U.S. Department of Labor

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

BRB No. 17-0004 BLA

ESAU CANTERBURY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/11/2017
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Esau Canterbury, Lenore, West Virginia.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2012-BLA-05456) of Administrative Law Judge Richard A. Morgan 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 subsequent claim filed on October 29, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with "at least seven" years of qualifying coal mine employment[3] and found that the new evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant could not invoke the Section 411(c)(4) presumption. Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement with respect to either the pneumoconiosis or total disability elements, pursuant to 20 C.F.R. §725.309.[4] Accordingly, the administrative law judge denied benefits.[5]

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[1] This is claimant's third claim. Director's Exhibit 4. Claimant's two prior claims were finally denied by the district director because the evidence failed to establish any of the elements of entitlement. Director's Exhibits 1, 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The administrative law judge found that as far as he could ascertain, "nearly all of [claimant's coal] mining was underground." Decision and Order at 4.

[4] The administrative law judge also noted that the new evidence post-dates the prior claim evidence by more than a decade. Decision and Order at 15. Thus, the administrative law judge found that, even if he were to review the entire record, the new evidence would be entitled to the most weight as it is more probative of claimant's current condition. *Id.*

[5] As an initial matter we note that, while this case was pending before the administrative law judge, claimant, through counsel, sought to have the report of Dr. Ammisetty, who performed the Department of Labor-sponsored pulmonary evaluation, removed from the record due to allegations of fraud. Decision and Order at 2, *referencing* Claimant's March 31, 2016 Pretrial Report. At the hearing, claimant's counsel, Ms. Vanzant, renewed her objection to Dr. Ammisetty's report. Hearing Tr. at

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be 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 evidence, and in accordance with law.[6] 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).

Where a miner 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). The applicable conditions of entitlement "are limited to 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 failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis or total respiratory disability. 20 C.F.R. §725.309(c)(3), (4). The Board has held that claimant can establish a change in an applicable condition of entitlement through invocation of the Section 411(c)(4) presumption. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-158 n.11 (2015) (Boggs, J., concurring & dissenting).

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5. Because claimant received a new complete pulmonary evaluation by Dr. Mettu, all parties agreed to the exclusion of Dr. Ammisetty's medical report and all supporting evidence, including the pulmonary function and blood gas studies, and the x-ray reading by Dr. Rasmussen. *Id.* at 7-10. Thus, in rendering his decision, the administrative law judge properly declined to consider this evidence. Decision and Order at 2, 6, 8, 9.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

Invocation of the Section 411(c)(4) Presumption-Total Disability

As set forth above, the administrative law judge found that claimant could not invoke the Section 411(c)(4) presumption based, in part, on his finding that the new evidence did not establish total disability. The regulations provide that the miner shall be considered totally disabled if his respiratory or pulmonary impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, the miner's disability is established if: 1) pulmonary function tests show values equal to or less than those listed in Appendix B to 20 C.F.R. Part 718; or 2) arterial blood-gas tests show values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner suffers from pneumoconiosis and is shown by the evidence to be suffering from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In finding that the new evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge correctly noted that all of the new pulmonary function and arterial blood gas studies of record are non-qualifying,[7] and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure.[8] Decision and Order at 8, 9, 23; Director's Exhibit 38; Claimant's Exhibit 4. The administrative law judge further correctly found that "[n]o physician has found [claimant] totally disabled," pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9] Decision and Order at 24;

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

[8] The administrative law judge noted that claimant also submitted the results of pulse oximetry testing, but did not submit a physician's explanation or interpretation of the test results. Decision and Order at 24; *see* Hearing Tr. at 14, 16-17, 21-22, 44. Thus, the administrative law judge permissibly found that the test was not established to be medically acceptable and relevant, and was entitled to no weight. *See* 20 C.F.R. §718.107; *Webber v. Peabody Coal Co*., 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 24. Thus the administrative law judge found that claimant could not establish total disability through "other medical evidence." *See* 20 C.F.R. §718.107.

[9] Dr. Mettu opined that claimant does not have any pulmonary impairment or disability and Dr. Gaziano opined that claimant has a "minimal" obstructive impairment

see Claimant's Exhibit 4, Director's Exhibits 38, 44. As substantial evidence supports the administrative law judge's determinations, we affirm his finding that the new evidence fails to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). We further affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 with respect to the element of total disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 24. Finally, in light of the administrative law judge's additional permissible finding that the new evidence is entitled to the most weight, we affirm the administrative law judge's determination that claimant failed to establish total disability based on all of the evidence of record.[10] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988), *citing Coffey v. Director, OWCP*, 5 BLR 1-404 (1982) (the evidence must address the relevant inquiry, *i.e.*, the miner's respiratory or pulmonary status at the time of the hearing); Decision and Order at 15.

In light of our affirmance of the administrative law judge's finding that claimant did not establish total respiratory 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] *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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that is not totally disabling. Director's Exhibits 38, 44. The record also contains a May 15, 2014 letter from Ms. Karnes, a nurse practitioner, stating that claimant cannot return to his usual coal mine work because of the condition of his lungs. However, as Ms. Karnes is not qualified as a physician, the administrative law judge properly declined to consider her opinion. *See* 20 C.F.R. §718.204(b)(2)(iv) (total disability may be established by the opinion of "a physician exercising reasoned medical judgement"); Decision and Order at 24.

[10] Because claimant did not establish total disability, he is unable to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). Therefore, we need not address the administrative law judge's length of coal mine employment determination. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] We therefore need not address the administrative law judge's finding that claimant also failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). *See Larioni*, 6 BLR at 1-1278.

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