U.S. Department of Labor

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

BRB No. 17-0018 BLA

EDWARD RODGERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 09/26/2017
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2014-BLA-05602) of Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

This case involves a subsequent claim filed on April 19, 2013.[1]

The administrative law judge credited claimant with thirty-two years of underground coal mine employment,[2] and found that the evidence established that he suffers from 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 invoked the Section 411(c)(4) presumption[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

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).

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[1] Claimant initially filed a claim for benefits on January 12, 2004. Director's Exhibit 1. In a Decision and Order dated October 5, 2006, an administrative law judge denied the claim because claimant failed to establish any element of entitlement. *Id.*

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, 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).

[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] Because employer does not challenge the administrative law judge's finding that claimant had thirty-two years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. The administrative law judge considered three new arterial blood gas studies, conducted on May 18, 2013, October 15, 2013, and February 6, 2015. The administrative law judge noted that while the May 18, 2013 and October 15, 2013 blood gas studies produced non-qualifying values, the February 6, 2015 blood gas study produced qualifying values.[5] Decision and Order at 10-11; Director's Exhibits 10, 29; Claimant's Exhibits 5, 6. The administrative law judge accorded greater weight to the more recent qualifying February 6, 2015 blood gas study, and found that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Employer contends that the administrative law judge erred in finding that the blood gas study evidence supported a finding of total disability because the qualifying February 6, 2015 study was performed "during or soon after an acute respiratory or cardiac illness." Employer's Brief at 6, quoting 20 C.F.R. Part 718, Appendix C. The record reflects, however, that the February 6, 2015 blood gas study was submitted as part of the miner's hospitalization and treatment records. Claimant's Exhibits 5, 6. Thus, the February 6, 2015 blood gas study is not subject to the quality standards set forth in 20 C.F.R. Part 718, as it was not generated in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Rather, the issue before the administrative law judge was whether the February 6, 2015 blood study was sufficiently reliable, despite the inapplicability of the quality standards.

In assessing the reliability of the study, the administrative law judge noted that the February 6, 2015 blood gas study was conducted during claimant's visit to the emergency room "for an acute exacerbation of chronic bronchitis." Decision and Order at 11 n.10. The administrative law judge, however, accurately observed that "no physician has offered a medical assessment indicating that [the] results are not reliable for an assessment of the [c]laimant's respiratory capability." *Id.* In its post-hearing brief, employer did not challenge the reliability of the February 6, 2015 blood gas study, noting only that it was the only blood gas study "establishing disability." Employer's Post-Hearing Brief at 14. Indeed, employer has failed to identify any medical evidence in the record that calls into question the reliability of the February 6, 2015 blood gas study. Because it is supported by substantial evidence, we affirm the administrative law judge's

[5] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

determination that the February 6, 2015 blood gas study was sufficiently reliable to support a finding of total disability. *See Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1014 (1984) (In the absence of qualified medical testimony that objective test results are unreliable, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination). The administrative law judge also permissibly accorded greater weight to the qualifying February 6, 2015 blood gas study because it is the most recent blood gas study of record. *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004). Consequently, we affirm the administrative law judge's finding that the blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Moreover, the administrative law judge properly weighed the blood gas study evidence with the pulmonary function study and medical opinion evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on 19. Because employer only challenges the administrative law judge's consideration of the blood gas study evidence, this finding is affirmed.[6]

In light of our affirmance of the administrative law judge's findings that claimant established thirty-two years of underground coal mine employment, and the existence of a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, because employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

[6] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we also affirm her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge