U.S. Department of Labor

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

BRB No. 17-0015 BLA

ROBERT L. ADAMS (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/20/2017
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-BLA-06037) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case

involves a subsequent claim filed on March 30, 2012.[1]

After crediting the claimant with less than fifteen years of qualifying coal mine employment,[2] the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant 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). The administrative law judge also found that claimant failed to 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 contends that the administrative law judge erred in crediting him with less than fifteen years of qualifying coal mine employment. Claimant also challenges the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Claimant therefore contends that the administrative law judge erred in finding that he did not invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates his previous contentions of error.[4]

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[1] Claimant initially filed a claim for benefits on July 26, 2007. Director's Exhibit 1. In a Decision and Order dated May 13, 2009, an administrative law judge denied the claim because he found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment. *Id.* Claimant filed an appeal with the Board. However, by Order dated July 8, 2010, the Board dismissed claimant's appeal as abandoned. *Adams v. Director, OWCP*, BRB No. 09-0636 BLA (July 8, 2010) (Order) (unpub.).

[2] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third 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 fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] By letter dated July 19, 2017, claimant's counsel informed the Board that claimant died on March 28, 2017.

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

Change in an Applicable Condition of Entitlement

Where a claimant files a claim 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 claimant did not establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309(c)(3).

Total Disability

The administrative law judge initially considered three new pulmonary function studies conducted on October 10, 2012, March 11, 2013, and July 8, 2013. Director's Exhibit 13; Claimant's Exhibit 1. Although the studies produced qualifying values,[5] the administrative law judge determined that none of the studies were valid.[6] Decision and

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[6] Dr. Talati administered the October 10, 2012 and March 11, 2013 pulmonary function studies, and Dr. Kraynak administered the July 8, 2013 pulmonary function study. Director's Exhibit 13; Claimant's Exhibit 1. The administrative law judge noted that Drs. Talati and Michos invalidated the October 12, 2012 and March 11, 2013 pulmonary function studies due to suboptimal effort. Although Dr. Kraynak disagreed that claimant's effort was suboptimal, Claimant's Exhibit 2 at 12-13, the administrative law judge credited the opinions of Drs. Talati and Michos over that of Dr. Kraynak based upon their superior qualifications. Decision and Order at 12-13. The administrative law judge similarly credited Dr. Ranavaya's opinion that the July 8, 2013 pulmonary function

Order at 12-13. The administrative law judge therefore found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* at 13. Because this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 13-14. Because no party challenges these findings, they are similarly affirmed. *Skrack*, 6 BLR at 1-711.

Claimant, however, contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant specifically contends that the administrative law judge erred in finding that Dr. Kraynak's opinion does not establish that claimant was totally disabled from a pulmonary standpoint.

Dr. Kraynak examined claimant on April 23, 2104. Claimant's Exhibit 2. In a report dated April 28, 2014, Dr. Kraynak opined that claimant was totally disabled due to coal workers' pneumoconiosis, based upon claimant's coal mine employment history, subjective complaints, pulmonary function study results, and physical examination. *Id.* During a May 2, 2014 deposition, Dr. Kraynak maintained that the pulmonary function studies conducted on October 10, 2012, March 11, 2013, and July 8, 2013 were valid. *Id.* at 10-13. However, when asked to offer an opinion as to the extent of claimant's pulmonary impairment if the pulmonary function study results were not considered, Dr. Kraynak opined that claimant would still have "a pulmonary impairment condition consisting of shortness of breath, productive cough, exertional dyspnea, wheezing on examination, [and] severe exercise limitations relative to his pulmonary system." *Id.* at 17.

The administrative law judge permissibly discounted Dr. Kraynak's opinion since it was based, in part, on the October 10, 2012, March 11, 2013, and July 8, 2013 pulmonary function studies, which he had found to be invalid. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Siegel v. Director,*

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study was invalid due to suboptimal effort over Dr. Kraynak's contrary opinion based on Dr. Ranavaya's superior qualifications. The administrative law judge accurately noted that while Drs. Talati and Michos are Board-certified pulmonologists, and Dr. Ranavaya is Board-certified in Occupational Medicine, Dr. Kraynak does not hold any Board-certification. Decision and Order at 12-13; Claimant's Exhibit 2 at 7.

OWCP, 8 BLR 1-156, 1-157 (1985); Decision and Order at 18. The administrative law judge also addressed the significance of Dr. Kraynak's deposition testimony that he would continue to opine that claimant was totally disabled, even if he excluded the pulmonary function study evidence from consideration. The administrative law judge noted that Dr. Kraynak based this opinion, in part, on wheezing that was revealed on physical examination, and claimant's reported symptoms. The administrative law judge found that Dr. Kraynak's observation of wheezing was contrary to the results of the physical examinations conducted by Dr. Talati, the physician who performed the Department of Labor-sponsored pulmonary evaluation.[7] Decision and Order at 18. The administrative law judge also correctly recognized that a mere recitation of symptoms is not a finding of the existence of an impairment, or a conclusion as to its severity.[8] *See Heaton v. Director*, *OWCP*, 6 BLR 1-1222 (1984); *Bushilla v. North American Coal Corp*., 6 BLR 1-365 (1983); Decision and Order at 18. The administrative law judge, therefore, permissibly determined that Dr. Kraynak's opinion, that claimant is totally disabled from a pulmonary standpoint, was not sufficiently reasoned.[9] *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-233-34 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 18. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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[7] Dr. Talati did not report any wheezing during his 2012 and 2014 examinations of claimant. Director's Exhibits 13, 39.

[8] Dr. Kraynak testified on May 2, 2014 that claimant suffered from exertional dyspnea, and severe exercise limitations. In his April 28, 2014 report, Dr. Kraynak had included these same descriptions in a section setting forth a history of claimant's current complaints. Claimant's Exhibit 2.

[9] Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as claimant's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as claimant's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found that his opinion was not well-reasoned. Decision and Order at 18; 20 C.F.R. §718.104(d); *see Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(i)-(iv), we further affirm the administrative law judge's finding that claimant failed to establish that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final.[10] 20 C.F.R. §725.309.

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

RYAN GILLIGAN
Administrative Appeals Judge

[10] Because we affirm the administrative law judge's finding that claimant was not totally disabled, we also affirm her finding that claimant is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); Decision and Order at 10. We, therefore, need not address claimant's contention that the administrative law judge erred in crediting claimant with less than fifteen years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).