U.S. Department of Labor

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

BRB No. 19-0389 BLA

WILLIAM K. ANDERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P & P COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 06/12/2020
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

William K. Anders, St. Charles, Virginia.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2017-BLA-05327) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 28, 2015.[2]

The administrative law judge found claimant established 12.89 years of underground[3] 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.[4] 30 U.S.C. §921(c)(4) (2012). Considering whether claimant is entitled to benefits without the presumption, the administrative law judge accepted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and therefore found he established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[5] He further found, however, claimant did not establish the existence of

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] On September 30, 1999, the district director denied claimant's most recent prior claim, filed on June 21, 1999, because he failed to establish pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment due to the disease. Director's Exhibit 2. Claimant took no further action until filing the current claim. Director's Exhibit 2.

[3] Claimant testified all of his coal mine employment occurred in underground mines. Decision and Order at 8; Hearing Transcript at 22.

[4] Section 411(c)(4) of the Act 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 impairment. 30 U.S.C. §921(c)(4)(2012); as implemented by 20 C.F.R. §718.305.

[5] 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 "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(d); *see 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(d)(2). The district director denied claimant's prior claim because he failed to

pneumoconiosis at 20 C.F.R. §718.202(a), a requisite element of entitlement, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer and its carrier (employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a response brief.[6]

In an appeal a claimant files without the assistance of counsel, the Board considers whether substantial evidence supports the decision and order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's findings of fact and conclusions if they are rational, supported by substantial evidence, and in accordance with law.[7] 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).

Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must prove he has at least fifteen years of coal mine employment either underground or on the surface in conditions substantially similar to those underground. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant has the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

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establish pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 1. Thus, he had to submit new evidence establishing one of these elements to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and thus a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 3; Hearing Transcript at 13.

In determining the length of claimant's coal mine employment, the administrative law judge considered his Social Security Administration (SSA) earnings records and hearing testimony. Decision and Order at 6-8; Director's Exhibit 5; Hearing Transcript at 5-22. Considering claimant's employment from 1950 to 1987,[8] the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii) by dividing his earnings for each year by the yearly average wage for 125 days as reported in Exhibit 610[9] of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order at 6-8. Where claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of employment; where claimant's wages were less, the administrative law judge credited him with a fraction of the year. Using this method, the administrative law judge found claimant has "10 full years in underground coal mine employment from 1972 through 1977, in 1982, and from 1984 through 1986. Decision and Order at 6. For partial years, he credited claimant with 0.02 of a year in 1950, 0.07 of a year in 1957, 0.22 of a year in 1970, 0.41 of a year in 1971, 0.03 of a year in 1978, 0.02 of a year in 1979, 0.39 of a year in 1980, 0.81 of a year in 1983, and 0.92 of a year in 1987, for a total of 2.89 years. Decision and Order at 8. Thus, he credited claimant with a total of 12.89 years of coal mine employment for the years 1950 through 1987. As substantial evidence supports this finding, we affirm it.

We note the administrative law judge used this same formula to find claimant had a full year of coal mine employment in 1981 but failed to add this year to claimant's total years of coal mine employment. Remand is not required on this basis, however, as the additional year brings claimant's total to 13.89 years, less than the fifteen years necessary to invoke the Section 411(c)(4) presumption.[10] *See Larioni v. Director, OWCP*, 6 BLR 1-

[8] Although the administrative law judge misstated that claimant "began working in the coal mining industry in 1970 and stopped in 1987," he correctly considered claimant's Social Security Administration earnings to credit claimant with coal mine employment in 1950 and 1957. Decision and Order at 6, 7; Director's Exhibit 5.

[9] 20 C.F.R. §725.101(a)(32)(iii) provides that if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

[10] Claimant alleged he had ten years of coal mine employment in his 1999 claim and twelve years in his 2015 claim. Director's Exhibits 1, 2. His lay representative agreed to

1276 (1984). Thus we affirm the administrative law judge's determination claimant is unable to invoke the presumption.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits without a presumption, claimant must establish disease (pneumoconiosis);[11] 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).

Existence of Pneumoconiosis

Clinical Pneumoconiosis

In considering whether claimant established clinical pneumoconiosis,[12] the administrative law judge considered eight interpretations of four x-rays, dated August 10, 2015, September 28, 2015, June 2, 2016, and February 15, 2018. 20 C.F.R. §718.202(a)(1); Decision and Order at 8, 9, 23, 24; Director's Exhibits 9, 18, 19, 22, 27; Claimant's Exhibit 2; Employer's Exhibits 1, 2. He accurately noted all of the physicians interpreting the chest x-rays are dually-qualified as Board-certified radiologists and B readers. *Id*.

