U.S. Department of Labor

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

BRB No. 20-0513 BLA

CECIL E. BRISTOW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EMERY MINING CORPORATION	)	
	)	
and	)	
	)	
ENERGY WEST MINING COMPANY, INCORPORATED	)	DATE ISSUED: 07/19/2021
	)	
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 of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Steven Winkelman (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order on Remand (2014-BLA-05797) rendered on a claim filed on September 3, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In a Decision and Order Denying Benefits dated April 26, 2017, Administrative Law Judge Colleen A. Geraghty credited Claimant with six and one-half years of coal mine employment. Thus she found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical pneumoconiosis and legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment. 20 C.F.R. §718.202(a)(1), (4). Although she found he established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), she found he failed establish his total disability is due to pneumoconiosis. 20 C.F.R. §718.204(c). Thus she denied benefits.

In consideration of Claimant's appeal and Employer's cross-appeal, the Board held Judge Geraghty properly weighed the medical opinions of Drs. Chavda, Sood, Selby, and Castle on the issue of legal pneumoconiosis. *Bristow v. Emery Mining Corp*., BRB Nos. 17-0441 BLA/A, slip op. at 3-7 (Oct. 19, 2018) (unpub.); *see* 20 C.F.R. §718.202(a). Thus the Board affirmed her finding Claimant established legal pneumoconiosis in the form of COPD arising out of coal mine employment. *Id*. The Board also affirmed her finding Claimant established total disability as the parties did not challenge it on appeal. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 3 n.2; *see* 20 C.F.R. §718.204(b)(2).

The Board held, however, Judge Geraghty applied an erroneous standard when addressing whether Claimant is totally disabled due to pneumoconiosis. *Bristow*, BRB

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Nos. 17-0441 BLA/A, slip op. at 7-11; *see* 20 C.F.R. §718.204(c). It concluded she erred by revisiting the question of whether Claimant's COPD is attributable to coal mine dust exposure rather than addressing the contribution Claimant's COPD/legal pneumoconiosis makes to his totally disabling respiratory or pulmonary impairment. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 7-11. The Board held remand for further consideration of this issue was unnecessary, however, because no factual issues remained to be determined and no further factual development was required. *Id*. The Board noted that all the doctors agreed Claimant is totally disabled by COPD, he established through the credible opinions of Drs. Chavda and Sood that his disabling COPD *is* legal pneumoconiosis, and there is no evidence of another condition that could have caused the disabling respiratory impairment other than COPD.[2] *Id*. Thus the Board concluded the opinions of Drs. Chavda and Sood establish that legal pneumoconiosis caused his total disability, satisfying Claimant's burden to prove the disability causation element. *Id*.; 20 C.F.R. §718.204(c). Based on the foregoing, the Board reversed the denial of benefits and remanded the case for an entry of an award of benefits.[3] *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 10-11.

Thereafter Employer appealed to the United States Court of Appeals for the Tenth Circuit,[4] which dismissed the appeal for lack of jurisdiction. *Energy West Mining Co. v. Director, OWCP* [*Bristow*], 790 F. App'x. 910, 911-13 (10th Cir. 2019). The court explained the Board's Decision and Order was not an appealable final order because the administrative law judge had not rendered a finding on the commencement date for benefits. *Id*.; *see* 20 C.F.R. §725.482.

Subsequently, the case was returned to the Office of Administrative Law Judges. Due to Judge Geraghty's retirement, it was reassigned to Administrative Law Judge Jonathan C. Calianos (the administrative law judge). In his July 31, 2020 Decision and

[2] The Board affirmed the administrative law judge's discrediting the contrary opinions of Drs. Selby and Castle on the issue of disability causation based on their failure to diagnose legal pneumoconiosis. *Bristow v. Emery Mining Corp*., BRB Nos. 17-0441 BLA/A, slip op. at 7-11 (Oct. 19, 2018) (unpub.).

[3] The Board declined to address Employer's allegations of error with respect to the issue of clinical pneumoconiosis as any error Judge Geraghty committed would be harmless. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 10 n.11.

[4] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 15.

Order on Remand that is the subject of this appeal, the administrative law judge reiterated Claimant established all the elements of entitlement. He entered an award of benefits commencing September 2013.

On appeal, Employer again challenges the finding of legal pneumoconiosis. On the issue of disability causation, it argues the Board exceeded its scope of review, misapplied the applicable regulations, and erred in reversing Judge Geraghty's finding. Both Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond urging the Board to reject Employer's arguments.

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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); *see* 30 U.S.C. §902(b). A "disease 'arising out of coal mine employment' 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).

As discussed above, the Board affirmed Judge Geraghty's finding Claimant established legal pneumoconiosis in the form of disabling COPD significantly due to coal mine dust exposure. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 3-7. In so holding, the Board rejected Employer's cross-appeal argument that the opinions of Drs. Chavda and Sood are insufficient to establish legal pneumoconiosis as a matter of law. *Id*. at 4-6. Citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014), the Board explained 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." *Id*. at 4-5, *quoting Groves*, 761 F.3d at 600. Thus the Board concluded Dr. Chavda's opinion that Claimant's COPD is due in part to coal mine dust exposure is sufficient to establish the existence of legal pneumoconiosis. *Id.* at 4-6; *see* 20 C.F.R. §718.201(a)(2), (b); Director's Exhibit 10; Employer's Exhibit 4. Further, the Board held Judge Geraghty was not required to separately determine whether Dr. Chavda's opinion establishes that coal dust exposure caused the pneumoconiosis at 20 C.F.R. §718.203 because her "finding at 20 C.F.R. §718.202(a)(4) [that Claimant's disabling COPD is significantly related to coal

mine dust exposure] necessarily subsumed that inquiry." *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 4-5 n.5.

With respect to Dr. Sood, because he opined Claimant's coal mine dust exposure was a "substantial contributory factor" to his COPD, the Board concluded the doctor's opinion was also sufficient to establish legal pneumoconiosis. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 5-6. The Board further affirmed the administrative law judge's permissible finding that the opinions of Drs. Sood and Chavda are well-reasoned and documented, and the contrary opinions of Drs. Selby and Castle are unpersuasive. *Id*.

Employer argues the Board should have applied the law of the Tenth Circuit, not the Sixth Circuit, in evaluating whether the administrative law judge erred in finding legal pneumoconiosis established. Employer's Brief at 21-24, 27-35. In the prior appeal, the Board indicated Claimant performed his coal mine employment in Kentucky, and thus applied the law of the Sixth Circuit. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 3 n.3. But Claimant performed his last coal mine employment in Utah, and thus the Board should have applied the law of the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 15.

We decline to revisit the Board's prior disposition of the legal pneumoconiosis issue, however, because there is no conflict between Sixth Circuit and Tenth Circuit case law. Both circuits acknowledge the applicable regulation at 20 C.F.R. §718.201(a)(2) states a miner may establish legal pneumoconiosis by proving he has a chronic lung disease or impairment and its sequelae arising out of coal mine employment. *See Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1214-15 (10th Cir. 2009) (legal pneumoconiosis is a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mining employment); *Andersen v. Director, OWCP*, 455 F.3d 1102, 1104 (10th Cir. 2006); *Groves*, 761 F.3d at 597-98 (miner must establish his obstructive lung disease arose out of coal mine employment to establish it constitutes legal pneumoconiosis).

In *Groves*, the Sixth Circuit interpreted the meaning of "arising out of coal mine employment." *Groves*, 761 F.3d at 597-99. It compared the regulation at 20 C.F.R. §718.201(b), which specifies "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," and the regulation at 20 C.F.R. §718.203(a), which specifies the miner's pneumoconiosis must arise at least in part out of coal mine employment. *Groves*, 761 F.3d at 597-99. The court explained, "reading [20 C.F.R.] §718.201 as imposing the only causal standard effectively negates the [20 C.F.R.] §718.203 causation inquiry[.]" *Id*., *quoting Southard v. Director, OWCP*, 732 F.2d 66, 72 (6th Cir. 1984). Thus, to harmonize the regulations, the Sixth

Circuit explained a miner can establish he has a chronic pulmonary disease or impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment "by showing that his disease was caused 'in part' by coal mine employment." *Id*.; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.203(a).

In support of its holding, the Sixth Circuit noted the Unites States Court of Appeals for the Fourth, Seventh, and Eleventh Circuits "have referred to both standards interchangeably." *Groves*, 761 F.3d at 598, *citing Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013) (doctor's opinion that COPD is due in part to coal mine dust exposure was supported by substantial evidence and sufficient to establish legal pneumoconiosis); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309 (4th Cir. 2012) (setting forth the "significantly related to, or substantially aggravated by" standard at 20 C.F.R. §718.201, then citing 20 C.F.R. §718.203(a) language as establishing the standard); *Freeman United Coal Mining Co. v. Director, OWCP* [*Shelton*], 957 F.2d 302, 303 (7th Cir. 1992) (the Act defines "coal workers' pneumoconiosis in accordance with the second, the broader, view, as any chronic lung disease caused in whole or part by exposure to coal dust"); *Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1264 n.9 (11th Cir. 1990); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1535 (11th Cir. 1987) ("20 C.F.R. §718.203(a) states that the proper causal inquiry is whether 'the miner's pneumoconiosis arose at least in part out of coal mine employment'" and a miner can carry his burden by showing "he suffers from a pulmonary impairment that is, at least in part, the result of exposure to coal mine dust."). Further, the Sixth Circuit recently revisited *Groves* and reiterated its conclusion. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n *Arch on the Green* we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

Employer fails to cite any Tenth Circuit decision inconsistent with the regulatory interpretation of the Fourth, Sixth, Seventh, and Eleventh Circuits on establishing legal pneumoconiosis. Although it cites *Andersen* to support its argument that the opinions of Drs. Chavda and Sood cannot establish legal pneumoconiosis under Tenth Circuit law, its reliance is misplaced. In that case, the Tenth Circuit did not disagree with its sister circuits or hold that a diagnosis of an obstructive impairment due in part to coal mine dust exposure cannot establish legal pneumoconiosis. Rather the Tenth Circuit rejected the miner's argument that he was entitled to a presumption that his COPD arose out of his coal mine employment, i.e., was presumed to be legal pneumoconiosis, because he had ten years of coal mine employment. *Anderson*, 455 F.3d at 1104-07. The court explained Congress did not intend to extend the ten-year presumption of pneumoconiosis causation to legal pneumoconiosis, and limited it to clinical pneumoconiosis. *Id*.; *see* 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203.

Based on the foregoing, we reiterate that the opinions of Drs. Chavda and Sood are sufficient to establish the existence of legal pneumoconiosis. *Oliver*, 555 F.3d at 1215; *Groves*, 761 F.3d at 597-99; *Cochran*, 718 F.3d at 322-23; Director's Exhibit 10; Claimant's Exhibit 8; Employer's Exhibits 4, 7.

The Board has already fully rejected Employer's remaining arguments on the issue of legal pneumoconiosis in its prior cross-appeal.[5] *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 3-7; Employer's Brief at 18-24, 26-35. Its holding remains the law of the case. *See Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Because Employer has not shown the Board's decision was clearly erroneous, or established any other exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *Id.*

Disability Causation

We next reject Employer's argument that the Board exceeded its scope of review by reversing Judge Geraghty's denial of benefits. Employer's Brief at 12-15. Contrary to Employer's characterization, we are not limited to reviewing only whether an administrative law judge's findings are supported by substantial evidence: they also must accord with law. 30 U.S.C. §932(a); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989). In reversing Judge Geraghty's denial of benefits, the Board concluded she "applied an erroneous standard in her analysis of whether the opinions of Drs. Chavda and Sood met [C]laimant's burden" on the issue of disability causation. *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 8; *see* 20 C.F.R. §718.204(c). Thus the Board concluded her findings were not in accordance with applicable law. Moreover, while factual determinations are the province of the administrative law judge, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins*, 751

[5] Employer argues Dr. Sood's opinion is not admissible in this case based on Rule 702 of the Federal Rules of Evidence's standards for testimony from expert witnesses and Kentucky common law evidence rules. Employer's Brief 18-24. An administrative law judge in black lung adjudications, however, is not bound by "common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. §554 and this subpart." 20 C.F.R. §725.455(b); *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-76 (1997). Moreover, the Board previously rejected Employer's related argument that the administrative law judge should have discredited Dr. Sood for basing his opinion on a "reasonable degree of medical certainty" rather than "absolute medical certainty." *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at n.6.

F.3d at 187 (reversing denial, with direction to award benefits without further administrative proceedings); *Adams*, 886 F.2d at 826 (same).

We also reject Employer's argument that the Board's holding "eliminates the 20 C.F.R. §718.204(c) disability causation element analysis" or the "substantially contributing cause" standard. Employer's Brief at 15-18. To the contrary, the Board correctly held there is only one rational outcome applying that standard to the indisputable facts in this case. Resolving a similar issue, the Sixth Circuit explained where all the medical experts "agreed that [the miner's] pulmonary problems were a significant cause of his total disability, the only question remaining was whether coal mine employment caused the pulmonary problems." *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). The legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability." *Id.*; *see also Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where miner's COPD constituted legal pneumoconiosis and all medical experts agreed that COPD contributed to miner's death); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 256 (2019).

Employer's remaining arguments challenge whether the evidence establishes total disability due to pneumoconiosis. Employer's Brief at 18-35. The Board's prior resolution of this issue also constitutes law of the case. *See Smith*, 760 F.3d at 1082; *Brinkley*, 14 BLR at 1-150-51; *Bristow*, BRB Nos. 17-0441 BLA/A, slip op. at 3-11. Because Employer has not shown 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 of this issue. *Id.* For the reasons set forth in the Board's prior decision, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge