U.S. Department of Labor

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

BRB No. 14-0393 BLA

DARRELL WAYNE SHEPHERD Claimant-Petitioner v. D & O COAL COMPANY, c/o DARRELL & OMA SHEPHERD and S & H COAL COMPANY, c/o D. SHEPHERD & G. HALE and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/20/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

William S. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5883) of Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge), 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 claimant with twelve years and six months of coal mine employment; determined that claimant worked as a miner under the Act after December 31, 1969; determined that employer is the properly designated responsible operator herein; and adjudicated this claim, filed on October 19, 2009, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Considering the entire record, the administrative law judge found the weight of the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that the x-ray and medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer responds, urging affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs (the

[1] Claimant's first application for benefits, filed on April 13, 2000, was denied by the district director on August 21, 2000, because claimant failed to prove any element of entitlement. Director's Exhibit 1.

[2] Where a claimant 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).

[3] In its response brief, employer also challenges the administrative law judge's finding that employer is the properly designated responsible operator, and his findings on

Director), has filed a limited response, asserting that the administrative law judge erred in his analysis of the x-ray evidence.

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.[4] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Specifically, claimant asserts that "the administrative law judge relied almost solely on the qualifications of the physicians;" that he "placed substantial weight on the numerical superiority of interpretations;" and that he "may have selectively analyzed the x-ray evidence." Claimant's Brief at 2-3. Claimant's arguments lack merit.

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the issues of total respiratory disability and length of coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Strike, arguing that employer's responsible operator argument should have been raised in a cross-appeal, since it was not responsive to the arguments raised in claimant's brief and seeks to expand employer's rights. *See* 20 C.F.R. §802.212(b). We grant the Director's motion and strike that portion of employer's response brief challenging the administrative law judge's responsible operator determination, as the transfer of liability for the payment of benefits would expand employer's rights in this case. *See Barnes v. Director, OWCP*, 19 BLR 1-73 (1995). Consequently, we affirm the administrative law judge's finding that employer is the properly designated responsible operator herein. We decline to address employer's argument that the administrative law judge should have credited claimant with 11.5 years of coal mine employment, rather than 12.5 years, as employer has not explained how the administrative law judge's error, if any, would affect the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge reviewed the x-ray evidence of record, consisting of eight interpretations of five x-rays dated May 4, 2000; December 18, 2009; January 28, 2010; March 4, 2010; and January 26, 2011. Decision and Order at 24-25. The administrative law judge noted that the film dated May 4, 2000, from claimant's prior claim, was negative, as it was read as negative for pneumoconiosis by Drs. Westerfield and Sargent, without contradiction. Director's Exhibit 1; Decision and Order at 24. The administrative law judge determined that the film dated December 18, 2009 was negative, as it was read as Category 1/0 by Dr. Baker, a B reader, and as negative by Dr. Wheeler, who is dually qualified as a Board-certified radiologist and B reader.[5] Director's Exhibits 15, 17; Decision and Order at 24. The administrative law judge further determined that the films dated January 28, 2010 and March 4, 2010 were negative, as they were both read as negative for pneumoconiosis by Dr. Wheeler, without contradiction. Employer's Exhibits 5, 6; Decision and Order at 24. In addition, the administrative law judge found that the x-ray dated January 26, 2011 was positive, "as the sole interpretation of the film"[6] was read as Category 1/0 by Dr. Rasmussen, "a Board-certified radiologist and B reader."[7] Claimant's Exhibit 1; Decision and Order at 24.

Considering the quality and quantity of the x-ray evidence as a whole, the administrative law judge acted within his discretion in concluding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by dually qualified physicians. Decision and Order at 25; *see Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). While

[5] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[6] In fact, the January 26, 2011 film was also read as negative by Dr. Wheeler. Employer's Exhibit 3; *see* Hearing Transcript at 8; Employer's Brief at 4; Decision and Order at 2 n.1.

[7] In fact, the record reflects that Dr. Rasmussen is a B reader, but is not dually qualified. Claimant's Exhibit 1.

the administrative law judge incorrectly stated that Dr. Rasmussen was a dually qualified reader, rather than a B reader, and the administrative law judge failed to weigh Dr. Wheeler's negative interpretation of the January 26, 2011 x-ray with Dr. Rasmussen's positive reading of the same film, these errors are harmless, as the administrative law judge accorded greater weight to the readings by physicians with superior qualifications, and permissibly relied on a numerical preponderance of negative interpretations by those readers.[8] *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibit 3; *see also Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

With regard to the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4), claimant maintains that the opinions of Drs. Baker and Rasmussen are well-reasoned and documented, because each was based on a thorough physical examination of claimant, a review of claimant's medical and work histories, the results of a pulmonary function study, a blood gas study, and a chest x-ray. Claimant's Brief at 4-6. Thus, claimant contends that the administrative law judge erred in discounting these opinions for the reasons he provided. Claimant's arguments are without merit.

The administrative law judge considered the medical opinions of Drs. Baker, Rasmussen, Broudy, Jarboe, and Westerfield. He determined that Dr. Baker's diagnosis of clinical pneumoconiosis was based on his own positive interpretation of a chest x-ray, which the administrative law judge found to be negative. Decision and Order at 25. Further, Dr. Baker based his opinion of legal pneumoconiosis, in part, on a smoking history of twenty-six pack-years, which was less than half of the fifty-four pack-years the administrative law judge found that claimant actually smoked. The administrative law judge concluded that Dr. Baker underestimated claimant's smoking history, and that the physician also erroneously stated that claimant had more than twenty years of coal mine

[8] We reject the Director's argument that the administrative law judge's finding of no clinical pneumoconiosis should not be affirmed because the administrative law judge "did not consider whether Dr. Rasmussen's [January 26, 2011] x-ray should be given greater weight based on its recency, or whether Dr. Wheeler's readings were based on the invalid belief that the absence of upper-zone opacities ruled out the presence of pneumoconiosis." Director's Brief at 3 (unpaginated). As we previously noted, the January 26, 2011 x-ray was re-read as negative by Dr. Wheeler, who possesses superior qualifications, thus consideration of the recency of the x-ray would not affect the outcome of this case. Further, Dr. Wheeler found "2 small calcified granulomata left base lateral," Employer's Exhibit 3, and a "few small calcified granulomata left base," Employer's Exhibits 5, 6; Director's Exhibit 17, but did not find any other opacities in the upper, middle or lower lung zones, and did not state that opacities in the lower lung zones could not be pneumoconiosis absent upper-zone opacities.

employment, sixteen of which were underground, when the administrative law judge determined that the evidence supports a finding of less than thirteen years of coal mine employment. Decision and Order at 27. Consequently, the administrative law judge permissibly found Dr. Baker's opinion insufficient to support a diagnosis of either clinical or legal pneumoconiosis, as it was based, in part, on erroneous information regarding the claimant. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Similarly, as Dr. Rasmussen opined that "a diagnosis of clinical pneumoconiosis can be entertained," and that "coal mine dust exposure *could* contribute, although likely to only a minimal degree" to claimant's moderate loss of lung function, the administrative law judge rationally determined that Dr. Rasmussen's opinion failed to establish the significant relationship or aggravation required by the regulations. Therefore, the administrative law judge properly found that Dr. Rasmussen's opinion was too equivocal to establish the existence of either clinical or legal pneumoconiosis. Decision and Order at 25, 27; Claimant's Exhibit 1; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); 20 C.F.R. §718.201(b). Noting that the remaining physicians did not diagnose either clinical or legal pneumoconiosis, the administrative law judge reasonably concluded that the weight of the medical opinion evidence did not support a finding of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 26, 27; Director's Exhibit 17; Employer's Exhibits 1, 2, 4. As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the evidence of record was insufficient to establish the existence of pneumoconiosis under any subsection at Section 718.202(a). Decision and Order at 26; *see Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012).

As claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we need not address employer's arguments with respect to the issue of total respiratory disability at 20 C.F.R. §718.204(b), and we affirm the administrative law judge's denial of benefits. *See 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).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge