U.S. Department of Labor

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

BRB No. 17-0592 BLA

BOBBIE JEAN COTTRELL, on behalf of JAMES HARRISON COTTRELL)	)	
Claimant-Petitioner	)	
v.	)	
DEBY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/28/2018
and	)	
OLD REPUBLIC 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Bobbie Jean Cottrell, Manchester, Kentucky.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order Denying Benefits (2013-BLA-05635) of Administrative Law Judge Alice M. Craft, rendered on a miner's claim filed on April 23, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined that the miner had 8.83 years of underground coal mine employment. Because claimant did not establish at least fifteen years of coal mine employment, the administrative law judge determined that she was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] Considering whether claimant could establish entitlement to benefits in the miner's claim under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish that the miner was totally disabled, a requisite element of entitlement.[4] Accordingly, the administrative law judge denied benefits.

[1] Claimant is the surviving spouse of the miner, who died on December 22, 2013. Hearing Transcript at 16. The miner filed two prior claims on December 14, 2004 and November 15, 2006, each of which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibits 1, 2. Claimant is pursuing the miner's most recent claim on behalf of her husband, and she also filed a survivor's claim. The administrative law judge held a consolidated hearing on the miner's claim (2014-BLA-05635) and the survivor's claim (2014-BLA-05577) on October 18, 2016. The administrative law judge indicated that she would issue a separate decision and order in each claim. The Board's decision addresses only an appeal filed by claimant in the miner's claim.

[2] 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 in case number 2013-BLA-05635, the miner's claim. Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis, or that his death was due to pneumoconiosis, in cases where the claimant establishes fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] To establish entitlement to benefits in the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer/carrier nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal filed by a claimant who is not represented by counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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 law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years the miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Claimant alleged that the miner had twenty-three years of coal mine employment. Hearing Transcript at 16. The administrative law judge determined that the miner's Social Security Administration (SSA) records were "the most reliable source of information" regarding the miner's work history and showed that the miner "first worked in the mines in 1976 and last worked in the mines in 1992." Decision and Order at 5; Miner's Claim (MC) Director's Exhibit 9. For pre-1978 coal mine employment, the administrative law

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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. 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).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Decision and Order at 19.

judge credited claimant for any quarter of coal mine employment in which his SSA records showed that the miner earned at least $50.00. Decision and Order at 5. The administrative law judge determined that the miner worked one-quarter in 1976 and four-quarters in 1977 for a total of 1.25 years. *Id*.

For the post-1978 coal mine employment, the administrative law judge indicated that she was unable to determine the exact beginning and ending dates of the miner's employment and therefore applied the formula at 20 C.F.R. §725.101(a)(32)(iii).[6] Decision and Order at 6. Calculating claimant's work with employer for the years 1983, 1984, 1986 and 1987, the administrative law judge compared claimant's yearly income from the SSA records with the average annual wages for a coal miner, using Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual. *Id*. She found that the miner had 2.89 years of coal mine employment with employer. *Id*. The administrative law judge next determined that the miner worked for various coal companies in the years 1978-1982, 1985, 1988-1992. Decision and Order at 7. She calculated the number of days that the miner worked in coal mine employment in each year[7] and, using Exhibit 610, found that the miner had 4.69 years of coal mine employment. *Id*. Thus, the administrative law judge concluded that claimant established a total of 8.83 years of coal mine employment. *Id*. at 8.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established less than fifteen years of coal mine employment. *Muncy*, 25 BLR at 1-27. Thus, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption.

[6] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics.

[7] Applying Exhibit 610, the administrative law judge "divided the total amount earned by the daily rate for coal mines" for each year as set out in the applicable table, "which yielded the number of days worked." Decision and Order at 6. Noting that "there was no testimony about the [m]iner's work schedules" the administrative law judge "used a standard five[-]day work week with two weeks of vacation to calculate a 250 day work year [and] then divided the number of days worked by the 250 day work year and credited the miner with portions of the years worked." *Id*.

II. Total Disability – 20 C.F.R. §718.204(b)

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

Pursuant to 20 C.F.R. §718.204b(2)(i), the administrative law judge considered the results of two pulmonary function studies dated May 11, 2012 and September 20, 2012. Total disability may be established based on pulmonary function studies showing a FEV1 value that is equal to or less than those listed in Table B1 (Males), Appendix B, 20 C.F.R. Part 718, "for an individual of the miner's age, sex, and height," if such tests also show either an FVC or MVV value that is equal to or less than those listed in the table "for an individual of the miner's age, sex, and height." *See* 20 C.F.R. §718.204(b)(2)(i).[8] The maximum age for which qualifying values are reported in Appendix B is 71 years. In this case, the miner was 78 years old when his pulmonary function studies were conducted. Finding that the pulmonary function studies reflected conflicting heights for the miner of 65.5 and 66 inches, the administrative law judge permissibly applied the "mid-point" of 65.75 in determining whether the studies were non-qualifying under Appendix B. Decision and Order at 11; *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). Applying the height of 65.75 at Appendix B, the FEV1 must be 1.54 or below and the FVC must be 2.00 or below in order to qualify.[9] While Dr. Baker's pre-bronchodilator FEV1 of 1.47 is below the table, the FVC values are above the table values and there was no MVV performed. Director's Exhibit 14. Similarly, Dr. Jarboe's FEV1 values were above the table values. Director's Exhibit 17. Thus, because there are no qualifying pulmonary function studies,

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[9] The table provides values for miners only up to age 71 years, consequently when applying the table values for a miner above age 71, the values applicable to a 71 year old are used. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008).

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)(i).

The administrative law judge also correctly found that the two arterial blood gas studies were non-qualifying and therefore claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[10] Decision and Order at 11; Director's Exhibits 14, 17. Because there is no evidence to establish that the miner had cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii).

The administrative law judge also considered the medical opinions of Drs. Baker and Jarboe pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker examined the miner on behalf of the Department of Labor (DOL) on May 11, 2012. Director's Exhibit 14. He opined that the miner had a mild impairment based on the pulmonary function studies and normal blood gas studies. *Id*. Dr. Baker stated that "[o]n the basis of his pulmonary function studies, [the miner] would have the ability to perform the duties required in his last coal mine related work."[11] *Id*. At the request of the DOL, Dr. Baker prepared a supplemental report dated June 23, 2012. Dr. Baker reviewed the May 11, 2012 pulmonary function study results again and stated that the testing was valid and "would indeed meet the [DOL] standards for total disability."[12] *Id*. He concluded that the miner was "totally disabled for his last coal mine employment." *Id*.

The administrative law judge permissibly assigned little weight to Dr. Baker's supplemental opinion, insofar as the administrative law judge found that Dr. Baker "incorrectly determined that the [May 11, 2012] testing met 'the DOL standards for total

[10] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[11] Dr. Baker reviewed the miner's employment history, Form CM-911a, and noted that the miner "picked slates, cleaned tipples, shoveled and loaded coal." Director's Exhibit 14.

[12] In a June 13, 2012 letter, the Department of Labor (DOL) advised Dr. Baker that the May 11, 2012 pulmonary function study was qualifying under the regulatory criteria for a miner who is at least 71 years of age. The DOL did not identify the specific table values used to reach that conclusion, and as discussed *infra*, the letter is incorrect.

disability."[13] Decision and Order at 16. The administrative law judge rationally concluded that Dr. Baker's "revised opinion" was "not well-reasoned" and entitled to "little weight." Decision and Order at 16; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because Dr. Baker's initial opinion was that the miner was not totally disabled, it does not assist claimant in satisfying her burden of proof. We also see no error in the administrative law judge's crediting of Dr. Jarboe opinion that the miner was not totally disabled as being reasoned and documented.[14] *See Rowe*, 710 F. 2d at 255; Decision and Order at 15-16.

The administrative law judge has discretion to weigh the evidence and make credibility determinations; the Board may not reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly concluded that the medical opinion evidence does not establish that the miner was totally disabled by a respiratory or pulmonary impairment, we affirm her finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). Further, as it is supported by substantial evidence, we affirm her finding that the evidence as a whole does not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232. Since claimant failed to establish total disability, a requisite element of entitlement, benefits are precluded. *Anderson,* 12 BLR at 1-112.

[13] As noted *supra*, utilizing the height found by the administrative law judge, the pulmonary function studies were not qualifying. Applying the maximum age of 71 and 65.5 inches in height as recorded by Dr. Baker, a study is qualifying under Appendix B with an FEV1 of 1.51 or below and an FVC of 1.96. Even if the height recorded by Dr. Baker were utilized, Dr. Baker's pre-bronchodilator FEV 1 value of 1.47 is qualifying but the pre-bronchodilator FVC value of 2.28 is not. The post-bronchodilator values are above the table for both the FEV1 and FVC and there are no MVV values. Therefore, the DOL incorrectly advised Dr. Baker that the pulmonary function study he obtained was qualifying for a miner who is at least 71.

[14] Dr. Jarboe examined the miner on behalf of employer on September 20, 2012, and diagnosed "a moderate restrictive defect" and "no clinically significant obstruction." Director's Exhibit 17. Dr. Jarboe opined that claimant "is not totally and permanently disabled from a pulmonary standpoint . . . [and that he] retains the pulmonary functional capacity to perform his last coalmine job or one of similar physical demand . . ." *Id*.

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