U.S. Department of Labor

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

BRB No. 20-0124 BLA

JOE T. KIRK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANIELS BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 12/23/2020
	)	
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 Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jeffery Gene Hinkle (Hinkle & Keenan, P.S.C.), Inez, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-05785) rendered on a subsequent claim filed on April 12, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).

The administrative law judge found Claimant established eleven years of coal mine employment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found he established the existence of legal pneumoconiosis but not clinical pneumoconiosis, total disability due to legal pneumoconiosis,[3] and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), 725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of the Workers' Compensation Programs, has not filed a response brief.

The Benefit Review Board's scope of review is defined by statute. The Board must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as

[1] Claimant's prior claim was denied for failure to establish total disability. Director's Exhibit 2.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] "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). "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 the 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).

[4] The administrative law judge incorrectly stated Claimant's last coal mine employment occurred in Kentucky. Decision and Order at 3. Because Claimant's social

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)[5] and (c)(4) 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). 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.[6] *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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant can satisfy this burden by showing coal dust exposure contributed "in part" to the miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly

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security records, employment history forms and hearing testimony show he had employment in both Kentucky and West Virginia but last worked in West Virginia, we 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); Hearing Transcript at 24; Director's Exhibits 5-8. However, we note that the applicable laws of the Fourth and Sixth Circuits are consistent with regard to the issues presented in this case.

[5] The administrative law judge found no evidence of complicated pneumoconiosis and thus Claimant is unable 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); 20 C.F.R. §718.304; Decision and Order at 5.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; Decision and Order at 4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

The administrative law judge credited Drs. Rasmussen's and Forehand's opinions that Claimant has legal pneumoconiosis over the contrary opinions of Drs. Spagnolo and Rosenberg. Decision and Order at 17. Employer asserts the administrative law judge failed to adequately explain his credibility determinations in accordance with the Administrative Procedure Act.[7] We disagree.

Initially, we reject Employer's contention that the administrative law judge erred in crediting Dr. Forehand's opinion that Claimant has legal pneumoconiosis because, in Employer's view, it is based on "causal probabilities in the abstract" and "not specific clinical facts" in this case. Employer's Brief at 16-19. Dr. Forehand conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on June 12, 2017. Director's Exhibit 13. He diagnosed obstructive lung disease "based on Claimant's history of shortness of breath, history of smoking, history of coal dust exposure, and the pulmonary function study results." *Id*. He opined Claimant's disabling obstruction is due to smoking and coal mine dust exposure. *Id*.

As the administrative law judge noted, Dr. Forehand specifically explained that Claimant's "[d]aily exposure to excessive coal mine dust working at the face of poorly ventilated coal mines (no split air, curtains not hung) as a roof bolt operator, coal driller and general inside employee caus[ed] [him] to inhale coal mine dust particles in his lungs, which triggered an inflammatory reaction damaging airways and resulting in small airways disease and airway obstruction." *Id*. He also stated Claimant's "workplace exposure to coal mine dust and silica interacted with cigarette smoke" to cause Claimant's obstructive lung disease. *Id*. He further described the contributions of both exposures as "substantial" to Claimant's impairment and that coal mine dust "materially aggravated" Claimant's obstructive lung disease by worsening airways inflammation otherwise caused by his smoking. *Id*.

Because the administrative law judge has discretion to determine the credibility of the evidence, we affirm his finding that Dr. Forehand's opinion is adequately reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *see also Tenn.*

[7] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Consol. Coal Co. v. Crisp, 866 F.2d 179, 185 (6th Cir. 1989). Thus, we affirm the administrative law judge's reliance on Dr. Forehand's opinion to find Claimant has legal pneumoconiosis.[8] *See Cochran*, 718 F.3d at 322-23; *Looney*, 678 F.3d at 311; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d 438, 441.

We also see no error in the administrative law judge's rejection of Employer's medical opinions. Dr. Rosenberg opined Claimant's chronic obstructive pulmonary disease (COPD) is related entirely to smoking, in part, because his pulmonary function testing revealed a reduced FEV1/FVC ratio, which is not a pattern of impairment consistent with coal mine dust exposure. Director's Exhibit 19 at 5-6. The administrative law judge permissibly found this aspect of Dr. Rosenberg's rationale conflicts with the medical science the DOL accepts, recognizing coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79.920, 79,943; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 15. He also permissibly found Dr. Rosenberg did not persuasively explain why Claimant's coal mine dust exposure could not have contributed, at least in part, to his obstructive respiratory impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Crisp*, 866 F.2d at 185; Decision and Order at 16.

Regarding Dr. Spagnolo, the administrative law judge accurately noted he opined that Claimant's obstructive respiratory impairment was not legal pneumoconiosis because there was no radiological evidence for pneumoconiosis to explain the rapid progression of Claimant's respiratory impairment over a short period of time. Employer's Exhibits 2 at 7, 4 at 15. Although Dr. Spagnolo acknowledged Claimant's condition would not deteriorate rapidly from smoking either, he nevertheless opined smoking in conjunction with an unknown condition, and not coal mine dust exposure, caused Claimant's COPD. Employer's Exhibit 4 at 15-16. The administrative law judge permissibly found Dr. Spagnolo's opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See* 65 Fed. Reg. at 79,971; 20 C.F.R. §718.201(a)(2); *Akers*, 131 F.3d at 441; *Crisp*, 866 F.2d at 185; Decision and Order at 14. Further, the administrative law judge permissibly found Dr. Spagnolo did not adequately explain why he completely excluded coal mine dust exposure as an additive factor for Claimant's impairment.

[8] Because we affirm the administrative law judge's crediting of Dr. Forehand's opinion on legal pneumoconiosis, we need not address Employer's contentions regarding the administrative law judge's weighing of Dr. Rasmussen's opinion. Employer's Brief at 5-11.

Decision and Order at 13; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17. Employer's arguments regarding the physicians' opinions are a request that the Board reweigh the evidence, which we are not empowered to do.[9] *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge's finding that Claimant established the existence of legal pneumoconiosis is rational and supported by substantial evidence, it is affirmed. 20 C.F.R. §718.202(a)(4); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 17.

Disability Causation

To establish that his total disability is due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). The administrative law judge relied on Dr. Forehand's opinion to find Claimant is totally disabled due to legal pneumoconiosis. Decision and Order at 19

We reject Employer's contention that the administrative law judge assessed the medical opinions based on a less stringent "in part" legal standard rather than the applicable "substantially contributing cause" standard. Employer's Brief at 17. The administrative law judge noted accurately that all the physicians agree Claimant has disabling COPD but disagree as to its etiology. Decision and Order at 18. Dr. Forehand opined that coal mine dust exposure was a substantial contributing cause of Claimant's disabling COPD. Director's Exhibit 13. Because we have affirmed the administrative law judge's reliance on Dr. Forehand's opinion to find legal pneumoconiosis established, we see no error in his reliance on Dr. Forehand's opinion to also find disability causation established. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Crisp*, 866 F.2d at 185; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 18-19. Moreover, contrary to

[9] Because the administrative law judge gave valid reasons for discrediting Drs. Rosenberg's and Spagnolo's opinions, we need not address all of Employer's contentions of error regarding the administrative law judge's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer's assertion, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Spagnolo on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of his mistaken belief the miner did not have pneumoconiosis); *see Skukan v. Consolidation Coal Co.*, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); Decision and Order at 18. We therefore affirm the administrative law judge's findings that Claimant established total disability due to legal pneumoconiosis and his entitlement to benefits. 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

DANIEL T. GRESH
Administrative Appeals Judge