U.S. Department of Labor

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

BRB No. 21-0220 BLA

DOYLE CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG HAZARD, LLC	)	
	)	
and	)	
	)	
Self-Insured Through ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 11/15/2022
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Denying Benefits (2019-BLA-05838) rendered on a subsequent claim filed on April 16, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has at least twenty-five years of underground coal mine employment, but found Claimant did not establish he has a totally disabling respiratory or pulmonary impairment. He therefore determined Claimant could not 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). Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the Benefits Review Board review the ALJ'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] The record of Claimant's prior claim for benefits was destroyed, so there is no record of why his claim was denied. Decision and Order at 3; Director's Exhibit 1. Pursuant to 20 C.F.R. §725.309(d), if 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 ALJ 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); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 3-4. The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because no record exists of Claimant's prior claim, the ALJ found he had to submit new evidence establishing at least one element of entitlement to proceed with this claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Decision and Order at 3.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

In an appeal filed by an unrepresented claimant, the Benefits Review Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law 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 Assocs., 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 a claimant in establishing these elements when certain conditions are met,[5] but failure to establish any element 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).

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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.[6] *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 ALJ must weigh all relevant supporting evidence against all relevant contrary evidence and determine whether the claimant established total disability

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17-18; Director's Exhibit 4.

[5] The ALJ accurately found there is no evidence of complicated pneumoconiosis, and therefore Claimant could not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 4; 30 U.S.C. § 921(c)(3).

[6] The ALJ found Claimant's usual coal mine work as a section foreman required "moderate manual labor." Decision and Order at 4.

by a preponderance of the 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).

The ALJ considered four pulmonary function studies conducted on August 31, 2017, May 21, 2018, August 7, 2018, and September 21, 2018.[7] Decision and Order at 5. The August 31, 2017 study produced qualifying values.[8] Director's Exhibit 24. The May 21, 2018 study produced qualifying values before the administration of bronchodilators but non-qualifying values post-bronchodilator. Director's Exhibit 15. The August 7, 2018 and September 21, 2018 studies produced nonqualifying values.[9] Director's Exhibits 28, 30.

Considering the conflict in the testing, the ALJ declined to give greater weight to the two most recent studies as they were non-qualifying. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 6. He further permissibly found that, given that the two earlier studies are qualifying and the two later studies are non-qualifying, he could not find the tests conclusively establish total disability. *Keathley*, 773 F.3d at 740; *Woodward*, 991 F.2d at 319-20; Decision and Order at 6. Because the ALJ performed a qualitative and quantitative review of the evidence supported by substantial evidence, we affirm the ALJ's determination that a preponderance of the pulmonary function study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 7.

[7] Because the pulmonary function studies reported varying heights for Claimant ranging from 67 to 68 inches, the ALJ calculated an average height for Claimant of 67.38 inches. Decision and Order at 5 n.11. He then permissibly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 67.7 inches for determining the qualifying or non-qualifying nature of the studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 5 n.11.

[8] A "qualifying" pulmonary function 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, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[9] Claimant did not perform post-bronchodilator testing as part of the August 31, 2017, August 7, 2018, and September 21, 2018 pulmonary function studies. *See* Director's Exhibits 15, 28, 30.

The ALJ also considered two arterial blood gas studies conducted on May 21, 2018 and September 21, 2018, both which were non-qualifying for total disability at rest and with exercise. Decision and Order at 6; Director's Exhibits 15, 28. As there were no qualifying studies, the ALJ rationally found the blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 6.

The ALJ accurately found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure, and therefore Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 4.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the ALJ considered the medical opinions of Drs. Ajjarapu and Dahhan. Decision and Order at 6. While Dr. Ajjarapu initially opined Claimant is totally disabled from a pulmonary impairment, Director's Exhibit 15, she subsequently opined Claimant is not disabled after a review of additional testing. Director's Exhibit 24. Dr. Dahhan also opined Claimant does not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 28. As the physicians agree that Claimant is not totally disabled, the ALJ rationally found that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 6.

Because the ALJ permissibly found the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm his determination that the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 7. As Claimant failed to establish a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's finding that Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). 20 C.F.R. §718.305; Decision and Order at 7. Further, because Claimant did not establish total disability, a requisite element of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-112; 20 C.F.R. §718.204(b)(2).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge