did not meet his burden in this case.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies dated October 19, 2011 and May 2, 2012. Decision and Order at 7-8; Director's Exhibits 11, 28. The October 19, 2011 pulmonary function study, performed by Dr. Porterfield, was non-qualifying prior to the administration of bronchodilators.[5] Director's Exhibit 11. A study was not performed post-bronchodilator. *Id*. The May 2, 2012 pulmonary function study, performed by Dr. Zaldivar, had non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 28. Therefore, the administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

At 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of a blood gas study performed by Dr. Porterfield on October 19, 2011, and a blood gas study that Dr. Zaldivar performed on May 2, 2012. Decision and Order at 8; Director's Exhibits 11, 28. Both of the blood gas studies were non-qualifying at rest and qualifying after exercise. Director's Exhibits 11, 28. The administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), based on the qualifying blood gas studies performed after exercise. Decision and Order at 19.[6] The administrative law judge also noted that 20 C.F.R. §718.204(b)(2)(iii) is not

[5] 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, C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] We understand this finding by the administrative law judge to be a determination that, in the absence of contrary evidence, the exercise blood gas studies would establish total disability.

applicable to the current claim, as there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure. *Id*.

Before addressing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge set forth his finding that claimant's last coal mine employment as a bulldozer operator "required medium manual labor."[7] Decision and Order at 20. The administrative law judge then considered the opinions of Drs. Porterfield, Zaldivar, and Basheda. *Id*. Dr. Porterfield examined claimant on October 19, 2011, at the request of the Department of Labor, and found that claimant is totally disabled, based on his qualifying blood gas study after exercise. Director's Exhibit 11. At his deposition, Dr. Porterfield testified that claimant's exercise blood gas study results were puzzling because claimant's "pulmonary function test was not bad enough to explain this degree of loss of oxygen transfer with exercise on his exercise test." Employer's Exhibit 2 at 13. Dr. Porterfield further stated that claimant "should have been able to have exerted himself without any trouble and maintain his oxygenation with his FEV1 at the level that it was." *Id*. at 14. Dr. Porterfield also indicated that claimant may need an echocardiogram "[t]o look for left ventricular systolic dysfunction," which could be the cause of the drop in pO2 on claimant's blood gas study. *Id*. at 13. Additionally, the physician stated that he "would like to have more investigation" before rendering an opinion as to whether coal workers' pneumoconiosis was the cause of the abnormal exercise blood gas study. *Id*. at 14.

Dr. Zaldivar examined claimant on May 2, 2012, conducted a review of claimant's medical records, and concluded that, from a respiratory standpoint, he is able to perform his usual coal mining work as a bulldozer operator. Director's Exhibit 28. Dr. Zaldivar testified at his deposition that claimant's pulmonary function study only showed a mild obstructive impairment, which would not be totally disabling, and that the hypoxemia evident on the blood gas study is due to the left ventricle of claimant's heart not pumping properly, while claimant's diffusion abnormality is from emphysema. Employer's Exhibit 6 at 18-19. Dr. Zaldivar also found that the impairment evident on the blood gas studies would be "a disabling impairment for somebody who's doing heavy exercise. In somebody who is doing just light or moderate exercise, it would not be." *Id*. at 21-22.

[7] In an introductory section of the administrative law judge's Decision and Order, he acknowledged claimant's written statements that his job as a bulldozer operator required him to sit for 11.5 hours per day. Decision and Order at 4; Director's Exhibits 5, 22. The administrative law judge stated, "Dr. Zaldivar noted that entering and exiting the cab required medium labor. I find therefore that the job required medium manual labor." Decision and Order at 4, *citing* Employer's Exhibit 5 at 9. We affirm this finding because it is not challenged by claimant on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Dr. Basheda reviewed medical records and prepared a report, dated May 13, 2013. Employer's Exhibit 3. Dr. Basheda determined that the pulmonary function studies of record demonstrate "very mild obstruction with impaired diffusion," which "would not prevent [claimant] from performing his last coal mining work as a dozer operator or work of similar effort." *Id*. In addition, Dr. Basheda noted that claimant's May 2012 blood gas study "demonstrated a severe reduction in the maximal oxygen uptake," which he felt "was most likely related to cardiac limitation from intrinsic cardiac disease or deconditioning." *Id*. Dr. Basheda reached a similar conclusion concerning claimant's October 2011 blood gas study, stating that claimant "does show significant impairment on exercise testing and exercise arterial blood gas measurements most likely related to cardiovascular disease." *Id*. Dr. Basheda further stated, "this evidence of cardiovascular limitation superimposed on [claimant's mild obstructive impairment] may prevent claimant from performing his last coal mining work or work of similar effort." *Id*. At his deposition, Dr. Basheda reiterated that he did "not believe [claimant] has any significant pulmonary impairment that would prevent him from his coal mining work," but "does have significant cardiovascular disease." Employer's Exhibit 5 at 15.

The administrative law judge determined that the well-documented and well-reasoned opinions of Drs. Zaldivar and Basheda outweighed Dr. Porterfield's contrary opinion and, therefore, that claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). Weighing the evidence as a whole, the administrative law judge observed that, although the blood gas studies supported a finding of total disability, claimant "has not shown disability on pulmonary function tests nor medical opinion evidence." Decision and Order at 20. He added that "Dr. Zaldivar has opined that claimant's blood-gas testing demonstrates that he is incapable of performing heavy, but not medium, manual labor, and that he therefore is capable of performing his last coal mine employment." *Id*. Consequently, the administrative law judge determined that claimant did not establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id*.

Claimant argues that the administrative law judge erred in finding that the non-qualifying pulmonary function studies and the "speculations" of employer's experts "somehow undercut the fact that his blood gas studies, as the [administrative law judge] found, did indeed establish total disability." Claimant's Brief at 5 (unpaginated). Claimant also maintains that the administrative law judge should not have determined that this evidence is sufficient "to carry the employer's burden of showing that [claimant] retains the ability to do comparable work to his coal mine employment." *Id*. Similarly, claimant contends that the administrative law judge should have found that his failure to "establish total disability under all of the methods set forth in 20 C.F.R. §718.204 does

not carry the employer's burden of . . . establishing that he somehow retains the ability to perform work which is comparable to his usual coal mine employment." *Id*. at 6. In support of these arguments, claimant asserts that pulmonary function studies and blood gas studies measure different types of impairments, and that Drs. Zaldivar and Basheda failed to provide "clear and convincing reasons which would allow the [administrative law judge] to credit their opinions." *Id*.

Claimant is correct in arguing that, because pulmonary function studies and blood gas studies measure different types of impairments, differing results do not necessarily constitute contrary probative evidence under 20 C.F.R. §718.204(b)(2).[8] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 n.8, 22 BLR 2-162, 2-173 n.8 (4th Cir. 2000); *Sheranko v. Jones and Laughlin Steel Corp*., 6 BLR 1-797, 1-798 (1984). However, in the current case, the administrative law judge acted within his discretion in determining that Dr. Zaldivar's opinion, that claimant's qualifying blood gas study results would not prevent him from performing the medium manual labor required by his last coal mine employment, is well-reasoned and well-documented.[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 20. The administrative law judge rationally found, therefore, that Dr. Zaldivar's opinion was sufficient to establish that claimant is capable of performing his usual coal mine employment. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 20.

[8] The administrative law judge did not determine that the non-qualifying pulmonary function studies outweighed the qualifying blood gas studies. Rather, he accurately determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), and, in summarizing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), correctly found that all of the physicians indicated that claimant's pulmonary function studies do not support a diagnosis of a totally disabling respiratory impairment. *See* Decision and Order at 9-11, 19-20.

[9] The administrative law judge observed that Dr. Zaldivar based his opinion on an examination of claimant and a review of claimant's medical records, including claimant's work history, Dr. Porterfield's examination report, the results of an October 19, 2011 pulmonary function study and blood gas study, the positive interpretation by Dr. Rasmussen and negative interpretation of Dr. Tarver of an October 19, 2011 x-ray, and medical records from December 9, 2010 concerning claimant's myocardial infarction. *See* Director's Exhibit 28. Prior to his deposition, Dr. Zaldivar also reviewed an interpretation by Dr. Meyer of the May 2, 2012 x-ray, the deposition transcript of Dr. Porterfield from March 5, 2013, Dr. Basheda's May 13, 2013 medical opinion, and an interpretation by Dr. Shipley of the October 19, 2011 x-ray. Employer's Exhibit 6 at 8.

Regarding Dr. Basheda's opinion, claimant has not identified any specific flaws in the physician's opinion that the administrative law judge failed to consider, other than the suggestion that Dr. Basheda did not attribute any of claimant's low pO2 on exercise to his coal mine employment because, contrary to the administrative law judge's finding, he concluded that claimant does not have pneumoconiosis. *See* Claimant's Brief at 6 (unpaginated). Because this allegation is relevant to the issue of total disability causation under 20 C.F.R. §718.204(c), rather than total disability under 20 C.F.R. §718.204(b)(2), we decline to address it. We also decline to otherwise address claimant's general allegation of error. *See Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Therefore, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), and did not invoke the amended Section 411(c)(4) presumption. As claimant has failed to prove an essential element of entitlement,[10] an award of benefits is precluded.[11] *See 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).

[10] In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled due to a pulmonary or respiratory impairment and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *See 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).

[11] Because claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), he was unable to invoke the amended Section 411(c)(4) presumption and, therefore, we need not address any arguments concerning whether employer would have been able to rebut the presumption.

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

JONATHAN ROLFE
Administrative Appeals Judge