U.S. Department of Labor

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

BRB No. 17-0025 BLA

EUGENE L. KOZLOWSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/26/2017
	)	
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.

Tullio DeLuca (Law Office of Tullio DeLuca), Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2013-BLA-05791) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the 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 July 10, 2012.[1]

After crediting claimant with twenty-five years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant further argues that the administrative law judge erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Claimant also contends that the administrative law judge erred in finding that he did not invoke the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. 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.[3]

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

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[1] Claimant initially filed a claim for benefits on January 15, 1980. Director's Exhibit 1. In a Decision and Order on Remand dated July 22, 1994, Administrative Law Judge Ainsworth H. Brown denied benefits because he found that the evidence did not establish that claimant suffered from total disability pursuant to 20 C.F.R. §718.204(b). *Id.* Pursuant to claimant's appeals, the Board and the United States Court of Appeals for the Third Circuit affirmed Judge Brown's denial of benefits. *Kozlowski v. Director, OWCP*, BRB No. 94-3830 BLA (June 28, 1995) (unpub.); *Kozlowski v. Director, OWCP*, No. 95-3388 (3d Cir. Apr. 10, 1996) (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] Because no party challenges the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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 he 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 is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309(c)(3).

Total Disability

Claimant contends that the administrative law judge erred in finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered the results of three new pulmonary function studies conducted on August 22, 2012, November 29, 2012, and October 21, 2013. The August 22, 2012 pulmonary function study produced non-qualifying values both before and after the administration of a bronchodilator.[4] Director's Exhibit 11. Conversely, the November 29, 2012 pulmonary function study produced qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 12. The October 21, 2013 pulmonary function study produced non-

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

qualifying values before the administration of a bronchodilator, but qualifying values after the administration of a bronchodilator. Director's Exhibit 25.

The administrative law judge accorded no weight to the pulmonary function studies conducted on November 29, 2012 and October 21, 2013 because the studies were invalidated by Dr. Gaziano, a Board-certified pulmonologist.[5] Decision and Order at 5-6. Because the remaining August 22, 2012 pulmonary function study was non-qualifying, the administrative law judge determined that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Claimant contends that the administrative law judge erred in crediting Dr. Gaziano's invalidation of the November 29, 2012 and October 21, 2013 pulmonary function studies because the doctor did not personally observe claimant's effort, cooperation, and comprehension. We disagree. The standards require that three tracings be prepared for each pulmonary function study in order to allow for an independent evaluation of the results.[6] *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 883, 16 BLR 2-129, 2-133 (7th Cir. 1992). The party opposing entitlement has the right to challenge the pulmonary function study results by presenting evidence of the study's invalidity. In this case, the administrative law judge permissibly credited Dr. Gaziano's conclusion that the tracings from the November 29, 2012 and October 21, 2013 studies indicated suboptimal effort by claimant, a finding which the administrative law judge found supported, in part, by the comments of the administering technicians.[7] *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the

[5] Dr. Gaziano invalidated the November 29, 2012 and October 21, 2013 pulmonary function studies because he found that there was evidence of "less than optimal effort, cooperation and comprehension." Director's Exhibits 30, 31. Dr. Gaziano specifically noted that there was "variable effort or comprehension." *Id.*

[6] The standards for the administration and interpretation of pulmonary function studies provide that a "minimum of three flow-volume loops and derived spirometric tracings shall be carried out." 20 C.F.R. Part 718, Appendix B.

[7] The technician who conducted the November 29, 2012 study noted only fair effort and cooperation. Director's Exhibit 12. The technician who conducted the October 21, 2013 study noted fair cooperation and good comprehension, but noted that the effort was sub-optimal and recommended repeat testing. Director's Exhibit 25.

November 29, 2012 and October 21, 2013 pulmonary function studies are invalid.[8] Consequently, as the only valid study produced non-qualifying values, we affirm the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant next argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant specifically argues that the administrative law judge erred in her consideration of Dr. Levinson's opinion. We disagree. Dr. Levinson opined that claimant's "physical and pulmonary limitations" would preclude him from performing his prior job in the coal mines. Director's Exhibit 12. The administrative law judge, however, permissibly discounted Dr. Levinson's opinion, since it was based, in part, on the November 29, 2012 pulmonary function study, which the administrative law judge found invalid. *See Siegel*, 8 BLR at 1-157; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 9. Because claimant does not raise any additional error regarding 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), this finding is affirmed.

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)(2),[9] we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of his

[8] The administrative law judge also found that the qualifying pre-bronchodilator study conducted on November 29, 2012 and the qualifying post-bronchodilator study conducted on October 21, 2013 were not valid based upon excessive variation in the results. Decision and Order at 6; *see* 20 C.F.R. Part 718 Appendix B(2)(ii)(G). The administrative law judge also accorded less weight to the qualifying post-bronchodilator study conducted on November 29, 2012 because "post-bronchodilator testing is less probative on the issue of whether [a miner] is totally disabled from a pulmonary standpoint." Decision and Order at 6. Because claimant does not challenge these additional bases for discrediting the November 29, 2012 and October 21, 2013 pulmonary function studies, they are affirmed. *Skrack*, 6 BLR at 1-711.

[9] Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).

prior claim. 20 C.F.R. §725.309(c). We, therefore, affirm the administrative law judge's denial of benefits.[10]

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

[10] Because there is no evidence of complicated pneumoconiosis in the record, we reject claimant's contention that he is entitled to the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304.