U.S. Department of Labor

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

BRB No. 18-0046 BLA

MARVIN E. STAPLETON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & G COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 11/16/2018
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Marvin E. Stapleton, Kingsport, Tennessee.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2011-BLA-06353) of Administrative Law Judge Morris D. Davis 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 miner's claim filed on July 9, 2010.

After crediting claimant with twenty-seven years of coal mine employment in conditions substantially similar to those in an underground mine, the administrative law judge found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore found that claimant could not 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).[2] The administrative law judge further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment 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] Although the administrative law judge additionally found that claimant established the existence of simple pneumoconiosis arising out of coal

[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] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled 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.

mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), he denied benefits because claimant did not establish total disability, an essential element of entitlement.

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' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they 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, 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption

Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 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).

[4] 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; Hearing Transcript at 13, 19.

Pursuant to 20 C.F.R. §718.204(b)(2)(i),[5] the administrative law judge considered the results of two pulmonary function studies dated April 21, 2007[6] and December 21, 2010. Decision and Order at 7-9, 17. The April 21, 2007 study administered by Dr. Smiddy during one of claimant's hospitalizations produced qualifying[7] results, while the December 21, 2010 study administered by Dr. Al-Khasawneh produced non-qualifying results. Director's Exhibits 9 at 60-61, 10. The administrative law judge permissibly found the non-qualifying December 21, 2010 pulmonary function study more probative of claimant's current condition as the most recent study of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Decision and Order at 17. Because it is supported by substantial evidence, 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).

We also affirm the finding that the blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) as the administrative law judge correctly found that there are no qualifying blood gas studies of record.[8] Decision and Order at 9,

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[5] The administrative law judge permissibly averaged the heights reported in claimant's pulmonary function studies to obtain a height of 72.5 inches for claimant. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *see Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8. Because claimant's height falls between the table heights of 72.4 and 72.8 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 72.8 inches to evaluate the studies. Decision and Order at 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).

[6] The administrative law judge noted that the April 21, 2007 pulmonary function study was not designated by either party as affirmative evidence, but was submitted as part of claimant's hospitalization records from Holston Valley Medical Center. Decision and Order at 17; Director's Exhibit 9 at 60-61.

[7] 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 or 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).

[8] The administrative law judge correctly noted that the blood gas study administered on December 21, 2010 produced non-qualifying results both before and after exercise. Decision and Order at 9, 17; Director's Exhibit 10. Claimant's hospitalization records also contain a blood gas study administered on April 22, 2007 which produced non-qualifying

17; Director's Exhibit 10. Additionally, we affirm the administrative law judge's finding 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 17.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that Dr. Al-Khasawneh, the only physician to address total disability, concluded that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.[9] Decision and Order at 9-10, 18; Director's Exhibit 10. Thus, the administrative law judge properly determined that claimant failed to demonstrate that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 18. We affirm this determination as supported by substantial evidence.

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.[10] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987);

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results. Director's Exhibit 9 at 34. While the administrative law judge did not consider this study, any error is harmless as it does not assist claimant is establishing total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] Dr. Al-Khasawneh examined claimant on behalf of the Department of Labor on December 21, 2010. Director's Exhibit 10. In determining that claimant is not disabled, he relied on the results of his physical examination, chest x-ray, pulmonary function studies and blood gas studies that were both non-qualifying for total disability, and a review of claimant's history. *Id.*

[10] The administrative law judge considered claimant's hospitalization and treatment records dating from July 26, 2006 to April 24, 2007, which list various medical problems including shortness of breath and dyspnea on exertion. Decision and Order at 10-12, 18-19; Director's Exhibit 9. The administrative law judge permissibly accorded the treatment records little weight, finding that the more recent evidence submitted is more probative of claimant's current level of disability. Decision and Order 18-19, *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc). Moreover, the treatment records do not contain an opinion regarding the level of claimant's pulmonary disability. Decision and Order at 10-12, 18-19; Director's Exhibit 9.

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 18-19.

In light of our affirmance of the administrative law judge's finding that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[11] 30 U.S.C. §921(c)(4); *see Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] We also affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as the record contains no evidence of complicated pneumoconiosis. Decision and Order at 13.