

U.S. Department of Labor

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



BRB No. 15-0408 BLA

THOMAS LEROY BARNETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TENNESSEE CONSOLIDATED COAL)	
COMPANY)	
)	DATE ISSUED: 06/28/2016
Employer-Respondent)	
)	
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 Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

B. Duane Willis, Nashville, Tennessee, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05698) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim¹ filed 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 credited claimant with nineteen days less than fifteen years of underground coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Parts 718 and 725.² The administrative law judge accepted the parties' stipulation that claimant had pneumoconiosis arising out of coal mine employment, and found that claimant had demonstrated that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R. §725.309 since the denial of his prior claim. The administrative law judge further found, however, that claimant failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that the evidence of record was insufficient to establish fifteen years of underground coal mine employment and total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.³

¹ Claimant filed prior claims for benefits on September 10, 1979, February 21, 1991, April 3, 2000, and March 29, 2004, each of which were each denied because claimant failed to establish any element of entitlement. Director's Exhibits 1-4. Claimant filed his current claim on April 10, 2009. Director's Exhibit 6.

² Because the administrative law judge found that claimant established less than fifteen years of underground coal mine employment, claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). While claimant challenges the administrative law judge's length of coal mine employment determination, claimant's failure to establish a totally disabling respiratory or pulmonary impairment, *see* discussion *infra*, precludes his entitlement to invocation of the Section 411(c)(4) presumption.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. *See* 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant challenges the administrative law judge's finding that the medical opinion of Dr. Manda was insufficient to establish total respiratory or pulmonary disability at Section 718.204(b)(2)(iv).⁵ Specifically, claimant contends that the administrative law judge erred in finding that Dr. Manda's opinion was equivocal, as Dr. Manda unequivocally testified at his deposition that claimant suffers from a totally disabling pulmonary impairment. Claimant maintains that, because Dr. Manda's deposition testimony is uncontradicted and the physician definitively opined that claimant is not able to perform his last coal mine work or comparable and gainful work from a pulmonary standpoint, despite inconclusive medical testing, Dr. Manda's opinion satisfies claimant's burden to establish total respiratory or pulmonary disability. We reject claimant's allegations of error.

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Dr. Manda diagnosed coal workers' pneumoconiosis and

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

⁵ Because claimant does not challenge the administrative law judge's finding that the evidence of record was insufficient to demonstrate total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), this finding is affirmed. Decision and Order at 5; *see Skrack*, 6 BLR at 1-711.

testified during his October 18, 2013 deposition that, from a pulmonary standpoint, claimant is unable to perform his usual coal mine work as a loader, or comparable and gainful work, due to his pneumoconiosis. Claimant's Exhibit 1 at 10-11, 19. The administrative law judge acknowledged that the opinion of Dr. Manda, as claimant's treating physician since October 2008, might merit added weight pursuant to 20 C.F.R. §718.104(d) if a reasoned basis for the doctor's opinion was demonstrated. Decision and Order at 7 n.6. However, the administrative law judge determined that Dr. Manda was not familiar with the duties and exertional requirements associated with claimant's work as a loader.⁶ Decision and Order at 6-7; Claimant's Exhibit 1; see *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-219, 20 BLR 2-360, 2-374 (6th Cir. 1996). Further, after reviewing the results of the pulmonary function studies associated with Dr. Manda's treatment of claimant, the administrative law judge determined that "the only valid testing showed that the claimant's [pulmonary] condition is 'mild'," which he found inconsistent with Dr. Manda's total disability assessment. Decision and Order at 7; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The administrative law judge additionally noted that Dr. Manda's medical assessment of June 6, 2012 indicated that the degree of claimant's lung impairment "cannot be determined," and his medical assessment of April 11, 2013 stated that the "[d]egree of lung impairment [is] currently unknown due to lack of complete [p]ulmonary data." Decision and Order at 7, quoting progress notes attached to Claimant's Exhibit 1. As Dr. Manda did not explain the apparent conflict between his most recent progress note and his deposition testimony taken approximately six months later, the administrative law judge permissibly concluded that Dr. Manda's opinion was inconsistent and, therefore, "equivocal" and entitled to little weight. Decision and Order at 7; see *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

As substantial evidence supports the administrative law judge's credibility determination, we affirm his finding that Dr. Manda's opinion was insufficient to demonstrate total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(iv), and that the weight of the evidence, like and unlike, failed to establish total respiratory or pulmonary disability at Section 718.204(b). See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR

⁶ The administrative law judge quoted Dr. Manda's deposition testimony, that "as a loader, I think from my understanding means you climb on – I think you're loading coal on some tracks, something like that?," Claimant's Exhibit 1 at 18, and noted that Dr. Manda's medical records did not mention claimant's duties or what his coal mine work as a loader entailed. Decision and Order at 7.

1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).⁷

⁷ Claimant's failure to establish total respiratory or pulmonary disability pursuant to Section 718.204(b), a requisite element of entitlement under Part 718, obviates the need to address claimant's arguments regarding the administrative law judge's length of coal mine employment determination. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge