U.S. Department of Labor

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

BRB No. 20-0128 BLA

REUBEN L. DANCEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 04/30/2021
PEABODY ENERGY CORPORATION	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice, LLP), Charleston, West Virginia, for Employer/Carrier.

Rita A. Roppolo (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Theresa C. Timlin's Decision and Order Denying Benefits (2018-BLA-05164) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on June 7, 2016.

After crediting Claimant with 6.50 years of qualifying coal mine employment, the administrative law judge found the evidence does not establish he suffers from either clinical or legal pneumoconiosis.[1] She therefore denied benefits.

On appeal, Claimant challenges the administrative law judge's determination that the medical opinion evidence does not establish legal pneumoconiosis. Employer filed a response brief in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), also filed a response brief, arguing the case should be remanded because the administrative law judge erred in weighing the medical opinions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 47-48. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

evidence, and in accordance with applicable law.[2] 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 without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions,[3] a 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. 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 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Four physicians offered opinions on this issue. Dr. Celko diagnosed Claimant with chronic bronchitis and chronic obstructive pulmonary disease (COPD), which he attributed to Claimant's coal dust exposure and smoking history. Director's Exhibit 18 at 2, 7. Dr. Zaldivar concluded Claimant has an oxygen transfer impairment and a low diffusion capacity, which he opined is consistent with pulmonary fibrosis and unrelated to coal mining. Employer's Exhibit 3 at 4-5. Dr. Zaldivar further explained that Claimant's computed tomography (CT) scan did not show evidence of coal mine dust in his lungs and his emphysema is "most reasonably" due to smoking. Employer's Exhibit 11 at 21, 24, 41. Dr. Sood diagnosed Claimant with legal pneumoconiosis in the form of "mixed chronic

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 3, 5.

[3] Because Claimant did not establish at least fifteen years of qualifying coal mine employment, the administrative law judge correctly noted he was not able to invoke the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Claimant is also not entitled to the Section 411(c)(3) presumption of total disability due to pneumoconiosis as there is no evidence he has complicated pneumoconiosis. 30 U.S.C §921(c)(3); 20 C.F.R. §§718.202(a)(3), 718.304.

bronchitis and emphysema phenotype of COPD," identifying coal dust as a substantial contributing factor. Claimant's Exhibit 4 at 14; Claimant's Exhibit 4a at 6. Finally, Dr. Rosenberg concluded Claimant is totally disabled from diffuse emphysema, attributable solely to his smoking history. Employer's Exhibit 4 at 5-6; Employer's Exhibit 12 at 15-19.

The administrative law judge determined Dr. Celko's opinion is entitled to little weight because he based his conclusion on an inaccurate understanding of Claimant's smoking history.[4] Decision and Order at 32. She also discredited Dr. Zaldivar's opinion that Claimant does not have legal pneumoconiosis as not well-reasoned because it is based on a general statement that Claimant's smoking history is undetermined. *Id.* at 33-34. In contrast, she found Dr. Sood's opinion that Claimant has legal pneumoconiosis in the form of emphysema due to coal dust exposure to be well-reasoned and well-documented, and therefore entitled to probative weight. *Id.* at 33. She similarly found Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis to be well-reasoned and well-documented, and therefore also gave it probative weight. *Id.* at 34. Because one doctor credibly explained why Claimant has legal pneumoconiosis, and another was "equally persuasive" in explaining why he does not, the administrative law judge found Claimant failed to satisfy his burden of proving he has the disease.[5] *Id.* at 35.

Claimant contends the administrative law judge erred in giving equal weight to Dr. Sood's and Dr. Rosenberg's opinions, asserting, in part, that Dr. Sood refuted the medical science on which Dr. Rosenberg relied to exclude a diagnosis of legal pneumoconiosis. The Director agrees Dr. Rosenberg's opinion is not credible and alleges the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), by failing to attempt to resolve the conflict in the medical opinions. We agree with Claimant and the Director that the administrative law judge erred in summarily giving equal weight to Dr. Sood's and Dr. Rosenberg's opinions.

While the administrative law judge permissibly discredited Dr. Celko's and Dr. Zaldivar's opinions because they are not based on an accurate understanding of Claimant's smoking history, *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993), she did not adequately

[4] Dr. Celko stated Claimant had a smoking history of three pack-years; however, the administrative law judge found the evidence established a history of fifteen pack-years. *See* Decision and Order at 7, 32.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant did not affirmatively establish legal pneumoconiosis based on his CT scans or treatment records. *See* Decision and Order at 38, 47.

weigh the remaining medical opinions. Dr. Sood opined Claimant has legal pneumoconiosis based on his diagnosis of COPD, as Claimant's lung disease is consistent with the forms of emphysema attributable to coal mine dust exposure. Claimant's Exhibit 4a at 4-6. He further explained his conclusion, and why he disagreed with Dr. Rosenberg's, in view of medical literature Dr. Sood maintained supports his own opinion. *Id*. In contrast, Dr. Rosenberg stated Claimant does not have legal pneumoconiosis, attributing his emphysema to his smoking, while also referring to medical literature that he asserts supports his opinion. Employer's Exhibit 4. Dr. Sood and Dr. Rosenberg based their diagnoses on directly contrary interpretations of scientific studies relating to whether coal dust can cause diffuse emphysema and diffusion capacity impairments. The administrative law judge did not attempt to resolve this conflict, but instead cursorily and summarily stated she found these opinions "equally persuasive" without further explanation. *See* Decision and Order at 35.

Because the administrative law judge did not fully analyze the opinions of Dr. Sood and Dr. Rosenberg or attempt to resolve the conflicting evidence, we cannot affirm her finding that Claimant failed to establish legal pneumoconiosis. In finding the two opinions in equipoise without explanation, the administrative law judge "counted heads," which the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized is a "hollow way" of resolving conflicting evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Sterling Smokeless Coal Corp. v. Akers*, 131 F.3d 438, 440-441 (4th Cir. 1997) (the administrative law judge erred "[b]y resolving the conflict of medical opinion solely on the basis of the number of physicians supporting the respective parties"). Without more, the administrative law judge's explanation does not satisfy the requirements of the APA and cannot be affirmed. We therefore vacate the administrative law judge's finding that Claimant does not have legal pneumoconiosis and remand for the administrative law judge to reconsider the conflicting opinions of Drs. Sood and Rosenberg. On remand, the administrative law judge is directed to resolve the conflicts in the evidence and provide an explanation for her findings.[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If she finds Claimant has legal pneumoconiosis, the administrative law judge must address the remaining issues in this case.

[6] We do not address the Director's argument that the administrative law judge should give less weight to Dr. Rosenberg's opinion, as the administrative law judge must make that determination in the first instance. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order Denying Benefits, and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues' decision. The administrative law judge adequately addressed and weighed the medical opinions as to the existence of legal pneumoconiosis and, therefore, I would affirm her Decision and Order.

As the fact-finder, the administrative law judge is granted broad discretion in evaluating the credibility of the evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012). A determination of the weight to be given conflicting medical opinions is a task for the administrative law judge, not the Board. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 (4th Cir. 1997).

The administrative law judge's decision meets the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). She reviewed all of the doctors' credentials and found them all well qualified to offer an opinion on whether Claimant has pneumoconiosis. *See* Decision and Order at 31-32. She acted within her discretion in discrediting the opinions of Dr. Celko and Dr. Zaldivar because neither doctor evinced an adequate understanding of Claimant's smoking history. *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993). She reviewed the bases for Dr. Sood's diagnosis and his reasons for concluding Claimant's coal mine work contributed to his COPD based on the duration and intensity of Claimant's coal mine work. *Id.* at 33. She also reviewed Dr. Rosenberg's opinion and his rationale for finding Claimant does not have legal pneumoconiosis. She rationally concluded she could find no reason to give the opinion of either Dr. Sood or Dr.

Rosenberg more weight than the other and adequately explained her reasons for doing so.[7] *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013); *see* Decision and Order at 33-35. Thus, she permissibly determined the medical opinion evidence as a whole is in equipoise and therefore did not satisfy Claimant's burden of proving the existence of pneumoconiosis.[8] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994). The Fourth Circuit has stated, "If we understand what the ALJ did and why [s]he did it, we, and the APA, are satisfied." *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998). Because her findings are rational and supported by substantial evidence, I would affirm the administrative law judge's conclusion that the medical opinion evidence does not establish legal pneumoconiosis and therefore the denial of benefits.

For the foregoing reasons, I respectfully dissent.

MELISSA LIN JONES
Administrative Appeals Judge

[7] An administrative law judge may not substitute her own opinion for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

[8] The United States Court of Appeals for the Tenth Circuit acknowledged "there may be cases in which the scientific evidence is evenly balanced." *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1026 (10th Cir. 2010).