U.S. Department of Labor

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

BRB No. 20-0215 BLA

VESS HALL, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 05/27/2021
ARROW INDEMNITY formerly THE FIRE & CASUALTY COMPANY OF CONNECTICUT	)	
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Dana Rosen's Decision and Order Awarding Benefits (2019-BLA-05132) rendered on a claim

filed on June 15, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found the evidence did not establish complicated pneumoconiosis, and thus Claimant was 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. Because she credited Claimant with fewer than fifteen years of coal mine employment, Claimant was also unable to invoke the rebuttable presumption he is totally disabled 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, the administrative law judge found Claimant established total disability due to legal pneumoconiosis, and she awarded benefits.[2] 20 C.F.R. §§718.202(a), 718.204(b), (c).

On appeal, Employer challenges the administrative law judge's findings that Claimant established legal pneumoconiosis, he is totally disabled, and his total disability is due to legal pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Benefits Review 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.[3] 33 U.S.C. §921(b)(3), as incorporated

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] "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). The definition 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). "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). The administrative law judge found Claimant did not establish clinical pneumoconiosis.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See*

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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) 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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate 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). Claimant can satisfy this burden "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). Relevant to this issue, the administrative law judge found Claimant has 10.31 years of coal mine employment and a forty-six pack-year smoking history. Decision and Order at 8, 10.

The administrative law judge credited the opinions of Drs. Forehand and Banick that Claimant has legal pneumoconiosis over the contrary opinion of Dr. Fino. Decision and Order at 37-38. Employer alleges Dr. Forehand did not have an accurate understanding of Claimant's smoking history,[4] and therefore his opinion is not credible to satisfy Claimant's burden of proof. Employer asserts that its own medical expert, Dr. Banick, also did not have an accurate understanding of either Claimant's coal mine employment history or his smoking history. It maintains that Dr. Banick's opinion on legal pneumoconiosis is based on his mistaken belief that Claimant had sufficient coal mine employment to invoke

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 6; Employer's Post-Hearing Brief at 4.

[4] Employer acknowledges Dr. Forehand corrected his opinion regarding the length of Claimant's coal mine employment, but asserts that because he still relied on an inaccurate smoking history, it cannot be inferred his opinion would be the same if confronted with an accurate smoking history. Employer's Brief at 10-11.

the Section 411(c)(4) presumption. Employer further contends the administrative law judge erred in discrediting Dr. Fino's opinion. We reject Employer's arguments as they lack merit. Employer's Brief at 10-12, 12-15.

Dr. Forehand conducted the Department of Labor (DOL) pulmonary evaluation. Director's Exhibit 14. In his initial report, he diagnosed legal pneumoconiosis in the form of "mixed restrictive-obstructive lung disease" caused by sixteen years of coal mine dust exposure and thirty-six years of smoking. *Id*. In a supplemental report responding to DOL's letter requesting that he reconsider his opinion on legal pneumoconiosis assuming Claimant worked "9 years and 4 months as a coal miner," instead of sixteen years, Dr. Forehand stated:

> When I take into consideration [Claimant's] work history and the dusty conditions in which he worked, I find that *9 years 4 months is a sufficient length of time to aggravate substantially his airways, already inflamed by the effects of smoking cigarettes.* The lack of response to bronchodilator points to the role played by exposure to coal mine dust, because exposure to coal mine dust causes irreversible airway obstruction… Although the principal cause of [Claimant's] obstructive lung disease is cigarette smoking, his exposure to coal mine dust working at the face of poorly ventilated coal mines substantially contributed to his obstructive lung disease and totally disabling respiratory impairment.

Director's Exhibit 19, 20 (emphasis added).

Although Dr. Forehand relied on a smoking history that was ten years less than the administrative law judge found, he specifically opined that smoking was the "principal" cause of Claimant's impairment. Director's Exhibit 20. He also explained why Claimant's coal mine dust exposure substantially aggravated Claimant's respiratory impairment primarily caused by smoking. *Id*. The administrative law judge permissibly found Dr. Forehand's opinion reasoned and documented because it is supported by physical examination findings, Claimant's respiratory symptoms, objective testing, Claimant's smoking history, and Dr. Forehand's description of Claimant's significant coal mine dust exposure.[5] *See Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983); *Sellards v.*

[5] Dr. Forehand described Claimant's working conditions as "frequent double shifts" working for "up to 6 straight days" and in "poorly ventilated" coal mines without wearing a mask; "no water" at the "face and return of the mine"; and "frequent blow outs" while the "dust box was inoperable." Decision and Order at 15, 16, 31; Director's Exhibits 14, 20.

Director, OWCP, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 31; Director's Exhibits 14, 20. Additionally, the administrative law judge permissibly found Dr. Forehand's opinion persuasive because it is consistent with DOL's position in the preamble to the 2001 revised regulations that the effects of smoking and coal mine dust exposure may be additive in causing obstructive lung disease. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 31-32; Director's Exhibits 14, 20. Thus, we affirm the administrative law judge's finding that Dr. Forehand's opinion is credible and sufficient to establish Claimant has legal pneumoconiosis.[6] *See Groves*, 761 F.3d at 599; Decision and Order at 31-32; Director's Exhibit 20.

Dr. Fino opined Claimant's obstructive respiratory impairment was due solely to cigarette smoking. Employer's Exhibit 6 at 4. As the administrative law judge accurately noted, Dr. Fino's rationale was based on various medical studies detailing the differences in the loss in FEV1 from coal mine dust exposure compared to the loss of FEV1 from smoking. Decision and Order at 33; Employer's Exhibit 6 at 4-10. Based on those studies, Dr. Fino explained that ninety percent of miners have a loss in FEV1 which does not cause impairment; therefore, a miner must have an above average loss of FEV1 to show a coal mine dust-related impairment. Employer's Exhibit 6 at 4.

The administrative law judge correctly noted, however, that Dr. Fino did not explain whether Claimant has an above average loss in FEV1, although he did observe Claimant's FVC and FEV1 values were "low and disabling." Decision and Order at 33-34. The administrative law judge permissibly found Dr. Fino's opinion on legal pneumoconiosis unpersuasive because he did not relate the medical studies he relied on to the specifics of Claimant's case. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir.

[6] Dr. Banick cited the regulatory definition of legal pneumoconiosis and opined he could not "rule out coal dust exposure as contributory to, and/or aggravating [Claimant's] (underlying) pulmonary condition, symptoms and decreased DLCO." Employer's Exhibit 1 at 7. He specifically stated that Claimant "meets the definition of legal pneumoconiosis." *Id*. While it is true Dr. Banick relied on inaccurate coal mine employment and smoking histories, we consider any error by the administrative law judge in crediting Dr. Banick's opinion on legal pneumoconiosis harmless, based on our affirmance of the administrative law judge's crediting of Dr. Forehand's opinion and discrediting of Dr. Fino's opinion, as discussed infra. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

2020); *Rowe*, 710 F.2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 33-34; Employer's Exhibit 6 at 4.

We also reject Employer's contention the administrative law judge's analysis of Dr. Fino's opinion reflects bias because she noted that he used a boilerplate phrase in his report; his curriculum vitae was undated and therefore she was unable to fully determine his current credentials;[7] and Dr. Fino relied on several medical studies and articles that were conducted or written over twenty-five to thirty years ago.[8] Employer's Brief at 12-14. A charge of bias against an administrative law judge is not to be made lightly and must be substantiated by concrete evidence of prejudice against a party's interest, which is a heavy burden for the charging party to satisfy. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Employer clearly has not met its burden. It points to no evidence to show the administrative law judge was prejudiced against Dr. Fino. Notably, the administrative law judge did not reject Dr. Fino's opinion for using boilerplate language. She noted his statement that a negative or 1/0 chest x-ray will result in only a "7% additional loss of FEV1 due to coal dust" and therefore "if we gave this gentleman back 7% of his FEV1 he'd still be disabled." Decision and Order at 22. Because Dr. Fino had made this identical statement in at least one prior case, the administrative law judge questioned whether this statement was simply "boilerplate." *Id.* She nevertheless concluded that "it appears Dr. Fino may be referring to *this Claimant*." *Id*. (emphasis added).

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179,

[7] Employer does not explain how the administrative law judge's treatment of Dr. Fino's qualifications was prejudicial. She acknowledged he is Board-certified in internal medicine, with a subspecialty in pulmonary medicine, and the Director of the Medical and Surgical ICU, the Pulmonary and Critical Care Clinical Leadership Group, and the Critical Medical Section at St. Clair Hospital in Pittsburgh, Pennsylvania. Decision and Order at 20. She also took official notice that he is listed as a member of Clinical & Occupational Pulmonary Associates, LLC, and Critical Care and Pulmonary Associates, LLC. *Id*. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *see* 29 C.F.R. §18.84.

[8] Contrary to Employer's contention, while the administrative law judge noted the age of some of the medical studies and articles regarding emphysema, she permissibly did so in the context of pointing out that Dr. Fino did not explain how they related to Claimant's case. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 33-34; Employer's Exhibit 6 at 4-10.

185 (6th Cir. 1989). Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established the existence of legal pneumoconiosis based on Dr. Forehand's opinion. 20 C.F.R. §718.202(a)(4); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 30-35.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[9] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge noted correctly the parties stipulated that Claimant is totally disabled based on the qualifying pulmonary function study evidence. Decision and Order at 3, 29 at n.11, 35-36; Employer's Post-Hearing Brief at 4, 12; Hearing Transcript at 6-7; *see also* Employer's Brief at 4. She also weighed the evidence on total disability and found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole. Decision and Order at 35-36.

Employer's only challenge to the administrative law judge's total disability finding is that she merely counted the pulmonary function tests to find Claimant totally disabled. Employer's Brief at 14. However, Employer does not explain why it is not bound by its stipulation regarding the pulmonary function study evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (a party is bound by its stipulations and concessions); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109-10 (1985); Decision and Order at 35-36; Employer's Brief at 14. Furthermore, Employer raises no other arguments

[9] The administrative law judge found the blood gas study evidence is non-qualifying, and there is no evidence to establish Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14.

regarding her weighing of the medical opinion evidence or the evidence as a whole. Therefore, we affirm the administrative law judge's determination that Claimant established total disability. 20 C.F.R. §718.204(b)(2).

Disability Causation

To establish that his total disability is 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)(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).

Employer asserts the administrative law judge erred in requiring it to establish "no part of Claimant's respiratory disability was caused by pneumoconiosis." Employer's Brief at 14. Contrary to Employer's argument, the administrative law judge properly recognized that Claimant had the burden of proof and applied the correct legal standard when weighing the conflicting medical opinions. *See* Decision and Order at 36-37. Her uses of the term "rule out" were simply references to the physicians' own opinions as to whether they completely excluded coal dust as a cause of Claimant's total disability; Drs. Banick and Fino specifically phrased their opinions in terms of whether they could "rule out" such a contribution. *Id.*; Employer's Exhibit 1 at 7 (Dr. Banick stating that "As I cannot rule out coal dust exposure as contributory to, and/or aggravating [Claimant's] (underlying) pulmonary condition, symptoms, and decreased DLCO, he meets the definition of legal pneumoconiosis."); Employer's Exhibit 6 at 10 (Dr. Fino stating that "With reasonable certainty, I can rule out coal dust as causing, contributing to, or making his disabling obstructive lung disease any worse.").

Because all of the physicians agree Claimant has a disabling respiratory impairment, the administrative law judge's analysis of the etiology of that impairment encompassed both the issues of legal pneumoconiosis and disability causation. As she correctly noted, Dr. Forehand opined that Claimant's legal pneumoconiosis substantially contributed to his respiratory disability because he believed Claimant's dust exposure at the face of the mines significantly aggravated his disabling respiratory impairment caused by smoking. Decision and Order at 36; Director's Exhibit 20. Dr. Forehand also explained that Claimant's lack of bronchodilator response "points to the role played by coal mine dust exposure" because pneumoconiosis is associated with irreversible airways obstruction. Director's Exhibit 20. The administrative law judge permissibly credited Dr. Forehand's opinion as reasoned and documented, and sufficient to satisfy Claimants' burden to establish that legal pneumoconiosis substantially contributed to his respiratory disability.

See Dixie Fuel Co. v. Director, OWCP [*Hensley*], 820 F.3d 833, 847-48 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and contributed to the miner's disabling impairment satisfies the substantially contributing cause standard); *Rowe*, 710 F.2d at 255; Decision and Order at 36.

Regarding Dr. Fino's opinion, the administrative law judge permissibly found he relied on "medical article generalizations" and failed to explain how they pertained to Claimant's case. Decision and Order at 37; *see Hensley*, 820 F.3d at 847-48; *Crisp*, 866 F.2d at 185; Employer's Exhibit 6 at 10. She also rationally found that Dr. Fino's opinion on disability causation is not credible because he did not diagnose legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 37. We therefore affirm the administrative law judge's rejection of Dr. Fino's opinion.[10] Decision and Order at 37.

Because it supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established that he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 38.

[10] We affirm, as unchallenged, the administrative law judge's rejection of Dr. Banick's opinion as to the cause of Claimant's respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge