U.S. Department of Labor

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

BRB No. 18-0387 BLA

JEFFREY JOSEPH SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COBRA NATURAL RESOURCES LLC/ CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 08/20/2019
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Jennifer L. Conner (Law Office of John C. Collins), Salyersville, Kentucky, for claimant.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-05909) of Administrative Law Judge Monica Markley, rendered on a claim filed on October 27, 2011,

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with 37.14 years of qualifying coal mine employment,[1] the administrative law judge found claimant failed to establish total disability and thus did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), or establish entitlement to benefits pursuant to 20 C.F.R. Part 718. She therefore denied benefits.

On appeal, claimant contends the administrative law judge erred in finding he did not establish total disability.[3] Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. 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).

To be entitled to benefits under the Act, claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability 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*

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[1] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 4; Hearing Transcript at 26; Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where claimant establishes at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. The administrative law judge also found there is no evidence of complicated pneumoconiosis to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

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).

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. *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 administrative law judge 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 administrative law judge found the pulmonary function and arterial blood gas studies do not establish total disability because none of the valid[4] studies are qualifying.[5] 20 C.F.R. §718.204(b)(2)(i)-(ii); Decision and Order at 10-11, 23. She found the record contains no evidence of cor pulmonale with right-sided congestive heart failure.[6] 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 23.

She then considered the medical opinions of Drs. Francis and King that claimant is totally disabled and Drs. Fino and Forehand that claimant is not totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23-25. She accorded little weight to Dr.

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[4] The administrative law judge specifically addressed the validity of the September 19, 2011 pulmonary function study. Decision and Order at 11. Dr. Fino opined this study is invalid because of "premature termination [due] to exhalation and a lack of reproducibility in the expiratory tracings," in addition to "a lack of an abrupt onset to exhalation." Employer's Exhibit 3. The technician who conducted the study also stated that "ATS Reproducibility [was not met]." Claimant's Exhibit 2. The administrative law judge found Dr. Fino's explanation credible and consistent with the technician's notes. Decision and Order at 11. Thus she found the study invalid. *Id.* Because claimant does not challenge this finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

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

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 23.

Francis's opinion because she found he relied on the invalid September 19, 2011 pulmonary function study. Decision and Order at 24; Claimant's Exhibit 1. She also found the treatment notes do not support his diagnosis of total disability. *Id*. She accorded little weight to Dr. King's opinion because she found he did not explain his diagnosis and because "the underlying data does not support his conclusions." Decision and Order at 24-25; Claimant's Exhibit 2. She found the opinions of Drs. Fino and Forehand are reasoned and documented and assigned their opinions significant weight. Decision and Order at 23-25; Director's Exhibit 11; Employer's Exhibit 1.

Claimant argues the administrative law judge should have credited the opinions of Drs. Francis and King because they are his treating physicians. Claimant's Brief at 12-15. Contrary to claimant's argument, there is no "requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians," *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997), and the administrative law judge was required to assess whether their opinions are reasoned and documented. *Id*.; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535 (4th Cir. 1998); *see also* 20 C.F.R. §718.104(d)(5).

Claimant generally contends that the opinions of Drs. Francis and King are credible because they are "based on physical examination, symptoms, an accurate work history, an accurate smoking history[,] and objective medical testing," and their opinions "should be afforded probative weight." Claimant's Brief at 15. The Board must limit its review, however, to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301*; Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because claimant does not identify any error in the administrative law judge's specific credibility findings when rejecting the opinions of Drs. Francis and King, we affirm the finding that claimant did not establish total disability based on the medical opinions.[7] 20 C.F.R. §718.204(b)(2)(iv); *see Sarf*, 10 BLR at 1-120-21; Decision and Order at 25.

Because we have affirmed the administrative law judge's determination that claimant did not establish total disability under to 20 C.F.R. §718.204(b)(2)(i)-(iv), we

[7] As it is unchallenged, we affirm the administrative law judge's finding that Dr. Forehand's opinion is entitled to significant weight. *Skrack*, 6 BLR at 1-711; Decision and Order at 23, 25. Moreover, because claimant has the burden of proof to establish total disability and we affirm the administrative law judge's discrediting of the opinions of Drs. Francis and King, the only opinions supportive of that burden, we need not address claimant's arguments regarding the weight accorded Dr. Fino's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 15-16.

affirm his finding that the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2). As claimant has failed to prove total disability, an essential element of entitlement under both Section 411(c)(4) and 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge