U.S. Department of Labor

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

BRB No. 17-0660 BLA

JERRY G. STROUTH Claimant-Petitioner v. DICKENSON-RUSSELL COAL COMPANY, LLC and BIRMINGHAM FIRE INSURANCE / CHARTIS CASUALTY INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/22/2018 DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jerry G. Strouth, Pound, Virginia.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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 (2015-BLA-5933) of Administrative Law Judge Thomas M. Burke denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves a claim filed on August 19, 2014.

After crediting claimant with at least 33.2 years of coal mine employment,[2] the administrative law judge found that he 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). Because claimant further failed to establish that he is totally disabled, the administrative law judge found that he did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), and that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence,

[1] Diane Jenkins, 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. Jenkins is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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 total disability 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The 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 has 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). *See* 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Section 718.304(a) – X-Ray Evidence

The administrative law judge initially addressed whether the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered seven interpretations of three x-rays taken on May 6, 2014, October 2, 2014, and March 4, 2015.

Although Dr. DePonte, a B reader and Board-certified radiologist interpreted the May 6, 2014, October 2, 2014, and March 4, 2015 x-rays as positive for a Category A large opacity, Director's Exhibits 10, 11; Claimant's Exhibit 1, the administrative law judge noted that Dr. Wolfe, an equally qualified physician, interpreted each of these x-rays as

negative for large opacities.[4] Decision and Order at 9; Director's Exhibit 12. Because each of claimant's x-rays was interpreted as both positive and negative by equally qualified physicians, the administrative law judge permissibly found that the x-ray evidence was insufficient to carry claimant's burden to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Section 718.304(c) – Other Evidence

The record also contains CT scan evidence relevant to a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[5] Although the administrative law judge noted that Dr. DePonte interpreted a December 12, 2014 CT scan as revealing progressive massive fibrosis (complicated pneumoconiosis), he accurately noted that the doctor did not interpret a subsequent CT scan taken on February 2, 2016 as revealing any evidence of the disease. Claimant's Exhibits 5, 6. The administrative law judge found that Dr. DePonte's earlier diagnosis of complicated pneumoconiosis was called by her failure to diagnose the disease on the subsequent CT scan. Decision and Order at 9. The administrative law judge, therefore, permissibly found that the CT scan evidence does not support a finding of complicated pneumoconiosis. *See 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).

Because there is no other evidence supportive of a finding of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Total Disability

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

[4] In addition, the administrative law judge noted that another dually qualified physician, Dr. Miller, also interpreted the October 2, 2014 x-ray as negative for large opacities. Decision and Order at 9; Claimant's Exhibit 2.

[5] Because there is no biopsy evidence in the record, there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

gainful 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 pneumoconiosis and 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 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 record contains four pulmonary function studies conducted on May 6, 2014, October 2, 2014, March 4, 2015, and January 5, 2016. Director's Exhibit 10; Claimant's Exhibits 3, 4; Employer's Exhibit 1. The administrative law judge permissibly accorded less weight to the qualifying pulmonary function studies[6] conducted on October 2, 2014 and January 5, 2016 because the studies were invalidated by Dr. Castle,[7] a Board-certified pulmonologist. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Additionally, the administrative law judge permissibly discounted the qualifying values of the May 6, 2014 pulmonary function study, because they were disparately low compared to the non-qualifying values obtained on the March 4, 2015 pulmonary function study.[8] *See Baker v. N. Am. Coal Corp.*, 7 BLR 1-79, 1-80 (1984); Decision and Order on 11; Claimant's Exhibit 4; Employer's Exhibit 1. The

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

[7] Dr. Castle invalidated Dr. Forehand's October 2, 2014 pulmonary function study because he asserted the study showed variability in effort during the forced vital capacity maneuver as well as the flow volume loop and did not reflect claimant's maximum physiologic effort. Employer's Exhibits 5 at 2; 6 at 10-11. Dr. Castle was aware that Dr. Ranavaya checked a box indicating that the study was acceptable, but explained that the significantly higher results obtained during Dr. Sargent's pulmonary function study conducted five months later confirmed the invalidation of the study. Decision and Order at 11; Employer's Exhibit 6 at 10-12. Dr. Castle invalidated the January 5, 2016 pulmonary function study because the study showed less than maximal effort during the flow volume loop, as well as the forced vital capacity maneuver. Employer's Exhibit 6 at 12.

[8] The administrative law judge found that the non-qualifying values from the March 4, 2015 study were "significantly higher" than the other three studies, noting the FVC value from the March 4, 2015 study is "over a liter higher." Decision and Order at 11.

administrative law judge therefore credited the non-qualifying March 6, 2014 pulmonary function study "as reflecting [c]laimant's pulmonary condition." Decision and Order at 11. Because it is based on substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), we affirm the administrative law judge's accurate finding that the three blood gas studies conducted on October 2, 2014, March 4, 2015, and March 9, 2016 produced non-qualifying values. Decision and Order at 4, 10; Director's Exhibit 10; Claimant's Exhibit 9; Employer's Exhibit 2. Because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

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 considered the medical opinions of Drs. Forehand and Castle. Based upon the results of the October 2, 2014 pulmonary function study, Dr. Forehand opined that claimant suffers from a significant respiratory impairment and does not have the respiratory capacity to "meet the physical demands of his coal mining jobs." Director's Exhibit 10. Conversely, Dr. Castle reviewed the evidence of record and opined that claimant retains the pulmonary capacity to perform his previous coal mine employment.[9] Employer's Exhibits 5 at 10-11; 6 at 15.

In weighing the conflicting medical opinion evidence, the administrative law judge noted that Dr. Forehand based his assessment of claimant's pulmonary impairment on the results of the October 2, 2014 pulmonary function study, a study that was invalidated due to less than maximal effort. Decision and Order at 13. The administrative law judge also noted that Dr. Forehand, unlike Dr. Castle, did not have the advantage of reviewing the significantly higher non-qualifying results from the March 4, 2015 pulmonary function study. *Id.* The administrative law judge permissibly accorded Dr. Castle's opinion the greatest weight because he conducted a more comprehensive review of the medical evidence.[10] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Fuller v. Gibraltar Coal*

[9] The administrative law judge found that claimant most recently worked as a roof bolter, miner operator, shuttle car operator and scoop operator. Decision and Order at 2. Drs. Forehand and Castle each relied upon a similar work history. Director's Exhibit 10; Employer's Exhibit 5.

[10] Dr. Castle reviewed the three most recent pulmonary function studies conducted on October 2, 2014, March 4, 2015, and January 5, 2016. Employer's Exhibits 5 at 2-3; 6 at 12.

Corp., 6 BLR 1-1291, 1-1294 (1984). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of that affirmance, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 13.

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