U.S. Department of Labor

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

BRB No. 19-0398 BLA

CLIMOUTH D. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCOTTS BRANCH COMPANY	)	DATE ISSUED: 07/23/2020
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 on Remand – Awarding Benefits of Dana A. Rosen, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier appeal the Decision and Order on Remand – Awarding Benefits (2012-BLA-06081) of Administrative Law Judge Dana A. Rosen rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a subsequent miner's claim filed on April 22, 2011,[1] and is before the Benefits Review Board for the second time.

In the initial Decision and Order Awarding Benefits, Administrative Law Judge Alan L. Bergstrom credited Claimant with 15.25 years of coal mine employment, with 11.48 years in underground coal mines or on the surface in substantially similar conditions. He therefore found Claimant did not have sufficient qualifying coal mine employment to 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). Judge Bergstrom then found the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). He further found Claimant established pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Accordingly, he awarded benefits.

Pursuant to Employer's appeal, the Board affirmed Judge Bergstrom's findings that Claimant established 11.48 years of qualifying coal mine employment, legal

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[1] Claimant filed three prior claims for benefits; two claims were finally denied, Director's Exhibits 1, 3, and one claim was withdrawn, Director's Exhibit 2. On February 3, 2009, the district director denied Claimant's most recent prior claim, filed on June 24, 2008, because Claimant failed to establish any element of entitlement. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when he establishes at least fifteen years of underground coal mine employment 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.

pneumoconiosis[3] and a change in an applicable condition of entitlement.[4] *Coleman v. Scotts Branch Co.*, BRB No. 17-0510 BLA, slip op. at 3-6, 8-9 (Jul. 23, 2018) (unpub.). The Board vacated, however, Judge Bergstrom's findings of 15.25 years of coal mine employment, clinical pneumoconiosis,[5] total disability, and total disability causation. *Coleman*, slip op. at 7-8, 11-12. Finally, the Board vacated Judge Bergstrom's determination that Claimant is entitled to benefits commencing as of April 2011, the month in which Claimant filed his current claim, as he had not properly determined whether the evidence established the onset date of Claimant's total disability due to pneumoconiosis. *Id*. Thus, the Board vacated the award of benefits and remanded the case for reconsideration of clinical pneumoconiosis, total disability, total disability causation, and the date for the commencement of benefits. *Id*.

Due to Judge Bergstrom's retirement from the Office of the Administrative Law Judges, District Chief Administrative Law Judge Paul C. Johnson, Jr., reassigned this case to Administrative Law Judge Dana A. Rosen (the administrative law judge) on January 16, 2019. She credited Claimant with twelve years of coal mine employment, and found Claimant established legal pneumoconiosis, total respiratory disability, and total disability due to pneumoconiosis. The administrative law judge therefore awarded benefits commencing August 2011.

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[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). This definition encompasses 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).

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[5] 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).

In the present appeal, Employer argues the administrative law judge erred in finding Claimant established legal pneumoconiosis and disability causation. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[6]

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.[7] 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).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[8] 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. *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).

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[6] We affirm, as unchallenged on appeal, the administrative law judge's determination that Claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 34-42.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[8] The administrative law judge determined the irrebuttable presumption of total disability due to pneumoconiosis is not available in this case as there is no evidence that Claimant has complicated pneumoconiosis. Decision and Order on Remand at 33-34, *citing* 20 C.F.R. §718.304.

Legal Pneumoconiosis

To establish legal pneumoconiosis,[9] Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by," coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (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. Baker, Green, Broudy, and Rosenberg. Decision and Order on Remand at 28-33. Dr. Baker opined that Claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11; Employer's Exhibit 2. Similarly, Dr. Green opined that Claimant suffers from COPD due to both coal mine dust exposure and cigarette smoking. Claimant's Exhibits 3, 4. Conversely, Dr. Broudy opined that Claimant has COPD due solely to smoking, and Dr. Rosenberg opined that he has COPD due to smoking and asthma. Employer's Exhibits 1, 3, 4, 7.

The administrative law judge found the opinions of Drs. Baker and Green well documented and reasoned, and entitled to significant weight. Decision and Order on Remand at 28-29. Conversely, she determined the opinions of Drs. Broudy and Rosenberg are inadequately explained and inconsistent with the medical science the Department of Labor (DOL) relied on in the preamble to the 2001 revised regulations. *Id.* at 29-33. Therefore, the administrative law judge concluded the medical opinion evidence established the existence of legal pneumoconiosis. *Id*. at 33.

Employer contends the administrative law judge erred in crediting the opinions of Drs. Baker and Green because they relied on inaccurate coal mine employment and cigarette smoking histories to diagnose legal pneumoconiosis. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 5-8 [unpaginated]. We decline to address Employer's allegations, as the Board's prior affirmance of Judge Bergstrom's finding that Claimant established legal pneumoconiosis constitutes the law of the case.[10] *Coleman,*

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[9] The administrative law judge found the x-ray evidence did not support a finding of clinical pneumoconiosis. Decision and Order on Remand at 26-28. She did not further address this issue.

[10] Contrary to the administrative law judge's characterization, the Board did not indicate legal pneumoconiosis was an issue to be reconsidered on remand. *Coleman*, slip op. at 7-9, 11-12; Decision and Order on Remand at 3. Rather, the Board rejected

BRB No. 17-0510 BLA, slip op. at 11. Because Employer does not argue the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Disability Causation

To establish he is totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 601-02. Pneumoconiosis is a "substantially contributing cause" of Claimant's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially 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); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001).

The administrative law judge determined the opinions of Drs. Baker and Green established disability causation, while she discredited the contrary opinions of Drs. Broudy and Rosenberg because they failed to diagnose legal pneumoconiosis. Decision and Order on Remand at 42-44. Employer argues the administrative law judge's finding is erroneous, as Drs. Baker and Green relied on inaccurate employment and smoking histories. Employer's Brief at 8 [unpaginated]. This contention has no merit.

Employer's challenge to the crediting of the opinions of Dr. Baker and Green on disability causation is identical to its arguments raised in the present appeal on legal pneumoconiosis. Because Judge Bergstrom's crediting of the diagnoses of legal pneumoconiosis by Drs. Baker and Green is the law of the case, the administrative law judge did not err in determining their opinions credibly establish legal pneumoconiosis is a substantially contributing cause of Claimant's totally disabling impairment. 20 C.F.R. §718.204(c); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision

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Employer's argument Judge Bergstrom did not specifically address legal pneumoconiosis and affirmed as unchallenged his finding that the opinions of Claimant's medical experts were sufficient to establish legal pneumoconiosis. *Coleman*, slip op. at 8-9.

and Order on Remand at 43. In addition, we affirm as unchallenged on appeal the administrative law judge's discrediting of the opinions of Drs. Broudy and Rosenberg on disability causation.[11] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 43-44. As Employer raises no further challenge to the administrative law judge's finding Claimant established disability causation, it is affirmed. 20 C.F.R. §718.204(c); Decision and Order on Remand at 43-44. Having affirmed the administrative law judge's determination that Claimant established the requisite elements of entitlement, we further affirm the award of benefits.

Accordingly, the Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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[11] Employer does not raise any specific error in the administrative law judge's consideration of the disability causation opinions of Drs. Broudy and Rosenberg. Its contention that those opinions are the only ones warranting consideration is at best a request for a reweighing of the evidence not within the ambit of the Board's authority. (cite)