13.61 years of coal mine employment at the hearing, which was the same length the district director found. Decision and Order at 4, 6; Hearing Transcript at 22; Director's Exhibit 2.

[11] 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). 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).

[12] Because there is no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding claimant cannot 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); *see* 20 C.F.R. §718.304; Decision and Order at 21.

Dr. Wolfe interpreted the August 10, 2015 x-ray as negative for pneumoconiosis, while Dr. DePonte interpreted it as positive. Director's Exhibits 18, 22. The administrative law judge determined this x-ray is inconclusive because an equal number of dually-qualified radiologists read the film as positive and negative for pneumoconiosis. Decision and Order at 24. Concerning the July 27, 2017 x-ray, Dr. Kendall interpreted it as negative for pneumoconiosis. Employer's Exhibit 2. The administrative law judge found this x-ray negative for pneumoconiosis because there is no contrary interpretation. Decision and Order at 24. Drs. Miller and DePonte interpreted the September 28, 2015 x-ray as positive for pneumoconiosis, while Dr. Adcock interpreted it as negative for pneumoconiosis. Director's Exhibits 9, 19; Claimant's Exhibit 2. Similarly, Dr. DePonte interpreted the June 2, 2016 x-ray as positive for pneumoconiosis, while Dr. Adcock interpreted it as negative for pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 1. Concluding Dr. Adcock has "somewhat" superior qualifications compared to the other dually-qualified radiologists because he published numerous articles in the field of radiology, the administrative law judge found the September 28, 2015 and June 2, 2016 x-rays negative for pneumoconiosis. Decision and Order at 24.

The administrative law judge did not satisfy the Administrative Procedure Act (APA).[13] 5 U.S.C. §557(c)(3)(A). While he stated Dr. Adcock "has been published 13 times," including an article relating to chronic obstructive pulmonary disease (COPD), the administrative law judge did not explain how his publications relate to radiology or why they render Dr. Adcock's readings more credible. 20 C.F.R. §718.202(a)(1) ("consideration shall be given to the *radiological* qualifications of the physicians" whose x-ray interpretations are in conflict)(emphasis added); *see generally* 65 Fed Reg. 79920, 79945 (Dec. 20, 2000) (adjudicator should consider any relevant factor in assessing a physician's credibility and each party may prove or refute the relevance of that factor), *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993) (administrative law judge may consider relevant academic qualifications such as whether a physician is a professor of radiology in weighing the x-ray evidence); *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 24. We therefore vacate his finding claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R.

[13] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "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).

§718.202(a)(1) and remand the case for further consideration of the x-ray evidence in accordance with the APA.[14]

The administrative law judge next considered the opinions of Drs. Ajjarapu, Fino, and Jarboe. Dr. Ajjarapu diagnosed clinical pneumoconiosis, while Drs. Fino and Jarboe did not. Director's Exhibits 9, 23; Employer's Exhibits 4, 6, 8. The administrative law judge discounted Dr. Ajjarapu's diagnosis of clinical pneumoconiosis because it is based on an x-ray he found inconclusive. Decision and Order at 25. He also found Dr. Ajjarapu's opinion outweighed by Dr. Fino's and Dr. Jarboe's opinions that claimant does not have clinical pneumoconiosis and his finding the x-ray evidence as a whole does not establish clinical pneumoconiosis. *Id*. Further, he accorded greater weight to Dr. Fino's opinion because it is based on multiple x-ray readings. *Id*. As we vacate the administrative law judge's finding claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), we must also vacate his finding claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the medical opinion evidence.

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 administrative law judge considered the opinions of Drs. Ajjarapu, Fino, and Jarboe. Dr. Ajjarapu opined claimant has legal pneumoconiosis in the form of chronic bronchitis related to coal mine dust exposure and smoking. Director's Exhibit 9. Dr. Fino initially opined claimant has obstruction and emphysema unrelated to coal mine dust exposure. Director's Exhibit 23; Employer's Exhibit 6. He subsequently opined at his deposition that claimant does not have emphysema, but does have asthma unrelated to coal mine dust exposure. Employer's Exhibit 8. Dr. Jarboe opined claimant has chronic bronchitis and bronchial asthma unrelated to coal mine dust exposure. Employer's Exhibit 4.

The administrative law judge found the opinions of Drs. Ajjarapu and Jarboe well-documented and reasoned. Decision and Order at 26, 27. While he determined Dr. Fino's initial opinion that claimant had emphysema was not well-reasoned, the administrative law judge found his subsequent diagnosis of asthma unrelated to coal mine dust exposure well-documented and reasoned. *Id*. at 26. He gave greater weight to employer's experts on the basis that Dr. Fino considered a more extensive medical history than Dr. Ajjarapu and Dr.

[14] The record contains no biopsy evidence. 20 C.F.R. §718.202(a)(2).

Fino and Dr. Jarboe had superior qualifications. *Id.* The administrative law judge thus concluded claimant did not establish the existence of legal pneumoconiosis.

In crediting Dr. Fino's opinion, the administrative law judge did not satisfy the APA, 5 U.S.C. §557(c)(3)(A), and failed to properly apply the definition of legal pneumoconiosis as set forth at 20 C.F.R. §718.201(b). Decision and Order at 26, 27. The administrative law judge initially rejected Dr. Fino's attribution of claimant's obstructive impairment to emphysema unrelated to coal mine dust exposure as not well-reasoned. He credited, however, Dr. Fino's subsequent diagnosis of obstruction due to asthma, unrelated to coal mine dust exposure, on the basis that Dr. Fino "explained that asthma is a disease of the general population and is not caused by coal mine dust exposure." *Id.* He also noted Dr. Fino's explanation that there are two types of asthma, allergic and adult-onset, neither of which are caused by coal mine dust exposure. *Id.*

In accepting Dr. Fino's categorical statement that asthma is a general disease not caused or aggravated by coal mine dust inhalation, the administrative law judge did not adequately consider that "any chronic lung disease or impairment" can meet the definition of legal pneumoconiosis so long as it is "significantly related to, or substantially aggravated by" coal dust exposure. 20 C.F.R. §718.201(b). In the preamble to the 2001 revised regulations, the Department of Labor (DOL) relied upon the "prevailing view of the medical community" that coal mine dust exposure can cause COPD, a term that "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and *asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added); *Helen Mining Co. v. Elliott*, 859 F.3d 226, 240 (3d Cir. 2017), *citing* 65 Fed. Reg. at 79,943. Thus, the administrative law judge did not consider whether Dr. Fino credibly explained his opinions that coal dust does not cause or aggravate asthma and why claimant's obstructive impairment, even if properly diagnosed as asthma, is not "significantly related" to coal mine dust exposure. Moreover, if he accepts that claimant's asthma was not directly caused by coal mine dust exposure, the administrative law judge must address whether Dr. Fino credibly explained why he concluded claimant's coal mine dust exposure could not have "substantially aggravate[d]" his asthma. *See Wojtowicz*, 12 BLR at 1-165; *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323-24 (4th Cir. 2013) (whether a particular miner's COPD/asthma is significantly related to, or substantially aggravated by, dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record).

Nor did the administrative law judge adequately address whether Dr. Jarboe credibly explained his conclusion claimant does not have legal pneumoconiosis. *See* Wojtowicz, 12 BLR at 1-165. As discussed, Dr. Jarboe attributed claimant's obstructive impairment to both chronic bronchitis and bronchial asthma but opined coal mine dust

exposure did not contribute to either. The administrative law judge noted Dr. Jarboe "formed" his opinion based on the significant reversibility of the miner's respiratory impairment, with 23% improved FVC after bronchodilators on pulmonary function testing. Decision and Order at 27. He further noted Dr. Jarboe stated the reversibility, together with the fixed airway obstruction and normal diffusion capacity, is very suggestive of bronchial asthma. *Id*. The administrative law judge did not, however, consider that the pulmonary function studies Dr. Jarboe conducted still supported a finding of total disability after bronchodilation or address whether he credibly explained why coal mine dust exposure did not cause the fixed portion of his respiratory impairment. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Director, OWCP* [*Banks*], 690 F.3d 477 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 27. The administrative law judge also noted Dr. Jarboe stated claimant's bronchitis symptoms "would have long since cleared" as he had not been in the coal mines for "over" thirty years. Decision and Order at 27. He did not, however, address whether Dr. Jarboe's reasoning conflicts with the recognition pneumoconiosis can be "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion that is not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited).

Because the administrative law judge did not critically analyze the bases for the physicians' opinions that claimant's coal mine dust exposure did not contribute to his respiratory impairment, we must vacate his finding the opinions of Drs. Fino and Jarboe entitled to more weight than Dr. Ajjarapu's. We thus vacate his finding claimant failed to establish the existence of legal pneumoconiosis and remand the case for further consideration of the medical opinion evidence. *See Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.202(a)(4).

Remand Instructions

On remand, the administrative law judge must reconsider whether the medical opinion evidence, including claimant's treatment records, establishes the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). He should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Moreover, he must weigh all of the relevant evidence together under 20 C.F.R. §718.202(a) to determine whether claimant suffers from legal pneumoconiosis. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000).

The administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If claimant establishes pneumoconiosis on remand, the administrative law judge must consider whether he has established the remaining elements of entitlement. If the administrative law judge finds claimant has not established pneumoconiosis, claimant will have failed to establish an essential element of entitlement. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge