U.S. Department of Labor

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

BRB No. 17-0340 BLA

JOE FRYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA ELECTRIC CORPORATION	)	DATE ISSUED: 04/12/2018
	)	
Employer-Petitioner	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5068) of Administrative Law Judge Natalie A. Appetta, rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on October 21, 2013.

The administrative law judge initially found that the claim was timely filed pursuant to 20 C.F.R. §725.308(c). She then credited claimant with 11.86 years of coal mine employment and, based in part on employer's concession, found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant had fewer than fifteen years of coal mine employment, the administrative law judge found that 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).[1] She further found, however, that claimant has clinical and legal pneumoconiosis[2] pursuant to 20 C.F.R. §§718.202(a)(1), (4), and that his respiratory disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the x-ray evidence establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also argues that she erred in finding that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

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,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *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). "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).

and in accordance with applicable law.[3] 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).

20 C.F.R. §718.202(a)(4) - Legal Pneumoconiosis

Claimant must prove that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Resolving this issue, the administrative law judge considered the medical opinions of Drs. Al-Jaroushi and Fino, together with claimant's treatment records.[4] Dr. Al-Jaroushi opined that claimant has legal pneumoconiosis, in the form of a severe obstructive impairment with emphysema and hypoxemia due to coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibits 4, 5. Conversely, Dr. Fino opined that claimant does not have legal pneumoconiosis, but suffers from severe obstruction with emphysema that is hereditary, and is unrelated to coal mine dust exposure. Director's Exhibit 17; Employer's Exhibit 1.

The administrative law judge found that while Dr. Fino is better qualified than Dr. Al-Jaroushi, Dr. Fino's opinion is not well-reasoned. Decision and Order at 22. In contrast, she found that Dr. Al-Jaroushi's opinion is the best-documented and best-reasoned opinion of record, and is entitled to dispositive weight. The administrative law judge therefore found that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in relying on Dr. Al-Jaroushi's opinion, asserting that it is based on his "personal beliefs" rather than evidence, because it rests on an inaccurate work history and is unsupported by the treatment records. Employer's Brief at 8. Employer's contentions lack merit.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 25.

[4] The administrative law judge also considered the opinions of Drs. Green and Silman that claimant suffers from legal pneumoconiosis in the form of a severe obstructive impairment and hypoxemia due to coal mine dust exposure. Decision and Order at 23-24. The administrative law judge discredited their opinions because they are not well-reasoned and because their credentials are unknown. *Id.* at 24.

As the administrative law judge correctly noted, Dr. Al-Jaroushi explicitly stated that he diagnosed legal pneumoconiosis based on *claimant's* respiratory symptoms of chronic productive cough, wheezing, and dyspnea on exertion; his pulmonary function studies demonstrating severe obstruction and low diffusion capacity; his arterial blood gas studies illustrating hypoxia and hypercapnia; and his coal mine employment and smoking histories. Decision and Order at 9, 22-23; Director's Exhibit 11. Contrary to employer's argument, while Dr. Al-Jaroushi initially relied on a fifteen-year coal mine employment history, he subsequently stated that a lower coal mine employment history would not change his opinion as "even ten years of coal dust exposure is enough to lead to airway disease . . . ." Director's Exhibit 19; *see* Decision and Order at 9. Dr. Al-Jaroushi also explained that coal dust is a known cause of airway disease, including chronic bronchitis and emphysema, and emphasized that claimant "never smoked in his life." Director's Exhibits 11, 19; *see* Decision and Order at 9, 22-23.

We further reject employer's contention that the administrative law judge failed to consider whether Dr. Al-Jaroushi's opinion is supported by the treatment records. Employer's Brief at 7. The administrative law judge acknowledged that although Dr. Al-Jaroushi's diagnosis of emphysema was not reflected in the treatment records, multiple physicians diagnosed emphysema, including employer's expert, Dr. Fino.[5] Decision and Order at 23; Employer's Brief at 7-8. Further, the administrative law judge specifically found that Dr. Al-Jaroushi described the clinical data, histories, and observations for his opinion, and explained why he concluded that claimant's severe obstructive impairment is due to coal dust exposure. Decision and Order at 22-23. Therefore, we affirm the administrative law judge's permissible finding that Dr. Al-Jaroushi's opinion is well-reasoned and well-documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 22-23. In asserting that Dr. Al-Jaroushi's opinion is not credible, employer is asking for a reweighing of the evidence, which the Board is not

[5] To the extent employer asserts that the administrative law judge erred in finding that the treatment records do not constitute probative evidence on the issue of legal pneumoconiosis, that argument is rejected. Employer's Brief at 7-8. The administrative law judge permissibly found that the treatment records are not well-reasoned because they do not discuss the etiology of claimant's pulmonary conditions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 21.

empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

We also reject employer's argument that the administrative law judge erred in failing to provide a valid basis for discrediting Dr. Fino's opinion. We find no merit to employer's assertion that the administrative law judge rejected Dr. Fino's opinion on legal pneumoconiosis because it contrasts with her finding that the x-ray evidence establishes clinical pneumoconiosis. Employer's Brief at 9. The administrative law judge found that Dr. Fino's "conclusion of no *clinical* CWP [coal workers' pneumoconiosis] is contrary to the weight of the x-ray evidence"; she did not rely on the absence of radiographic evidence of clinical pneumoconiosis in weighing Dr. Fino's opinion that claimant does not have *legal* pneumoconiosis. Decision and Order at 22 (emphasis added).

Nor is there merit to employer's contention that the administrative law judge erred in finding Dr. Fino's opinion speculative. Employer's Brief at 8. The administrative law judge noted that, in his August 26, 2014 report, Dr. Fino stated that it was unlikely that twelve years of coal mine dust exposure would cause clinically significant emphysema. Decision and Order at 11-12, 23; Director's Exhibit 17 at 13-14. Dr. Fino also noted, correctly, that claimant never smoked cigarettes. *Id.* Thus, Dr. Fino concluded that claimant's disabling emphysema was not due to coal mine dust or smoking, but was a hereditary form of emphysema, possibly caused by a form of alpha-1 antitrypsin deficiency. *Id.* After DNA test results showed that claimant did not have alpha-1 antitrypsin deficiency, Dr. Fino stated in a report dated September 14, 2016 that there are other forms of hereditary emphysema, and reiterated his conclusion that claimant's emphysema is not due to coal mine dust exposure. Employer's Exhibit 1 at 6-7.

Noting that there is no record evidence that claimant has any hereditary predisposition to emphysema and that Dr. Fino acknowledged that he did "not have a specific reason as to why [claimant] has emphysema," the administrative law judge permissibly discredited his opinion as "pure speculation."[6] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010); Decision and Order at 23; Employer's Brief at 9. The administrative law judge also permissibly discredited Dr. Fino's opinion based on her finding that, even assuming that claimant has some form

[6] There is also no merit to employer's contention that only Dr. Fino was aware of claimant's other potentially detrimental employment in a chemical plant. Employer's Brief at 8. Dr. Al-Jaroushi recorded that claimant worked at Owen Chemical from 1951 to 1967. Director's Exhibit 11 at 2. Moreover, as the administrative law judge properly found, no physician, including Dr. Fino, pointed to any other significant exposure histories as a potential cause of claimant's emphysema. Decision and Order at 23.

of hereditary emphysema, Dr. Fino did not explain why his nearly twelve years of coal mine dust exposure did not significantly contribute to, or aggravate, his emphysema. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; 20 C.F.R. §718.201(b) (including within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment").

We thus affirm, as based on substantial evidence, the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and her finding that the evidence of record, when weighed together, establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[7] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 24.

20 C.F.R. §718.204(c) - Total Disability Causation

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[8] Employer's contention lacks merit. The administrative law judge rationally discounted Dr. Fino's opinion that claimant is totally disabled due to emphysema caused by unknown factors, because it is contrary to her own finding that claimant's emphysema is legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 25. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Al-Jaroushi to find that claimant's disabling emphysema is legal pneumoconiosis, she permissibly found that Dr. Al-Jaroushi's opinion establishes that claimant is totally disabled due to legal pneumoconiosis.

[7] Having found that the medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge properly found that she was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 24.

[8] The administrative law judge found that, as no doctor attributed claimant's disabling pulmonary impairment to clinical pneumoconiosis, claimant did not establish total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order at 25.

Hicks, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 25.

Finally, we reject employer's contention that the administrative law judge relied, erroneously, on the previously discredited opinions of Drs. Green and Silman to find that claimant' disability is due to legal pneumoconiosis. Employer's Brief at 9. While the administrative law judge noted that certain aspects of their opinions supported Dr. Al-Jaroushi's opinion, she did not rely on them to find disability causation established.[9] Decision and Order at 25. Moreover, as the administrative law judge permissibly accorded dispositive weight to Dr. Al-Jaroushi's opinion, *see Hicks*, 138 F.3d at 532-34, 21 BLR at 2-334-37; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76, we hold that any potential error by the administrative law judge in noting that Drs. Green and Silman also attributed claimant's total disability to legal pneumoconiosis is harmless. *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*, 12 BLR 1-1276, 1-1278 (1984). Consequently, we affirm the administrative law judge's finding that claimant established that his totally disabling pulmonary impairment is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[10] *Id.*

[9] The administrative law judge noted that Drs. Green and Silman similarly opined that claimant is totally disabled due to legal pneumoconiosis, that Drs. Green, Silman, and Fino all diagnosed disabling obstruction based on claimant's pulmonary function studies, and that Dr. Fino further agreed that claimant's disabling obstructive impairment is due to emphysema. Decision and Order at 25.

[10] As the administrative law judge specifically found that claimant did not establish total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c), we need not address employer's argument that the administrative law judge erred in finding clinical pneumoconiosis established at 20 C.F.R. §718.202(a). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 12 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge