U.S. Department of Labor

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

BRB No. 16-0318 BLA

CHARLES A. CHEMELLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PENN ALLEGHENY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 04/11/2017
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

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

Jeffrey S. Goldberg (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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2012-BLA-5774) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on April 5, 2011,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with twelve years of coal mine employment,[2] and found that the new biopsy evidence established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(2).[4] After

[1] Claimant's previous claim, filed on November 13, 1996 was finally denied by the district director on March 7, 1997, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited claimant with less than fifteen years of qualifying coal mine employment, he found that claimant was not entitled to invocation of the Section 411(c)(4) presumption.

[3] "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).

[4] Because the new biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Chemelli v. Penn Allegheny Coal Co.*, BRB No. 15-0024 BLA (Oct. 9, 2015) (unpub.). However, the Board vacated the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis because the administrative law judge failed to weigh all of the relevant evidence together in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). *Id.* The Board also held that the administrative law judge erred in not considering all of the biopsy evidence of record. *Id.* In addition, because the administrative law judge's consideration of the evidence regarding disability causation was affected by his failure to properly weigh all of the relevant evidence together at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.

On remand, the administrative law judge found that the evidence, when weighed together, established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the biopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge impermissibly relied upon "secret rules" to discredit Dr. Basheda's opinion. In separate reply briefs, employer reiterates its previous contentions.

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.[5] 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

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4). In addressing this issue, the administrative law judge considered the opinions of Drs. Knight, Perper, Begley, Basheda, and Fino.

Drs. Knight and Perper diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibit 4. Dr. Begley diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Claimant's Exhibits 1, 3 at 13. Conversely, Drs. Basheda and Fino opined that claimant does not suffer from legal pneumoconiosis. Although Dr. Basheda diagnosed a disabling obstructive pulmonary impairment, he attributed the condition to sarcoidosis and asthma. Employer's Exhibits 1, 13 at 34. Dr. Fino opined that claimant's obstructive and restrictive impairments, as well as a reduction in diffusing capacity, are due to sarcoidosis. Director's Exhibit 16.

In evaluating the conflicting medical opinion evidence, the administrative law judge found that Dr. Basheda's basis for eliminating coal dust exposure as a cause of claimant's obstructive impairment was inconsistent with the regulations. Decision and Order at 17-18. The administrative law judge further found that one of Dr. Fino's bases for eliminating coal dust exposure as a cause of claimant's obstructive pulmonary impairment – that there is no evidence of emphysema – was not supported by the record.

[5] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] "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).

By contrast, the administrative law judge found that Dr. Perper's diagnosis of legal pneumoconiosis was "well-documented and reasoned."[7] Decision and Order at 19.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Basheda and Fino. We disagree. In regard to Dr. Basheda's opinion that claimant's obstructive pulmonary impairment was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that claimant's pulmonary impairment did not develop until several years after claimant ceased his coal mine employment. Decision and Order at 17; Employer's Exhibits 1 at 29, 13 at 20. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[8] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002); Decision and Order at 17.

[7] Although the administrative law judge noted that Drs. Knight and Begley diagnosed legal pneumoconiosis, he did not address whether their opinions were well-reasoned.

[8] Employer contends that the administrative law judge's "rationale for discrediting Dr. Basheda's opinion reflects application of what can only be characterized as 'secret rules' promulgated by the Office of Administrative Law Judges." Employer's Brief at 21. Employer alleges that a training program for new administrative law judges, which the current administrative law judge "presumably" attended, included training on the analysis and weighing of evidence in light of the principle that pneumoconiosis is recognized as a latent and progressive disease. Employer's Brief at 21 (quoting Power Point slides not of record). We reject employer's allegation that "secret rules" were applied. As we indicated above by our legal citations, the administrative law judge's reason for discounting Dr. Basheda's opinion is grounded both in the regulation at 20 C.F.R. §718.201, and in published case law. Moreover, to the extent employer argues that the administrative law judge was biased because of a training program, employer has not supported its claim with evidence in the record that administrative law judges were instructed to reject certain evidence, or that the current administrative law judge attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992)("Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence."). Therefore, employer's claim of bias is rejected.

In regard to Dr. Fino's opinion, the administrative law judge noted that the doctor eliminated coal mine dust exposure as a cause of claimant's reduced diffusing capacity based on the fact that there was "no evidence of emphysema."[9] Decision and Order at 18. The administrative law judge, however, accurately found that Dr. Fino's assertion was inconsistent with the findings of two Board-certified pathologists, Drs. Bush and Perper, who each opined that claimant's August 17, 2012 biopsy slides revealed emphysema.[10] *Id.* at 18-19. The administrative law judge noted that Dr. Fino's review of the record did not include a review of the biopsy slides. *Id.* The administrative law judge, therefore, permissibly accorded less weight to Dr. Fino's opinion that claimant does not suffer from legal pneumoconiosis.[11] *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-

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[9] Dr. Fino explained that:

> I do not believe that [claimant's] obstruction is related to coal mine dust for a couple of reasons. First of all, he does have evidence of another lung disease – sarcoidosis – which can cause obstruction. There is a reversible component to the obstruction which would not be consistent with a coal dust related lung disease. *I see no evidence of emphysema so the reduction in diffusion is quite consistent with sarcoidosis*.

Director's Exhibit 16 at 11.

[10] Based upon their review of the August 17, 2012 biopsy slides, Dr. Bush diagnosed moderate subpleural emphysema, while Dr. Perper found "moderate centrilobular emphysematous changes." Claimant's Exhibit 4 at 23.

[11] Employer argues that it was not rational for the administrative law judge to discount Dr. Fino's opinion regarding the etiology of claimant's impairment on the basis that Dr. Fino was unaware that claimant was diagnosed with emphysema by biopsy evidence, because "whether or not Dr. Fino termed [claimant's] pulmonary condition as emphysema . . . Dr. Fino found an obstructive impairment that was unrelated to coal dust exposure . . . ." Employer's Brief at 23. This argument lacks merit. Substantial evidence supports the administrative law judge's determination that Dr. Fino relied, in part, on his belief that there was no evidence of emphysema as a reason for concluding that claimant's diffusion capacity impairment is due solely to sarcoidosis. Director's Exhibit 16 at 11. In turn, Dr. Fino stated that his determination on the cause of claimant's diffusion impairment was one of his reasons for concluding that claimant's obstruction is unrelated to coal mine dust exposure. *Id.* The administrative law judge determines the credibility of the evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Employer's statement regarding the administrative law judge's consideration of Dr. Fino's opinion amounts to a request to reweigh the evidence.

215, 2-233-34 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Employer does not challenge the administrative law judge's finding that Dr. Perper's diagnosis of legal pneumoconiosis is well-reasoned, and sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[12] This finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As we have affirmed the administrative law judge's decision to accord greater weight to the opinion of Dr. Perper than to the contrary opinions of Drs. Basheda and Fino, we consequently affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[13]

Total Disability Due to Pneumoconiosis

Employer also argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In considering whether claimant's total disability is due to pneumoconiosis, the administrative law judge accorded the most weight to Dr. Perper's opinion that claimant's total disability is due to sarcoidosis, clinical pneumoconiosis, and legal pneumoconiosis. Decision and Order at 23-25; Claimant's Exhibit 4 at 28. The administrative law judge found that Dr. Perper's opinion on the issue of disability causation was well-reasoned. *Id.* The administrative law judge accorded less weight to

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Such a request is beyond the Board's scope of review. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[12] Dr. Perper explained that claimant "was never a smoker, and therefore the only etiology for his chronic obstructive lung disease was his exposure to coal mine dust and coal workers' pneumoconiosis." Claimant's Exhibit 4 at 27.

[13] Because the administrative law judge properly found Dr. Perper's opinion sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis, we need not discuss the administrative law judge's consideration of the opinions of Drs. Knight and Begley, the other physicians of record who diagnosed legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, in light of our affirmance of the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's finding that the evidence also established the existence of clinical pneumoconiosis. *Id.*

the opinions of Drs. Basheda and Fino that claimant's disabling pulmonary impairment is not due to pneumoconiosis, because the doctors did not diagnose the existence of legal pneumoconiosis. Decision and Order at 24; Director's Exhibit 16; Employer's Exhibits 1, 13. The administrative law judge, therefore, found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Basheda and Fino. We disagree. The administrative law judge permissibly accorded less weight to their opinions because they were based on a faulty premise, that claimant does not suffer from legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986)*; see also Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 22-23.

Employer also argues that the administrative law judge erred in crediting Dr. Perper's opinion that claimant is totally disabled due to clinical pneumoconiosis without resolving the conflict between Drs. Perper and Bush regarding the extent of the miner's clinical pneumoconiosis. Employer's Brief at 24-25. Employer, however, has not explained how Dr. Perper's opinion regarding the extent of claimant's clinical pneumoconiosis would affect his opinion that claimant's totally disabling pulmonary impairment is also due to his legal pneumoconiosis. *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"); Claimant's Exhibit 4 at 28. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge