U.S. Department of Labor

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

BRB No. 19-0116 BLA

BARTER COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STURGEON MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 03/16/2020
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Paul Jones, Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05258) of Administrative Law Judge Richard M. Clark rendered 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 June 27, 2014.[1]

The administrative law judge credited claimant with less than fifteen years of coal mine employment and therefore found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Decision and Order at 6, 15. Considering whether claimant established entitlement to benefits without the benefit of this presumption,[3] the administrative law judge found the new evidence established the existence of legal pneumoconiosis,[4] a totally disabling respiratory impairment, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4); 718.204(b), (c); 725.309(c). He therefore found claimant demonstrated

[1] On February 7, 2000, the district director denied claimant's prior claim, filed on October 18, 1999, because the evidence did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no further action until filing the current subsequent claim on June 27, 2014. 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 in cases where the claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The administrative law judge also 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 at 16, *citing* 20 C.F.R. §718.304.

[4] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

a change in an applicable condition of entitlement[5] and awarded benefits.[6] Decision and Order at 22.

On appeal, employer challenges the administrative law judge's findings that claimant established legal pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[7]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C.

[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 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). Claimant's prior claim was denied because he did not establish any of the conditions of entitlement. Director's Exhibit 1. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing one element of entitlement. *See* 20 C.F.R. §725.309(c).

[6] The administrative law judge considered the old and new evidence together and permissibly relied upon the evidence submitted with the current claim, which he found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 16.

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant established over fourteen but fewer than fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 15, 21.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1 at 88; 4; 6; 8; 27.

§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).

To be entitled to benefits under the Act, claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is due to pneumoconiosis. 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

I. Existence of Pneumoconiosis – 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(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held this standard requires claimant to establish his lung disease or impairment was caused "in part" by coal mine employment. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

In considering whether claimant met this burden, the administrative law judge reviewed the medical opinions of Drs. Ammisetty, Westerfield, and Jarboe. Decision and Order at 16-19. The administrative law judge found that Dr. Ammisetty diagnosed legal pneumoconiosis in the form of chronic bronchitis, bronchial asthma, and chronic obstructive pulmonary disease due to a combination of coal dust exposure and cigarette smoking. Decision and Order at 9. He found Dr. Westerfield "conceded" legal pneumoconiosis because he diagnosed chronic obstructive pulmonary disease (COPD) resulting from cigarette smoking, but "could not exclude a contribution of coal mine dust to his respiratory injury." *Id.* at 9-10, 18. He found Dr. Jarboe opined claimant does not have legal pneumoconiosis but has allergic rhinitis and severe obstructive airways disease due to cigarette smoking and bronchial asthma. *Id.* at 11-12. The administrative law judge credited Dr. Ammisetty's opinion as reasoned and documented and supported by the opinion of Dr. Westerfield. Decision and Order at 19. Conversely, he discredited Dr. Jarboe's opinion as inadequately explained. Therefore, he found the medical opinion evidence established legal pneumoconiosis. *Id.*

We reject employer's argument the administrative law judge discredited Dr. Jarboe's opinion based on the application of an incorrect standard, and affirm he provided

valid reasons for finding Dr. Jarboe's opinion inadequately reasoned.[9] The administrative law judge correctly noted Dr. Jarboe relied, in part, on studies showing that smoking is more harmful and causes a greater loss of FEV1 than the inhalation of coal mine dust. Decision and Order at 11-12, 19; Director's Exhibit 19 at 11-12. He further stated it was "not likely" claimant, a surface miner, experienced the same level of coal mine dust exposure as underground miners and therefore "highly unlikely" he would have developed clinically significant airflow obstruction due to dust exposure. Director's Exhibit 19 at 12. The administrative law judge permissibly discredited Dr. Jarboe's opinion because it relies, in part, on statistical generalities and does not explain how Dr. Jarboe was able to determine that coal mine dust was not a contributing or aggravating factor in claimant's individual case. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19. We therefore affirm the administrative law judge's permissible discounting of Dr. Jarboe's opinion as supported by substantial evidence and in accordance with law. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

We further reject employer's argument the administrative law judge erred in crediting Dr. Ammisetty's opinion because it is based on inaccurate coal mine employment and smoking histories. Employer's Brief at 6-7. Employer concedes Dr. Ammisetty provided a supplemental opinion acknowledging an employment history of fourteen years, consistent with the administrative law judge's findings, *id.* at 6, and he reiterated his diagnosis of legal pneumoconiosis based on that revised history.

Similarly, the administrative law judge found claimant smoked "for at least 40 years, from a few cigarettes a day up to two packs of cigarettes a day, and that he continues

[9] The administrative law judge initially stated correctly that "[c]laimant must prove that he has pneumoconiosis," and that legal pneumoconiosis includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 14-17; *citing* 20 C.F.R. § 718.201(b). He subsequently stated Dr. Jarboe failed to show that coal mine dust exposure had "not at all aggravated" claimant's impairment which, as employer asserts, could be interpreted as a "stricter more stringent" standard. Employer's Brief at 9, *referencing* Decision and Order at 18. Dr. Jarboe, however, ruled out all contribution by coal mine dust exposure. Employer's Exhibit 3 at 14. The administrative law judge did not discredit Dr. Jarboe for failing to satisfy a particular standard; rather, he did not credibly support his own conclusion that he could rule out all contribution by coal mine dust exposure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 19.

to smoke." Decision and Order at 6. Dr. Ammisetty considered a history of ten cigarettes a day, or half a pack, for thirty-eight years, and acknowledged claimant continues to smoke. Director's Exhibit 14 at 28. As Dr. Ammisetty relied on employment and smoking histories within the range the administrative law judge found, employer has not shown how the administrative law judge's determination to credit his opinion constitutes error. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Nor did Dr. Ammisetty rely solely on claimant's symptoms in diagnosing legal pneumoconiosis, as employer asserts. Employer Brief at 7-8. As the administrative law judge noted, Dr. Ammisetty examined claimant and based his diagnosis on clinical findings and objective testing, including pulmonary function studies suggestive of severe obstruction and blood gas studies reflecting hypoxia, as well as his history of smoking and coal mine dust exposure. Decision and Order at 17; Director's Exhibit 14. Further, contrary to employer's contention, Dr. Ammisetty did not "simply state" that claimant "may have been exposed to significant coal dust, so he has legal pneumoconiosis." Employer's Brief at 7, *referencing* Director's Exhibit 14. In his initial report Dr. Ammisetty recorded claimant "was exposed to significant coal dust and rock dust" inhaled from 1994 to 2012. Director's Exhibit 14 at 27. Dr. Ammisetty noted that while it was very difficult to differentiate the percentage of contribution by coal dust exposure and smoking, claimant's chronic bronchitis, bronchial asthma, COPD and hypoxia were "definitely" "substantially exacerbated" by coal dust exposure. *Id.*

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012). The administrative law judge specifically found Dr. Ammisetty's opinion supported by objective studies. Decision and Order at 17. He further permissibly found it consistent with the Department of Labor's recognition that the effects of smoking and coal dust exposure can be additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 17. Because it is based on substantial evidence, we affirm the administrative law judge's permissible determination that Dr. Ammisetty's opinion is well reasoned and documented and sufficient to satisfy claimant's burden of proof to establish legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"); Decision and Order at 17.

We agree with employer, however, that the administrative law judge erred in his evaluation of Dr. Westerfield's opinion because of unresolved conflicts in his testimony. As the administrative law judge acknowledged, Dr. Westerfield stated "because [claimant]

has sufficient coal mine employment history to develop legal pneumoconiosis I cannot exclude a contribution of coal mine dust to [his] respiratory injury." Decision and Order at 17; Employer's Exhibit 18 at 6. He also stated "because [claimant] does have some respiratory impairment and . . . coal mine dust exposure one cannot rule out legal pneumoconiosis. So you can make a diagnosis of legal pneumoconiosis." *Id.* at 17-18.

But the administrative law judge also noted that Dr. Westerfield further opined "[t]he big issue is did the coal mine dust cause his respiratory impairment, and my opinion in that is no." Employer's Exhibit 5 at 14. He also asserted he could "rule out [claimant's] 14 years of surface mining as a causative factor" in his pulmonary impairment, and concluded "[claimant] has COPD as a result of his cigarette smoking." Employer's Exhibit 5 at 14-15.

In light of Dr. Westerfield's conflicting opinion, we agree with employer the administrative law judge did not sufficiently explain his conclusions that Dr. Westerfield "conceded" claimant has legal pneumoconiosis and that his opinion supports Dr. Ammisetty's diagnosis of legal pneumoconiosis. Decision and Order at 18. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We therefore vacate his finding claimant established the existence of legal pneumoconiosis and instruct him to reconsider this issue on remand. 20 C.F.R. §718.202(a)(4). The administrative law judge must consider all the relevant medical opinions in determining whether claimant has met his burden of proof. *See 2*0 C.F.R. §718.202(a)(4).

Because we have vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, we must also vacate the administrative law judge's finding that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[10] On remand, after the administrative law judge considers whether the evidence establishes legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), he must determine whether the evidence establishes that legal pneumoconiosis is a

[10] For this reason, we do not reach the merits of employer's argument that the administrative law judge erred in concluding claimant's total disability is due to his legal pneumoconiosis. 20 C.F. R. §718.204(c); Employer's Brief at 12-13.

substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c); *see Groves*, 761 F.3d at 599; *Banks*, 690 F.3d at 490; *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611 (6th Cir. 2001).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge