



BRB Nos. 20-0473 BLA
and 20-0473 BLA-A

ROGER WYCISKALLA)

Claimant-Petitioner)

Cross-Respondent)

v.)

ARCH OF ILLINOIS, INCORPORATED)

fka PIPESTONE CREEK MINING)

COMPANY)

and)

Self-Insured through ARCH OF ILLINOIS,)

INCORPORATED)

Employer/Carrier-)

Respondents)

Cross-Petitioners)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 09/15/2021

DECISION and ORDER

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

Roger Wyciskalla, Sesser, Illinois.

Laura Metcoff Klaus, Michael Pusateri, and Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and Employer cross-appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Denying Benefits (2016-BLA-05900) rendered on a subsequent claim filed on November 17, 2014, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).¹

The ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore could not establish entitlement under 20 C.F.R. Part 718. Accordingly, he denied benefits.²

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief to Claimant's appeal. On cross-appeal,

¹ Claimant filed two previous claims. On September 19, 1989, the district director denied Claimant's first claim, filed on April 10, 1989, because he failed to establish any element of entitlement. Director's Exhibit 1. On October 26, 2009, the Benefits Review Board affirmed the denial of benefits in Claimant's second claim, filed on May 23, 2005, because Claimant failed to establish pneumoconiosis and, thus, failed to establish a change in an applicable condition of entitlement. Director's Exhibit 1; *R.W. [Wyciskalla] v. Pipestone Creek Mining Co.*, BRB No. 09-0362 BLA (Oct. 26, 2009) (unpub.). On December 10, 2009, the United States Court of Appeals for the Seventh Circuit notified the Board that it dismissed Claimant's appeal for failure to timely pay the required docketing fee. Director's Exhibit 1. Claimant did not take any further action until filing his current claim. Director's Exhibit 3.

² The irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act is not applicable because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Employer challenges the ALJ's determination that it is the responsible operator. The Director responds in support of the ALJ's finding that Employer is the responsible operator.

In an appeal a claimant files without the assistance of counsel, the 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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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. 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, 1-2 (1986) (en banc).

A miner is 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 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. 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 record contains a non-qualifying⁴ pulmonary function study conducted on December 18, 2014 and two non-qualifying arterial blood gas studies conducted on May 20, 2013 and February 23, 2015. Director's Exhibit 11; Employer's Exhibit 17 at 11. Thus

³ This case arises within the jurisdiction of the Seventh Circuit because Claimant performed his coal mine employment in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4; Employer's Exhibit 20 at 25.

⁴ A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

the ALJ accurately found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 4, 5, 8. Further, the record contains no evidence of cor pulmonale with right-sided congestive heart failure, which precludes a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii).

The ALJ next considered the medical opinions of Drs. Istanbuly,⁵ Rosenberg,⁶ and Tuteur,⁷ and Claimant's treatment records. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 5-9. He accurately found none of the physicians opined Claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 8-9; Director's Exhibit 11; Employer's Exhibits 16, 17, 18, 19. Further, he accurately found the treatment records do not contain a diagnosis of a totally disabling respiratory or pulmonary impairment. Decision and Order at 5, 9; Employer's Exhibits 16, 17. Thus, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9.

We also affirm, as supported by substantial evidence, the ALJ's finding that the medical evidence, weighed separately and together, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 9. As Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the ALJ's denial of benefits.⁸ *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address Employer's argument on cross-appeal that it should be dismissed as the responsible operator.

⁵ Dr. Istanbuly opined "[Claimant] is not considered totally or partially disabled due to his underlying pulmonary disease." Director's Exhibit 11.

⁶ Dr. Rosenberg opined Claimant is not disabled from a pulmonary perspective. Employer's Brief at 18.

⁷ Dr. Tuteur opined Claimant is disabled from "trauma induced back syndrome as well as suboptimally controlled diabetes mellitus, evidence of coronary artery disease associated with diastolic left ventricular dysfunction as well as hypertension." Employer's Exhibit 19.

⁸ The rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act is not applicable because the ALJ rationally found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305; Decision and Order at 8-9.

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