U.S. Department of Labor

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

BRB No. 19-0383 BLA

KENNETH RAY MOZINGO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPLE COAL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 08/12/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier appeal Administrative Law Judge Morris D. Davis's Decision and Order (2016-BLA-05889) granting benefits 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 subsequent claim[1] filed on November 24, 2014.[2]

Although the administrative law judge credited Claimant with twenty-six years and nine months of coal mine employment,[3] he found Claimant failed to establish that at least fifteen years of his employment took place underground or in substantially similar surface coal mine employment. He therefore found Claimant could not invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish clinical pneumoconiosis. However, he found the medical opinion evidence established legal pneumoconiosis. 20

[1] Claimant filed prior claims in 2008, 2011 and 2013. Director's Exhibits 1-3. The district director denied Claimant's most recent claim on October 10, 2013 because he failed to establish any element of entitlement. Director's Exhibit 3.

[2] In a modification proceeding the moving party has the burden of proof. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008). In this case, the administrative law judge placed the burden of proof on Claimant; however, any error was harmless as he found in favor of Claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's totally disabling respiratory or pulmonary impairment 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

C.F.R. §718.202(a)(4). He further found the evidence established Claimant is totally disabled due to legal pneumoconiosis,[5] 20 C.F.R. §718.204(b), (c), and awarded benefits.

On appeal, Employer argues that the Section 411(c)(4) presumption is unconstitutional. Employer also contends the administrative law judge erred in finding the medical opinions established legal pneumoconiosis and that Claimant's total disability is due to legal pneumoconiosis. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to decline to entertain Employer's inapplicable constitutional objection.[6]

The 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 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).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[7] 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).

[5] Because the administrative law judge found the new evidence established legal pneumoconiosis and total disability, he found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding of total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this affirmance, we also affirm the administrative law judge's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[7] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge found the Section 411(c)(3) presumption inapplicable. *See* 20 C.F.R. §718.304; Decision and Order at 15.

Constitutional Challenge

Employer initially objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, which revived this provision, "violates Article II of the United States Constitution." *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 3. The Director, however, accurately notes the administrative law judge did not award benefits based on the Section 411(c)(4) presumption. Director's Brief at 1. Moreover, we agree with the Director's contention that Employer fails to provide any specific argument for its constitutional objection. Director's Brief at 2 n.2. Thus, we decline to address Employer's argument. *See* 20 C.F.R. §802.211(b).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate 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). The United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered the medical opinions of Drs. Forehand and Rosenberg. Dr. Forehand diagnosed legal pneumoconiosis in the form of mixed restrictive-obstructive lung disease due to coal mine dust exposure and cigarette smoking. Director's Exhibits 12, 31. Dr. Rosenberg, however, opined that Claimant does not have legal pneumoconiosis. Director's Exhibit 28. He opined that Claimant's disabling impairment is due to asthma. *Id.*

The administrative law judge found that Dr. Forehand's diagnosis of legal pneumoconiosis was well-reasoned. Decision and Order at 15-16. Conversely, he found that Dr. Rosenberg's opinion was not. *Id.* The administrative law judge therefore found the medical opinions established legal pneumoconiosis. *Id.*

Employer argues that Dr. Forehand's diagnosis of legal pneumoconiosis is not well-reasoned because he did not provide any basis for his opinion. Employer's Brief at 4. The determination of whether a medical opinion is adequately reasoned is designated to the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge found that Dr. Forehand based his opinion on a physical examination, his review of objective test results, and medical and occupational histories.

Decision and Order at 9. The administrative law judge also found that Dr. Forehand based his opinion on claimant's work for many years as a heavy equipment operator without the benefit of constant protection from a cab and mask. *Id.* The administrative law judge noted Dr. Forehand explained that Claimant's coal mine dust exposure put him at an extremely high risk of developing mixed restrictive-obstructive lung disease. Decision and Order at 9. The administrative law judge also noted Dr. Forehand explained that the effects of cigarette smoking and coal mine dust exposure on the lung are additive. *Id.* He also noted Dr. Forehand explained that Claimant's coal mine dust exposure contributed to, and materially aggravated, his mixed restrictive-obstructive lung disease by worsening airways inflammation. *Id.* The administrative law judge therefore permissibly found Dr. Forehand's diagnosis well-reasoned. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 15-16.

We also reject Employer's contention that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. Employer's Brief at 4-5. The administrative law judge noted Dr. Rosenberg, who attributed the decline in Claimant's condition entirely to asthma, opined that Claimant's respiratory impairment was not legal pneumoconiosis because Claimant showed a marked worsening of his respiratory impairment since his examination of Claimant two years earlier. Decision and Order at 15. The administrative law judge also noted that Dr. Rosenberg explained that "latent and progressive clinical and legal pneumoconiosis are rare" and that "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." *Id.* at 15-16, *quoting* Director's Exhibit 28 at 3. The administrative law judge permissibly discredited Dr. Rosenberg's opinion because he attributed Claimant's impairment entirely to other causes without adequately explaining why coal dust exposure did not contribute, along with asthma, to Claimant's respiratory impairment. *See Groves*, 761 F.3d at 599 (holding that legal pneumoconiosis includes lung disease "caused 'in part' by coal mine employment"); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (holding that an administrative law judge permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Disability Causation

As Employer raises no specific allegations of error regarding disability causation, other than to assert Claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 18-19.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge