U.S. Department of Labor

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

BRB No. 18-0292 BLA

DENVER PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 02/28/2019
	)	
GATLIFF COAL COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Denver Parker, London, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2012-BLA-05808) of Administrative Law Judge John P. Sellers, III, rendered 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 claim filed on June 10, 2011.[2]

The administrative law judge credited claimant with twenty-three years of underground coal mine employment but found that claimant failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). Thus, he found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Because claimant did not establish total disability, an essential element of entitlement, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief in this appeal.

[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).

[2] On July 1, 2011, claimant underwent a Department of Labor (DOL)-sponsored complete pulmonary evaluation in connection with his claim. On March 27, 2017, due to the age of the DOL exam, the invalidity of the pulmonary function study, and the incomplete medical opinion, the administrative law judge ordered the Director, Office of Workers' Compensation Programs, to provide claimant with an updated evaluation, which was performed on May 9, 2017. Decision and Order at 3-4; Director's Exhibit 62. Noting that claimant is entitled to only one DOL-sponsored evaluation, the administrative law judge did not consider the results of the July 1, 2011 evaluation. *See* 20 C.F.R. §§725.406(a); 725.414(a)(3)(iii); Decision and Order at 4 n. 5.

[3] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305(b).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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 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. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying[5] pulmonary function studies or 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). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the three pulmonary function studies dated December 1, 2011, September 3, 2015, and June 15, 2017.[6] Decision and Order at 6-7, 18-21; Director's Exhibits 13, 58, 64. He properly found all of these studies produced uniformly non-qualifying values.[7] Thus we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 21.

The administrative law judge next considered the three arterial blood gas studies dated December 1, 2011, September 3, 2015, and May 9, 2017. Decision and Order at 7-8, 21; Director's Exhibits 13, 58, 62. He properly found all of these studies are non-qualifying. Thus we affirm, as supported by substantial evidence, the administrative law judge's finding that total respiratory disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 21.

Similarly, we affirm the administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure and, thus, total respiratory disability cannot be demonstrated pursuant to 20

[6] The administrative law judge noted that the May 9, 2017 pulmonary function study administered by Dr. Forehand as part of the DOL-sponsored evaluation produced qualifying values before bronchodilators, but non-qualifying values after bronchodilators. Decision and Order at 20-21; Director's Exhibit 62. Because the study was subsequently invalidated for variable effort, however, Dr. Forehand conducted a repeat study on June 15, 2017, as provided by the regulations. 20 C.F.R. §725.406(c); Director's Exhibit 63; Employer's Exhibit 6. Thus the administrative law judge declined to consider the May 9, 2017 pulmonary function study. Decision and Order at 21.

[7] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's average reported height was 75.1 inches. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6 n.8. Because claimant's height falls between the table heights of 74.8 and 75.2 inches listed in 20 C.F.R. Part 718, Appendix B, the administrative law judge used the table values for the closest greater height of 75.2 inches to evaluate the studies. Decision and Order at 6 n.8, *citing Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84 n.6 (4th Cir. 1995).

C.F.R. §718.204(b)(2)(iii). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 18.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Jarboe, Vuskovich, and Forehand. Drs. Jarboe and Vuskovich opined that claimant is not disabled.[8] Decision and Order at 8-15, 22; Director's Exhibits 58; Employer's Exhibits 3, 4, 5. At the request of the Department of Labor, Dr. Forehand performed a complete pulmonary evaluation on May 9, 2017, and diagnosed a totally disabling respiratory impairment. Director's Exhibit 62. Because the pulmonary function study Dr. Forehand obtained was invalidated, a repeat study was done on June 15, 2017. *Id*. As the administrative law judge observed, after reviewing this study Dr. Forehand revised his opinion and concluded that claimant's impairment is "not totally disabling, leaving him with sufficient residual ventilatory function to return to his last coal mining job." Director's Exhibit 65; *see* Decision and Order at 22. Because no physician concluded that claimant has a totally disabling pulmonary or respiratory impairment, we 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). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order at 22.

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 Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at1-198; Decision and Order at 22. Consequently, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2).[9] As claimant has failed to prove total disability, an essential

[8] Dr. Jarboe opined that claimant has no pulmonary impairment and can return to his usual coal mine work or work requiring similar exertion. Director's Exhibits 13, 58 at 13-14; Employer's Exhibits 3, 5 at 23, 28. Dr. Vuskovich similarly opined that claimant retains the pulmonary capacity to perform coal mine work. Employer's Exhibit 4 at 7.

[9] Because the administrative law judge accurately noted that the record contains no evidence of complicated pneumoconiosis, claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §§718.204(b)(1), 718.304; Decision and Order at 18.

element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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