U.S. Department of Labor

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

BRB No. 18-0568 BLA

ALVA A. MULLENS (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 10/07/2019
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Alva A. Mullens, Cowen, West Virginia.

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2017-BLA-5015) of Administrative Law Judge Natalie A. Appetta on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge initially credited claimant with twenty-one years of coal mine employment,[2] all of which she found occurred in conditions substantially similar to those in an underground coal mine. The administrative law judge, however, found the evidence did not establish that claimant was totally disabled.[3] 20 C.F.R. §718.204(b)(2). She therefore found claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2012), or establish entitlement under 20 C.F.R. Part 718. Accordingly, she denied benefits.

On appeal, claimant generally challenges the denial of benefits and employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in

[1] The miner died on June 30, 2018. Decision and Order at 2. The miner's widow is pursuing the claim on his behalf.

[2] Claimant's most recent coal mine employment was in Virginia. Hearing Transcript at 26. 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).

[3] The administrative law judge also found the evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4).

[4] 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.

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 he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his 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 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). Presumptions aid claimants in meeting these elements when certain conditions are met.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[5] *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 weigh all relevant supporting evidence against all relevant 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 noted the three pulmonary function studies of record conducted on November 4, 2015, October 26, 2016, and June 29, 2017, are non-qualifying.[6] Decision and Order at 9; Director's Exhibit 15; Employer's Exhibits 4, 8. We therefore affirm her finding the pulmonary function studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii).

[5] The administrative law judge correctly found claimant cannot establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 17 n.13.

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

The record contains three arterial blood gas studies conducted on November 4, 2015, October 26, 2016, and June 29, 2017. Dr. Shamma-Othman conducted the November 4, 2015 blood gas study as part of claimant's Department of Labor (DOL)-sponsored pulmonary evaluation. The study produced non-qualifying values at rest, but qualifying values during exercise. Director's Exhibit 15. Dr. Zaldivar conducted the October 26, 2016 blood gas study. The study produced qualifying values at rest, but non-qualifying values during exercise. Employer's Exhibit 4. Dr. Lenkey conducted the June 29, 2017 blood gas study which produced non-qualifying values at rest. Employer's Exhibit 8.

Dr. Shamma-Othman questioned the validity of Dr. Zaldivar's November 4, 2015 exercise blood gas study, particularly whether claimant had been provided oxygen during the testing. Employer's Exhibit 7 at 19-20. Dr. Shamma-Othman suggested that during an exercise blood gas study, when the pO2 value goes up, the pCO2 value should go down. *Id.* at 21-22. She noted that both values went up during Dr. Zaldivar's exercise study. *Id.* at 22.

In response to Dr. Shamma-Othman's comments, Dr. Zaldivar indicated that contrary to the doctor's suggestion, claimant was not given any oxygen during the November 4, 2015 blood gas study. Employer's Exhibit 9 at 5. Moreover, Dr. Zaldivar used an "alveolar air equation" to demonstrate that the values from his exercise blood gas study were "perfectly achievable on room air." *Id.* Dr. Zaldivar therefore opined that there was nothing wrong with the November 4, 2015 exercise blood gas study results. *Id.*

The administrative law judge found that Dr. Zaldivar, through application of the alveolar air equation, "sufficiently and clearly explained why his [blood gas study] results are valid . . . ." Decision and Order at 11. Because the administrative law judge permissibly credited Zaldivar's opinion regarding the validity of the November 4, 2015 blood gas study, *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), we affirm his determination that the study is valid.

Finding the most recent resting and exercise blood gas studies[7] the most probative of claimant's current respiratory condition, the administrative law judge determined the blood gas studies did not establish total disability. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (administrative law judge may credit evidence that better

[7] As discussed, *supra*, the most recent resting blood gas study conducted on June 29, 2017 and the most recent exercise blood gas study conducted on October 26, 2016 produced non-qualifying values. Employer's Exhibits 4, 8.

reflects the miner's respiratory or pulmonary status at the time of the hearing); *Hicks*, 138 F.3d at 530; *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge also accurately found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11-12. We therefore affirm her finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Shamma-Othman's opinion. Based upon the results of the qualifying November 4, 2015 exercise blood gas study, Dr. Shamma-Othman opined claimant has a mild to moderate disability. Director's Exhibits 15, 22; Employer's Exhibit 7. The administrative law judge, however, discredited Dr. Shamma-Othman's opinion, noting that in making her assessment, she did not consider the non-qualifying results from Dr. Zaldivar's October 26, 2016 exercise blood gas study which the administrative law judge found more probative of claimant's condition. Decision and Order at 16; Employer's Exhibit 7 at 22-23. This is within the discretion of the administrative law judge, who has wide latitude in determining whether a physician's opinion is well-reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. The administrative law judge therefore permissibly accorded her opinion less weight. Because there are no other medical opinions supportive of a finding that claimant is totally disabled, we affirm the administrative law judge's finding that the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

Because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determinations that claimant did not invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27; Decision and Order at 8, 25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge