U.S. Department of Labor

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

BRB No. 20-0111 BLA

BILLY R. WRIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RBJ COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 01/12/2021
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

Billy R. Wright, Mosheim, Tennessee.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Dana Rosen's Decision and Order Denying Benefits (2017-BLA-05297) rendered on 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 November 2, 2015.[2]

The administrative law judge credited Claimant with twelve years of coal mine employment and found the evidence insufficient to establish he is totally disabled. Thus, Claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), or establish entitlement under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.[4]

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[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant filed four previous claims, three of which were withdrawn. Director's Exhibits 1, 3, 4. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). On June 30, 2011, the district director denied Claimant's May 14, 2010 claim (the only one not withdrawn) for failure to establish any element of entitlement. Director's Exhibit 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] When a miner files an application 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 "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); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Because Claimant's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one of those elements in order to obtain a review of his claim on the merits. The administrative law judge found it unnecessary to render a specific finding under 20 C.F.R. §725.309(c), as she considered the entire record on total disability and found benefits precluded. Decision and Order at 17.

On appeal, Claimant generally challenges the denial of benefits. Employer responds urging affirmance of the denial. The Director, Office of Workers' Compensation Programs has declined to file a response brief.

When a claimant files an appeal without the assistance of counsel, the Benefits Review Board considers whether the decision and order is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.[6] *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).

A miner is 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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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). 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).

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 207.

[6] There is no evidence of complicated pneumoconiosis and, thus, Claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304; Decision and Order at 7.

The administrative law judge considered four pulmonary function studies. The October 21, 2015 pulmonary function study was qualifying for total disability,[7] while the September 26, 2015, December 22, 2015, and October 2, 2016 studies were non-qualifying. Director's Exhibits 19, 20; Employer's Exhibits 3, 6.

The administrative law judge permissibly found the qualifying October 21, 2015 study invalid based on Dr. Dahhan's opinion that it demonstrates "excessive hesitation, lack of plateau formation, and breath holding" and does not represent Claimant's "true ventilatory capacity." Director's Exhibit 22; s*ee 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); Decision and Order at 15. Thus, in view of Dr. Dahhan's invalidation report and because the administrative law judge found the qualifying October 21, 2015 study inconsistent with and outweighed by the other valid and non-qualifying studies, we affirm her determination that the weight of the pulmonary function study evidence does establish total disability. 20 C.F.R. 718.204(b)(2)(i); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 15.

The administrative law judge next accurately found the three blood gas studies submitted with the current claim are non-qualifying. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 15; Director's Exhibit 9; Employer's Exhibits 3, 6. She also accurately found there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

Regarding the medical opinion evidence, the administrative law judge correctly noted there is "a consensus" among the physicians that Claimant is not totally disabled. Decision and Order at 16. Dr. Forehand, who conducted the Department of Labor's complete pulmonary evaluation, diagnosed a restrictive respiratory impairment but opined Claimant retains sufficient residual ventilatory capacity to return to his usual coal mine employment. Director's Exhibit 19. Drs. Dahhan and McSharry opined Claimant does not have a respiratory or pulmonary impairment. Employer's Exhibits 3, 6. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that

[7] 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 medical opinions do not establish total disability.[8] 20 C.F.R. §718.204(b)(2)(iv); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 16.

Considering all of the evidence of record together, including the evidence from Claimant's prior claim, the administrative law judge found Claimant did not satisfy his burden to establish he has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine employment.[9] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant is not totally disabled. Claimant's failure to establish total disability precludes him from invoking the Section 411(c)(4) presumption[10] or establishing entitlement to benefits under 20 C.F.R. Part 718. 30 U.S.C. § 921(c)(4); 20 C.F.R. §718.305; *Anderson*, 12 BLR at 1-112.

[8] As the administrative law judge noted, Claimant submitted treatment records from Stone Mountain Health Services from May 2010 until October 2015. Decision and Order at 12. An entry for May 7, 2010, by Dr. Ajjarapu, noted chronic obstructive pulmonary disease, coal workers' pneumoconiosis, and resulting chronic dyspnea. Claimant's Exhibit 1 at 3. An entry from St. Charles Breathing Center dated October 21, 2015, for a black lung evaluation, noted his symptoms as fatigue, sleep disturbance, and abnormal activity level, and his respiratory symptoms included coughing, wheezing, sputum, and shortness of breath. The diagnoses (all by Cynthia Dean, FNP) were cough; dyspnea, unspecified; coal workers' pneumoconiosis; chronic obstructive pulmonary disease; personal history of nicotine dependence; unspecified chronic bronchitis; and chronic ischemic heart disease. Claimant's Exhibit 1 at 5-6. We see no error in the administrative law judge's determination that the treatment records do not establish Claimant is totally disabled. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 16.

[9] The administrative law judge noted in the prior claim that the two pulmonary function studies were invalid and the blood gas studies were non-qualifying. Decision and Order at 16-17, *citing* Director's Exhibit 2 at 81-109. She also noted correctly that the one medical opinion from Dr. Habre indicated Claimant had respiratory symptoms but he did not diagnose a totally disabling respiratory or pulmonary impairment. *Id.*

[10] We need not address the administrative law judge's findings on the length of Claimant's coal mine employment, as Claimant is unable to invoke the Section 411(c)(4) presumption based on his failure to establish total disability, even if he were to establish at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge