U.S. Department of Labor

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

BRB No. 17-0607 BLA

KENNETH D. ROBINETTE Claimant-Petitioner v. STONEY GAP COAL COMPANY, INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL MIDDLE MARK Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/18/2018 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Kenneth D. Robinette, Pennington Gap, Virginia.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denying Benefits (2013-BLA-05562) of Administrative Law Judge Alan L. Bergstrom, rendered 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 miner's claim filed on October 29, 2010.

The administrative law judge credited claimant with twenty-three years of underground coal mine employment, as stipulated by the parties, but found that the evidence did not establish the existence of 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 could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish entitlement to benefits under 20 C.F.R. Part 718. He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial

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

evidence, and in accordance with law.[2] 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 that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his 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).

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 gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by qualifying pulmonary function studies or arterial blood gas studies,[3] 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies dated December 1, 2011, March 21, 2012, August 8, 2012, March 23, 2015,[4] and November 24, 2015.[5] Decision and Order at 10, 24-

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] A "qualifying" pulmonary function study or 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The administrative law judge noted that the March 23, 2015 pulmonary function study was submitted with claimant's treatment records from Wellmont Medical Associates. Decision and Order at 16-17.

[5] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's self-reported height was 74 inches for purposes of assessing the pulmonary function studies for total disability. *See Protopappas*

25; Director's Exhibit 10; Claimant's Exhibits 2, 5; Employer's Exhibit 1. He found that while all of the studies produced qualifying results, each study was invalidated by reviewing physicians due to claimant's inability to provide optimal effort.[6] Decision and Order at 24. Specifically, Dr. Habre, who conducted the Department of Labor (DOL)-sponsored complete pulmonary evaluation, invalidated his December 1, 2011 and March 21, 2012 studies due to air leaks around the mouth piece that produced suboptimal airflow. Director's Exhibit 10. Dr. Michos reviewed both studies and concurred with Dr. Habre that they are invalid.[7] *Id.* Dr. Rosenberg invalidated his August 8, 2012 study based on incomplete efforts due to claimant's inability to keep his mouth tight on the mouthpiece. Employer's Exhibits 1, 3 at 6. The technician administering the March 23, 2015 study noted that claimant had difficulty performing the test with multiple trials, and Drs. Rosenberg and Castle invalidated the study due to suboptimal effort.[8] Claimant's Exhibit 5, Employer's Exhibits 6, 7. Finally, Drs. Rosenberg and Castle invalidated the November 24, 2015 study due to less than maximal effort exerted during the entirety of the flow

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v. Director, OWCP, 6 BLR 1-221, 1-223 (1983); Decision and Order at 24; Hearing Transcript at 14.

[6] Dr. Rosenberg explained that claimant suffered a stroke in 2009, which resulted in his inability to keep his mouth tight on the mouthpiece of the testing machine. Decision and Order at 25; Director's Exhibit 10; Employer's Exhibit 3 at 6. Dr. Habre similarly opined that claimant's suboptimal flow volume was likely related to his underlying history of stroke. Director's Exhibit 10. The administrative law judge found this explanation to be consistent with claimant's symptoms of right hemiparesis. Decision and Order at 25.

[7] As part of the Department of Labor (DOL)-sponsored pulmonary evaluation, Dr. Habre administered the December 1, 2011 pulmonary function study. Director's Exhibit 10. Because Drs. Habre and Michos both concluded that the study was deficient due to suboptimal effort, Dr. Habre administered a second pulmonary function study on March 21, 2012. *See* 20 C.F.R. §725.406(c) (providing that "[w]here the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result."); Director's Exhibit 10.

[8] While the March 23, 2015 study was obtained in conjunction with claimant's treatment and, thus, is not subject to the specific quality standards set forth at 20 C.F.R. §718.103 and Appendix B, the administrative law judge properly considered whether the study is nonetheless sufficiently reliable to support a finding of total disability. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 17; Claimant's Exhibit 5.

volume loop as well as hesitation at the onset of exhalation. Employer's Exhibits 6, 7, 9, 10.

Based on this evidence, the administrative law judge permissibly found that all of the pulmonary function studies of record are invalid and, therefore, are insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 25. As this finding is supported by substantial evidence, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of two resting blood gas studies, dated December 1, 2011 and August 8, 2012.[9] Decision and Order at 25. The December 1, 2011 study conducted by Dr. Habre yielded qualifying values, while the August 8, 2012 study conducted by Dr. Rosenberg yielded non-qualifying values. Decision and Order at 25-26; Director's Exhibit 10; Employer's Exhibit 1. The administrative law judge noted that while Dr. Michos reviewed Dr. Habre's qualifying study and deemed it to be technically valid, Dr. Habre himself, and Drs. Castle and Rosenberg all invalidated the December 1, 2011 study.[10] He further noted that the invalidating opinions were supported by the fact that while Dr. Rosenberg's study was performed less than a year after Dr. Habre's study, the PO2 values Dr. Rosenberg obtained were significantly higher. Decision and Order at 26. Consequently, the administrative law judge permissibly found that the opinions of Drs. Habre, Castle, and Rosenberg

[9] The administrative law judge did not consider the September 26, 2014 blood gas study that claimant submitted as part of a treatment note from Wellmont Medical Associates. Claimant's Exhibit 5. Because the values obtained on the study are not qualifying and, therefore, cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), error, if any, in the administrative law judge's failure to consider this study is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] Dr. Habre invalidated his December 1, 2011 study because it was "another end sampling;" Dr. Castle opined that the results appeared to be from a venous blood sample; and Dr. Rosenberg explained that because the PO_2 value was well outside normal range, if it had been valid claimant would have been in the hospital with a life-threatening condition. Decision and Order at 26, Director's Exhibit 10; Employer's Exhibits 3 at 7; 4.

persuasively establish that the December 1, 2011 qualifying blood gas study is invalid. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; Decision and Order at 26. In the absence of valid qualifying blood gas studies, the administrative law judge found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See* 20 C.F.R. §718.101(b); Decision and Order at 26.

The administrative law judge also correctly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 26.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Habre, Castle, and Rosenberg, together with claimant's medical records, and correctly found that no physician opined that claimant has a totally disabling pulmonary or respiratory impairment.[11] Decision and Order at 28; Director's Exhibit 10; Employer's Exhibits 1, 3, 4, 6, 7, 9, 10. Finally, the administrative law judge considered claimant's treatment records, which list various medical problems but do not contain an opinion regarding the level of claimant's pulmonary disability. *See Clay v. Director, OWCP*, 7 BLR 1-82, 1-84 (1984) (diagnosis of a lung disease does not establish the presence of a disabling respiratory impairment); Claimant's Exhibits 5, 6, 7, 8. We therefore 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).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 29. Consequently, we affirm the administrative law judge's findings that, on this record, claimant did not establish total

[11] Dr. Habre opined that it was not possible to determine the presence or the absence of a disabling lung disease. Director's Exhibit 10. Similarly, Dr. Castle opined that while claimant is totally disabled as a whole man, it is not possible to accurately assess whether or not he has any respiratory disability. Employer's Exhibit 10. Dr. Rosenberg opined that invalid pulmonary function studies prevent an accurate assessment of impairment and disability. Employer's Exhibit 6.

disability at 20 C.F.R. §718.204(b)(2), and did not invoke the Section 411(c)(4) presumption.

For the reasons stated below, however, we remand this claim for claimant to be provided with a complete pulmonary evaluation.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. When an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). In light of our affirmance of the administrative law judge's findings that Dr. Habre administered an invalid blood gas study and opined that he could not determine whether claimant is totally disabled from a respiratory standpoint, we hold that, as a matter of law, Dr. Habre's DOL-sponsored pulmonary evaluation is incomplete on the issue of total disability, a requisite element of entitlement.[12] *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990).

We therefore vacate the administrative law judge's denial of benefits and remand the case to the district director to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required by the Act,

[12] As set forth above, while the December 1, 2011 DOL-sponsored pulmonary function study was also invalidated due to suboptimal effort, on March 21, 2012 claimant was properly afforded an additional opportunity to produce a satisfactory result, but was unable to do so due to his medical condition. 20 C.F.R. §725.406(c).

including a new blood gas study.[13] 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.401, 725.406.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[13] There is no indication in the record that claimant's medical condition would prevent a valid resting blood gas study from being obtained.