U.S. Department of Labor

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

BRB No. 17-0019 BLA

GARY GROSS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNICORN MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/12/2017
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Gary Gross, Sr., Baxter, Kentucky.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2014-BLA-05471) of Administrative Law Judge Theresa C. Timlin,

[1] Judy Hamblin, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 14, 2013.[2]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] the administrative law judge credited claimant with sixteen years of underground coal mine employment, but found that new 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 at Section 411(c)(4), or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the administrative

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administrative law judge's decision, but Ms. Hamblin is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's initial claim for benefits, filed on February 13, 1992, was denied by Administrative Law Judge Charles P. Rippey on December 22, 1993 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. By order dated March 26, 1996, Judge Rippey denied claimant's request for modification. *Id*. Claimant's second claim for benefits, filed on February 27, 2001, was denied by the district director on April 30, 2003 because claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2 at 7, 34. Claimant took no further action until he filed the instant claim for benefits on January 14, 2013. Director's Exhibit 4.

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

law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

When a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2 at 7, 34. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing that he has a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

Invocation of the Section 411(c)(4) Presumption-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 and comparable and gainful work. *See* 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 of 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure;

[4] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law 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); Director's Exhibits 1, 2, 5.

or 4) a physician's reasoned medical judgment that the miner's respiratory or pulmonary condition is totally disabling. 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 four new pulmonary function studies, dated December 20, 2012, February 22, 2013, October 31, 2013 and September 2, 2014. Decision and Order at 11-12. The February 22, 2013 pulmonary function study yielded qualifying[5] values both before, and after, the administration of a bronchodilator.[6] Director's Exhibit 15. The December 20, 2012 and September 2, 2014 pulmonary function studies yielded non-qualifying pre-bronchodilator values and no post-bronchodilator testing was performed for either of these studies. Claimant's Exhibits 3, 4. Finally, the October 31, 2013 pulmonary function study yielded non-qualifying values both before, and after, the administration of a bronchodilator.[7] Employer's Exhibit 1.

Weighing the conflicting results, the administrative law judge correctly noted that "only the test done on February 22, 2013 produced qualifying values," while "[t]he study done before [the February 22, 2013] study, as well as the two studies done after, did not produce qualifying values." *Id.* Thus, the administrative law judge permissibly concluded that the preponderance of the new pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); Decision and Order at 12. As this finding is supported by substantial evidence, it is

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge noted that Dr. Gaziano reviewed this test and determined that the results were acceptable. Decision and Order at 11; Director's Exhibit 15 at 12.

[7] The administrative law judge permissibly averaged the heights reported in claimant's pulmonary function studies to obtain a height of 67.5 inches for claimant. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *see Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 11. Because claimant's height falls between the table heights of 67.3 and 67.7 inches listed in 20 C.F.R. Part 718, Appendix B, the administrative law judge used the table values for the closest greater height of 67.7 inches to evaluate the studies. Decision and Order at 11-12, *citing Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84 n.6 (4th Cir. 1995).

affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge properly found that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as all of the new blood gas studies yielded non-qualifying values and there is no evidence establishing that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 12-13; Director's Exhibit 15; Employer's Exhibit 1.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinion of Dr. Habre[8] that claimant is totally disabled and the new opinions of Drs. Jarboe[9] and Gaziano[10] that claimant is not totally disabled together with

[8] Dr. Habre examined claimant and performed objective testing on behalf of the Department of Labor. Director's Exhibit 15. In a report dated March 25, 2013, Dr. Habre opined that the February 22, 2013 pulmonary function study reflected "severe obstructive airflow and disabling lung disease." Director's Exhibit 15 at 38. Dr. Habre concluded that "[claimant] will not be able to perform his last coal mine job." *Id*.

[9] In a medical report dated December 6, 2013, Dr. Jarboe opined that, based on his examination of claimant and his review of Dr. Habre's report, "[claimant] has no pulmonary impairment" and "retains the functional pulmonary capacity to do his last coal mining job or one of similar physical demand in a dust-free environment." Employer's Exhibit 1. In a supplemental report dated September 12, 2015, Dr. Jarboe reviewed Dr. Gaziano's May 28, 2015 medical report, the treatment records by Drs. Ahmed and Bollavaram, and all of the new pulmonary function studies. Employer's Exhibit 2. Dr. Jarboe opined that "[w]hen all of the functional data is considered, it does not show that [claimant] has a totally and permanently disabling pulmonary impairment." *Id*.

[10] Dr. Gaziano, in a medical report dated May 28, 2015, reviewed Dr. Habre's March 25, 2013 medical report and Dr. Jarboe's December 6, 2013 medical report, and opined that claimant is "not totally disabled from a pulmonary standpoint" and "would be able to perform his usual coal mine employment." Director's Exhibit 37.

the new medical treatment records of Drs. Bollavaram[11] and Ahmed.[12] The administrative law judge initially noted that Drs. Jarboe and Gaziano "reviewed all of the medical evidence" in concluding that, despite the qualifying pulmonary function study results obtained by Dr. Habre, claimant does not have a disabling respiratory impairment. Decision and Order at 19. By contrast, the administrative law judge noted that "Dr. Habre based his conclusion that [c]laimant has a totally disabling respiratory impairment on the [qualifying] results he obtained on [the February 22, 2013] pulmonary function testing," but he "did not address the significance of the entirely normal values [later] obtained by Dr. Jarboe in October 2013." *Id.* Similarly, the administrative law judge noted that while Dr. Bollavaram stated that claimant has shortness of breath with "severe limitation [of] exercise tolerance," he also had not reviewed claimant's more recent pulmonary function studies. Decision and Order at 18, 20; Claimant's Exhibit 6. In light of these factors, the administrative law judge permissibly concluded that the opinions of Drs. Jarboe and Gaziano, that claimant does not suffer from a disabling respiratory impairment, are entitled to greater weight than the contrary opinions of Drs. Habre and Bollavaram. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Stark v.*

[11] Dr. Bollavaram noted that he saw claimant on March 26, 2016 for complaints of worsening shortness of breath on exertion and cough. Decision and Order at 18; Claimant's Exhibit 6. Dr. Bollavaram reported that claimant had a history of being diagnosed with "black lung" about twenty years ago and, since then, has been having shortness of breath on exertion which has gotten worse in the last couple of years. Dr. Bollavaram reported that claimant has severe limitation of exercise tolerance such that he gets short of breath from walking less than twenty to thirty yards. Claimant's Exhibit 5. Dr. Bollavaram's assessment included chronic obstructive pulmonary disease/chronic bronchitis, due to tobacco consumption and coal dust exposure, coal workers' pneumoconiosis, and severe sleep apnea. *Id.* Dr. Bollavaram noted that claimant had a pulmonary function test done recently at a different facility and that he had asked claimant to obtain the report. *Id.*

[12] The administrative law judge noted that Dr. Ahmed's treatment notes dating from October 19, 2010 to March 5, 2015 reflect diagnoses of diabetes, polyneuropathy, fatty liver, hyperlipidemia, hypertension, and degenerative disc disease. Decision and Order at 18, 20; Claimant's Exhibit 5. In addition, Dr. Ahmed consistently reported "smothering consistent with black lung" and stated that an April 27, 2009 x-ray showed chronic bronchitis. Decision and Order at 18, 20; Claimant's Exhibit 5. The administrative law judge correctly found, however, that aside from these notations, Dr. Ahmed's treatment records do not contain any diagnosis or finding consistent with a pulmonary impairment. Decision and Order at 20; Claimant's Exhibit 5.

Director, OWCP, 9 BLR 1-36, 1-37 (1986) (recognizing that administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health); Decision and Order at 19-20.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge provided a valid basis for according diminished weight to the opinions of Drs. Habre and Bollavarum, the only opinions supportive of claimant's burden, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983), we affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability at 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 new evidence, like and unlike, fails to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 20. Consequently, we affirm the administrative law judge's findings that claimant failed to invoke the Section 411(c)(4) presumption, or establish a change in the applicable condition of entitlement under 20 C.F.R. §725.309 and, therefore, failed to establish entitlement to benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

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