U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0317 BLA
and 16-0317 BLA-A

RUTH LEE NEAL (o/b/o THOMAS H. NEAL, deceased) Claimant-Petitioner Cross-Respondent v. UNION CARBIDE CORPORATION Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/13/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2012-BLA-6207) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 13.93 years[2] of coal mine employment.[3] Based on his finding that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304. Therefore, the administrative law judge found that claimant could not invoke the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). In addition, the administrative law judge found that the evidence did not establish the existence of either clinical or legal pneumoconiosis[4] at 20 C.F.R. §718.202(a). Therefore, the administrative law judge also

[1] The miner's first claim for benefits, filed on October 19, 1987, was denied by Administrative Law Judge Victor Chao on June 6, 1990, because the miner did not establish any element of entitlement. Director's Exhibit 1. The miner filed his current claim on September 26, 2011. Director's Exhibit 3. It was pending when he died, and claimant, his surviving spouse, is pursuing the miner's claim on behalf of his estate. Administrative Law Judge Exhibit 3.

[2] Because the miner had less than fifteen years of coal mine employment, claimant cannot invoke the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2 n. 1; Director's Exhibit 4.

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

found that claimant failed to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the medical evidence when he found that it did not establish that the miner had clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with claimant that the administrative law judge erred in weighing the x-ray and CT-scan evidence regarding clinical pneumoconiosis. Employer has filed a cross-appeal, arguing that the administrative law judge erred in discrediting Dr. Zaldivar's medical opinion that the miner did not have legal pneumoconiosis. Claimant responds to employer's cross-appeal, arguing that the administrative law judge properly weighed Dr. Zaldivar's opinion.[5]

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. 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory

---

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).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had 13.93 years of coal mine employment, and that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309, but did not establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 22-24, 27-31.

or pulmonary impairment 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. *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).

I. CLINICAL PNEUMOCONIOSIS

Claimant contends that the administrative law judge erred in finding that the x-ray, CT scan, and medical opinion evidence did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), because he did not address a credibility issue that claimant raised below regarding the x-ray and CT scan readings of the physician whose negative readings the administrative law judge ultimately credited in denying benefits. For the reasons set forth below, we agree with claimant.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of two x-rays dated October 20, 2011 and August 22, 2012. Dr. Gaziano, a B reader, and Dr. Smith, a dually-qualified Board-certified radiologist and B reader, read the October 20, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer, also a dually-qualified radiologist, read this x-ray as negative. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Smith read the August 22, 2012 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative. Claimant's Exhibit 2; Employer's Exhibit 2.

Relevant to the issue raised by claimant on appeal, part of Dr. Meyer's rationale for concluding that the miner's x-rays and CT scans were negative for pneumoconiosis was that the opacities seen were linear and irregular and were located in the lower lung zones, whereas, in Dr. Meyer's opinion, clinical pneumoconiosis typically appears as rounded or nodular opacities, predominantly in the upper lung zones. Employer's Exhibit 7 at 19, 34. In claimant's closing brief to the administrative law judge, claimant argued that Dr. Meyer's negative readings should not be credited because his opinion that the shape and location of the miner's opacities were not consistent with pneumoconiosis was called into question by findings in recent medical literature. Claimant's Post-Hearing Brief at 5 (citing and discussing Laney and Petsonk, *Small pneumoconiotic opacities on U.S. coal workers' surveillance chest radiographs are not predominantly in the upper lung zones*, Am. J. Indus. Med., 55: 793-98 (2012)); *see also* Claimant's Exhibit 9 at 11, 17 (Dr. Sood's medical report, citing and quoting the same study).

In resolving the conflicting x-ray readings, the administrative law judge identified the additional radiological qualifications of Drs. Smith and Meyer,[6] and found that "Dr. Meyer is the best qualified radiologist . . . ." Decision and Order at 31. Based on Dr. Meyer's superior credentials, the administrative law judge found that the October 20, 2011 and August 22, 2012 x-rays were negative for pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge next considered readings of two CT scans dated June 9, 2010 and November 22, 2011. Dr. Smith[7] read both CT scans as positive for pneumoconiosis, while Dr. Meyer read both CT scans as negative. Claimant's Exhibit 6; Employer's Exhibit 4. In resolving the conflict in the CT scan evidence the administrative law judge deferred to Dr. Meyer's superior credentials, and found that the June 9, 2010 and November 22, 2011 CT scans were negative for pneumoconiosis.[8]

[6] The administrative law judge noted that Dr. Smith "is licensed in four states and currently operates his own radiology practice in the towns of New Cumberland and Millersburg, Pennsylvania." Decision and Order at 9; Claimant's Exhibit 11. The administrative law judge noted that Dr. Meyer "has practiced in the subspecialty of thoracic radiology since 1992 and is a past section head of cardiothoracic imaging at the University of Cincinnati." Decision and Order at 9; Employer's Exhibits 4, 7. He noted that Dr. Meyer is also "an associate professor of diagnostic radiology at University Hospital in Cincinnati, Ohio" and is "very well published on radiology topics and lectures nationally on radiographic interpretation, interstitial lung disease and pneumoconiosis." *Id*.

[7] The administrative law judge incorrectly stated that Dr. Leef read the June 9, 2010 and November 22, 2011 CT scans as positive for pneumoconiosis. Decision and Order at 8. The miner's treatment records contain CT scan readings by Drs. Leef and Schlarb. Dr. Leef read the June 9, 2010 CT scan as revealing advanced pulmonary fibrosis, and Dr. Schlarb read the November 22, 2011 CT scan as revealing end-stage pulmonary fibrosis. Claimant's Exhibits 3, 5.

[8] The administrative law judge also noted that "Dr. Smith compared the x-rays and CT scans and stated that they suggest the presence of an opacity due to complicated [coal workers' pneumoconiosis] with an opacity due to cancer overlaid in the same location." Decision and Order at 29. The administrative law judge reduced the weight accorded Dr. Smith's x-ray readings at 20 C.F.R. §718.202(a)(1) because he found that "Dr. Smith was the only physician who read the x-ray as two overlapping [large] opacities," and because Dr. Meyer, "the most qualified radiologist who looked at the entire radiological record[,]

Also at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Gaziano, Sood, and Rasmussen, who diagnosed clinical pneumoconiosis, and of Drs. Meyer[9] and Zaldivar, who opined that the miner did not have clinical pneumoconiosis but suffered from idiopathic pulmonary fibrosis. Claimant's Exhibits 7-9; Employer's Exhibits 1, 7, 8. The administrative law judge summarized Dr. Meyer's explanation that coal workers' pneumoconiosis "typically presents on x-ray as small nodules with an upper zone predominance, typically greater on the right than the left, and if the disease continues to progress, the nodules can be diffusely spread throughout the entire lung." Decision and Order at 15, *citing* Employer's Exhibit 7 at 19-20. Because that pattern was absent from the miner's x-rays and CT scans,[10] Dr. Meyer read them as negative. Employer's Exhibit 7 at 19-20.

The administrative law judge found that "Dr. Meyer persuasively explained why the miner's irregular opacities combined with his pattern of basilar fibrosis and honeycombing seen here did not suggest a diagnosis of [coal workers' pneumoconiosis]." Decision and Order at 34. The administrative law judge further found that the medical opinions of Drs. Meyer and Zaldivar were consistent with the weight of the x-ray evidence, which the administrative law judge found to be negative for clinical pneumoconiosis. *Id*. at 37. The administrative law judge rejected the diagnoses of clinical pneumoconiosis by Drs. Gaziano, Rasmussen, and Sood, because he found that they were inconsistent with the weight of the x-ray evidence. *Id*. at 34-37. Based on the foregoing findings, the administrative law judge concluded that claimant did not establish that the miner had clinical pneumoconiosis under 20 C.F.R. §718.202(a).

Both claimant and the Director argue that the administrative law judge failed to consider claimant's argument that Dr. Meyer's rationale for excluding clinical

---

did not see multiple opacities." Decision and Order at 29-30, 32. Claimant has not challenged that finding. *See Skrack*, 6 BLR at 1-711.

[9] Employer submitted the deposition testimony of Dr. Meyer as one of its two affirmative medical reports. Employer's Exhibit 7; *see* 20 C.F.R. §725.414(c).

[10] Dr. Meyer relied on the fact that the opacities on the miner's x-rays "are lower-lobe predominant with the typical gradient of fibrosis from the base to light fibrosis in the apex, the opacities are irregular and linear in shape, and honeycombing is present . . . ." Decision and Order at 15, *citing* Employer's Exhibit 7. He testified that what is seen on x-ray and CT scan is linear and irregular, rather than nodular. Employer's Exhibit 7 at 22.

pneumoconiosis on x-ray and CT scan testing is undermined by recent medical science.[11] We agree. As we set forth above, claimant argued to the administrative law judge that the Laney and Petsonk study undermined the reasoning relied upon by Dr. Meyer. Claimant's Post-Hearing Brief at 5. Claimant argued that this study found that, among coal miners with pneumoconiosis, small opacities were found equally over all lung zones and that 37.9% of opacities were irregular, contrary to Dr. Meyer's rationale. *Id*. The record reflects that one of claimant's physicians, Dr. Sood, set forth the results of this study, along with other relevant studies, in his October 19, 2015 medical report in which he diagnosed clinical coal workers' pneumoconiosis. Claimant's Exhibit 9 at 11-12, 17-19.

Because the administrative law judge did not address the credibility issue raised below before assigning the most weight to Dr. Meyer's x-ray and CT scan readings and medical opinion, he did not adequately explain the weight he accorded the relevant evidence. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 25 BLR 2-779, 2-788 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-334-35 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439, 21 BLR 2-269, 2-272 (4th Cir. 1997); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Therefore we must vacate the administrative law judge's finding that claimant failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and his finding that the overall weight of the evidence did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a). Because the administrative law judge's weighing of the x-ray evidence affected the weight he assigned the medical opinion evidence regarding the existence of clinical pneumoconiosis, we also vacate the administrative law judge's decision to discount the opinions of Drs. Gaziano, Sood, and Rasmussen and to credit the opinion of Dr. Zaldivar at 20 C.F.R. §718.202(a)(4). In addition, because we vacate the administrative law judge's finding at 20 C.F.R.

[11] The Director, Office of Workers' Compensation Programs (the Director), further argues that the regulations make no distinction between rounded and irregular opacities, or opacities appearing in the upper, middle, or lower lung zones. Director's Brief at 2-3. The Director asserts that when "the Department of Labor first promulgated the original version of [20 C.F.R. §718.102(b)], it specifically explained that irregular opacities must be included when assessing the profusion of pneumoconiotic opacities on x-ray . . . ." *Id*. at 3, *citing* 45 Fed. Reg. 13,678, 13,680-81 (Feb. 29, 1980). The Director also argues that "nothing in the *Guidelines For The Use Of The ILO International Classification of Radiographs Of Pneumoconioses*, Revised edition 2011 – an integral part of the ILO Classification – states or suggests that the absence of opacities in the upper lung zones, rules out clinical pneumoconiosis." Director's Brief at 2.

§718.202(a), we also vacate his finding that claimant failed to establish disability causation at 20 C.F.R. §718.204(c).

We remand this case for the administrative law judge to reconsider the relevant x-ray, CT scan, and medical opinion evidence on the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Specifically, the administrative law judge should address claimant's argument that the medical study cited by Dr. Sood undermines Dr. Meyer's rationale for finding no clinical pneumoconiosis on the miner's x-rays and CT scans. The administrative law judge should then explain his findings as to the weight of the relevant medical evidence in light of his determination on that issue. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-334-35; *Akers*, 131 F.3d at 439, 21 BLR at 2-272.

II. LEGAL PNEUMOCONIOSIS

Claimant asserts that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge noted that "Dr. Rasmussen diagnosed legal [coal workers' pneumoconiosis] as interstitial fibrosis caused in part by coal mine dust exposure." Decision and Order at 35-36; Claimant's Exhibit 7. The administrative law judge also noted that "Dr. Sood diagnosed the miner's 'chronic bronchitis phenotype of [chronic obstructive pulmonary disease (COPD)]' as legal pneumoconiosis" and "opined that coal mine dust exposure substantially contributed to the miner's pulmonary fibrosis." *Id*. at 36, *quoting* Claimant's Exhibit 9. Both Drs. Rasmussen and Sood opined that the miner's pulmonary fibrosis was not idiopathic. Claimant's Exhibits 7, 9.

The administrative law judge found that Dr. Rasmussen's opinion was not persuasive because it was based on "general statistics," and "Dr. Rasmussen [did] not point to factors other than the higher rate of interstitial fibrosis [in miners,] and the miner's occupational exposure to support his conclusion." Decision and Order at 36. With respect to Dr. Sood, the administrative law judge found that his opinion was not persuasive because he relied on evidence from the miner's prior claim, in which the miner was found not to suffer from pneumoconiosis. *Id*. at 36. Moreover, the administrative law judge found that Dr. Sood did "not link his general statistics . . . to the particular facts of this miner . . . ." *Id*. at 37.

Claimant argues that the opinions of Drs. Rasmussen and Sood "are more persuasive" and establish that the miner's "pulmonary fibrosis was caused by his coal

mine dust exposure rather than that he had idiopathic pulmonary fibrosis."[12] Claimant's Brief at 14. Claimant's argument constitutes a request to reweigh the evidence. The Board is not empowered to reweigh the evidence, or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. As claimant has raised no specific allegations of error with regard to the administrative law judge's findings that the opinions of Drs. Rasmussen and Sood were not persuasive on the issue of legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[13] *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

III. CONCLUSION

On remand, the administrative law judge must address whether claimant has established that the miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Further, in reconsidering the issue of clinical pneumoconiosis, the administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If clinical pneumoconiosis is established, the administrative law judge must determine whether employer has rebutted the presumption that the clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge must then determine whether claimant has established that clinical pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(c). In reconsidering the relevant evidence, the administrative law judge should take into consideration the respective physicians' explanations for their conclusions, the

[12] Claimant argues that Dr. Gaziano also diagnosed legal pneumoconiosis. Claimant's Brief at 14. Contrary to claimant's argument, the administrative law judge accurately found that Dr. Gaziano "diagnosed no legal pneumoconiosis." Decision and Order at 34; Claimant's Exhibit 8 at 15.

[13] The administrative law judge discredited Dr. Zaldivar's opinion that the miner did not have legal pneumoconiosis, because he found that Dr. Zaldivar's reasoning was "in direct conflict with the regulatory definition of legal pneumoconiosis." Decision and Order at 35. In view of our affirmance of the administrative law judge's finding that claimant did not meet her burden of establishing that the miner had legal pneumoconiosis, we need not reach employer's cross-appeal challenging the discrediting of Dr. Zaldivar's opinion on that issue. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

If the administrative law judge finds that the evidence does not establish clinical pneumoconiosis, he must deny benefits. Given our affirmance of the finding that the evidence did not establish legal pneumoconiosis, claimant will not have established the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge