U.S. Department of Labor

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

BRB No. 20-0033 BLA

WILLIAM E. WALSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	DATE ISSUED: 12/28/2020
	)	
and	)	
	)	
OLD REPUBLIC GENERAL INSURANCE 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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C, for Employer and its Carrier (Employer).

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

PER CURIAM:

Claimant appeals Administrative Law Judge Lauren C. Boucher's Decision and Order Denying Benefits (2017-BLA-00002) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves a request for modification of the denial of a miner's claim filed on April 8, 1991.[1]

The administrative law judge credited Claimant with twenty years of coal mine employment, based on the parties' stipulation, and noted Employer's concession that Claimant has pneumoconiosis arising out of his coal mine employment. She also found that granting Claimant's request for modification would be in the interest of justice. She determined the evidence filed in support of Claimant's request for modification established total disability and therefore further found Claimant established a basis for modification at 20 C.F.R. §725.310 (2000).[2] Weighing the evidence as a whole, however, the administrative law judge concluded Claimant did not establish total disability causation and denied benefits.

On appeal, Claimant contends the administrative law judge erred in determining he failed to establish total disability causation. Employer responds, urging affirmance of the denial. Claimant replies, reiterating the arguments in his initial brief, and contending Employer waived its right to challenge the administrative law judge's findings concerning

[1] This is Claimant's eighth modification request regarding the denial of his April 8, 1991 claim for benefits. Director's Exhibit 1. Claimant's seventh, and most recent previous modification request, filed on April 3, 2012, was denied by Administrative Law Judge Theresa C. Timlin on April 7, 2016, because Claimant failed to establish a total respiratory or pulmonary disability. Director's Exhibits 328, 348. Claimant filed the instant, eighth modification request on July 28, 2016, and following reassignment to Administrative Law Judge Boucher (the administrative law judge), an administrative hearing was held on April 4, 2019. Decision and Order at 2-3; Director's Exhibits 349.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations. The revised regulation at 20 C.F.R. §725.310 does not apply to claims, as here, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

the existence of pneumoconiosis and total disability.[3] The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

The Benefit 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 evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718 without the benefit of the statutory presumptions, 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).[6] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

[3] We note that Employer, in its response brief, argues the administrative law judge erred in finding the evidence established the existence of pneumoconiosis and total disability. Employer's Response Brief at 16-19. First, as Claimant contends and the administrative law judge noted, Employer stipulated at the hearing to pneumoconiosis arising out of his coal mine employment. Hearing Transcript at 12; Decision and Order at 5. But Employer's argument in its response brief that the administrative law judge erred in finding the evidence established total disability is in support of another method by which the administrative law judge may reach the same result and deny benefits. Therefore, contrary to Claimant's contention, that argument is properly before the Board, and no cross-appeal is required. *See Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co*., 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co*., 6 BLR 1-87, 1-92 (1983).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the parties stipulated to twenty years of coal mine employment and her threshold determination that his request for modification, if granted, would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Hearing Transcript at 10.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[6] Congress amended the Black Lung Benefits Act in 2010, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. These amendments to the Act, which became effective on March 23, 2010, include the rebuttable presumption

718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but 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).

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310 (2000). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *see Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The administrative law judge found Claimant established total disability due to a respiratory or pulmonary impairment, and thus established a change in condition pursuant to 20 C.F.R §725.310 (2000). Decision and Order at 8-33.

Disability Causation

To establish he is totally disabled due to pneumoconiosis, Clamant must prove pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3d Cir. 1989). Pneumoconiosis is a substantially contributing cause of total disability if it has a material adverse effect on Claimant's respiratory or pulmonary condition, or materially worsens a disabling impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

In addressing disability causation, the administrative law judge considered the newly submitted medical opinions of Drs. Greco and Levinson and the previously submitted medical evidence in this case, including Dr. Kraynak's opinion. Decision and Order at 11-16, 34-37. Drs. Greco and Kraynak attributed Claimant's respiratory impairment to his coal mine employment, while Dr. Levinson did not.[7] Director's Exhibits

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set forth in Section 411(c)(4) of the Act that a miner is totally disabled due to pneumoconiosis if he establishes 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) (2018); *see* 20 C.F.R. §718.305. But because Claimant has not filed a subsequent claim after January 1, 2005, Section 411(c)(4) of the Act does not apply to this current claim.

[7] Additionally, the administrative law judge considered Dr. Prince's opinion but found that although he diagnosed a totally disabling respiratory or pulmonary impairment, he did not opine regarding the cause of the impairment. Decision and Order at 35;

350, 353, 354; Claimant's Exhibits 1-3, 5; Employer's Exhibits 1-3, 6. The administrative law judge discounted Dr. Greco's medical opinion as internally inconsistent, unexplained, and inadequately reasoned, and gave it little probative weight. Decision and Order at 35-36. She also determined Dr. Kraynak's 2013 medical opinion was not fully probative of Claimant's current medical condition and therefore also merited little probative weight. *Id*. at 36 As only Drs. Greco and Kraynak attributed Claimant's respiratory or pulmonary disability to pneumoconiosis, she concluded Claimant failed to carry his burden to establish disability causation pursuant to 20 C.F.R. §718.204(c). *Id*. at 36-37.

Claimant argues the administrative law judge erred in discrediting Drs. Greco and Kraynak because they provided unequivocal and uncontradicted opinions establishing disability causation. Claimant's Brief at 6-13. We disagree.

Contrary to Claimant's contention that the administrative law judge imposed an "impossible burden of proof" upon him, the administrative law judge properly determined Claimant has the burden to affirmatively establish all elements of entitlement, including total disability causation. *Bonessa*, 884 F.2d at 734; Decision and Order at 4, 34; Claimant's Brief at 10. Further, the administrative law judge is not required to credit a medical opinion simply because it is uncontradicted; rather, she "has broad discretion to determine the weight accorded each doctor's opinion." *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Claimant's Brief at 5.

We also reject Claimant's assertion that the administrative law judge was required to defer to Drs. Greco and Kraynak as treating physicians. Claimant's Brief at 12-13; Claimant's Reply Brief at 9-10. While a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded greatest weight. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002) *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) (administrative law judge must consider quality of a physician's reasoning); *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997) (administrative law judge may permissibly require treating physician to provide more than a conclusory statement); *but see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004) ("[i]t is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians."). Moreover, this case does not involve

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Claimant's Exhibit 1. Thus, she determined neither he nor Dr. Levinson support Claimant's burden of proof on the issue of disability causation. Decision and Order at 34-35.

crediting the opinions of non-treating physicians over those of treating physicians. Rather, the administrative law judge acknowledged Drs. Greco[8] and Kraynak[9] treated Claimant but found their opinions insufficient to meet Claimant's burden to establish total disability causation. Decision and Order at 11-12, 35-37; *see* 20 C.F.R. §718.104(d); *Lango*, 104 F.3d at 577; *Kertesz*, 788 F.2d at 158, 163.

Claimant does not challenge the administrative law judge's finding that Dr. Greco did not adequately explain why he previously repeatedly noted that Claimant's totally disabling respiratory or pulmonary impairment was due his coronary artery disease but then subsequently determined Claimant's impairment is due "solely" to coal workers' pneumoconiosis.[10] Decision and Order at 35-36. Nor does Claimant challenge the administrative law judge's determination that Dr. Kraynak's opinion is entitled to little probative weight because he was only able to consider evidence that predated his 2013 deposition testimony and therefore was not as probative of Claimant's current physical condition. Decision and Order at 36.

Rather, Claimant contends that rejecting Dr. Greco's opinion for "this one innocuous reason constitutes error when the Claimant has submitted overwhelming, detailed medical evidence from his treating physicians." Claimant's Brief at 10-11. Claimant also asserts that if Dr. Kraynak's opinion is not probative because of its age and because he only considered medical evidence predating his 2013 deposition, "then Dr. Greco's more recent opinion is probative." *Id*. at 10.

The administrative law judge determines the credibility of the evidence. *See Kertesz*, 788 F.2d at 163. Claimant's statements regarding the administrative law judge's consideration of the opinions of Drs. Greco and Kraynak amount to a request to reweigh

[8] The administrative law judge considered all of Dr. Greco's medical reports as well as his treatment records and summarized all relevant portions. Decision and Order at 11-12, 19-32; Director's Exhibit 350; Claimant's Exhibits 3, 5, 6; Employer's Exhibit 4.

[9] The administrative law judge noted her agreement with Judge Timlin's recognition that Dr. Kraynak is a treating physician. Decision and Order at 36.

[10] The administrative law judge observed Dr. Greco's treatment records from September 2012 until February 2019 related Claimant's chronic shortness of breath (i.e. his totally disabling respiratory impairment) to coronary artery disease. Decision and Order at 19-32, 35; Employer's Exhibit 4; Claimant's Exhibit 6. In his more recent report of September 9, 2016, however, Dr. Greco stated Claimant's chronic shortness of breath caused severe debility, and opined: "[H]is shortness of breath is solely on the basis of his coal workers pneumoconiosis." Director's Exhibit 350; *see* Decision and Order at 35.

the evidence. Such a request is beyond the Board's scope of review. *Anderson*, 12 BLR at 1-113. Thus, we affirm the administrative law judge's finding that Claimant failed to establish total disability causation and further affirm her denial of benefits.[11] 20 C.F.R. §718.204(c); *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; Decision and Order at 36-37.

[11] Based on this conclusion, we need not address Employer's argument regarding total disability. Employer's Brief at 16-19; *see also* Decision and Order at 5.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge