U.S. Department of Labor

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

BRB No. 14-0410 BLA

DON MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	DATE ISSUED: 08/12/2015
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED, c/o OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts, PSC, Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5801) of Administrative Law Judge John P. Sellers, III 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). The administrative law judge adjudicated this claim, filed on October 26, 2009, pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in coal mine employment for thirteen years.[1] While the administrative law judge found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), he further found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Employer/carrier (employer) responds, urging affirmance.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he is not participating in this appeal.[3]

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] Because claimant established less than fifteen years of coal mine employment, claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[2] After filing his Notice of Appeal in this case, claimant filed a Motion to Remand with the Board on October 28, 2014, requesting that this case be remanded to the district director to obtain a new complete pulmonary evaluation of claimant. Claimant asserted that the record contained a disparity in the heights recorded by the various physicians, which affected whether the various pulmonary function studies of record yielded qualifying results. Therefore, claimant argued that he was entitled to a new complete pulmonary evaluation to resolve the disputed height issue. Employer filed a response brief urging the Board to deny claimant's motion and affirm the denial of benefits. Claimant filed a reply brief, reiterating his request. By Order dated January 14, 2015, the Board denied claimant's Motion to Remand for a new examination. *Miller v. Heritage Coal Co.*, BRB No. 14-0140 BLA (unpub. Order) (Jan. 14, 2015).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant does not challenge the administrative law judge's finding that clinical pneumoconiosis was not established, but contends that he erred in finding that claimant failed to establish legal pneumoconiosis at Section 718.202(a). Specifically, claimant maintains that Drs. Chavda and Houser rendered reasoned and documented opinions satisfying the definition of legal pneumoconiosis, *i.e.*, that claimant's chronic pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment, and claimant argues that the administrative law judge should have credited these opinions.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. A review of the Decision and Order reveals that the administrative law judge provided a comprehensive discussion of the opinions of Drs. Chavda and Houser, and fully delineated the physicians' findings and the bases supporting their diagnoses of legal pneumoconiosis. Decision and Order at 8-9, 18-24; Director's Exhibit 12; Claimant's Exhibit 6. Despite recognizing that both physicians were well-qualified to render opinions in this case, as they are Board-certified in internal and pulmonary medicine, the administrative law judge identified deficiencies in the opinions of Drs. Chavda and Houser that detracted from their reliability. With regard to Dr. Chavda's opinion, the administrative law judge determined that the physician interpreted claimant's pulmonary function studies as "suggestive" of obstructive and restrictive airway disease, and stated that the obstructive airway disease was the "main finding" that was significantly consistent with legal pneumoconiosis. Decision and Order

[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).

at 31; Director's Exhibit 12-27. Dr. Chavda additionally diagnosed morbid obesity, indicating that the reduction in FVC, "which suggests restrictive airway disease," could result from obesity or pneumoconiosis, and that "to differentiate between morbid obesity causing shortness of breath and reduction in lung function caused by legal pneumoconiosis causing shortness of breath is very hard." *Id.* In view of Dr. Chavda's equivocal language, the administrative law judge acted within his discretion in finding that the physician's diagnosis of legal pneumoconiosis was unpersuasive. Decision and Order at 31; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge permissibly found the probative value of Dr. Chavda's opinion further diminished because equally qualified physicians, Drs. Repsher, Selby and Houser, either invalidated Dr. Chavda's pulmonary function studies or questioned his interpretation of the studies, specifically finding that the studies revealed a restrictive impairment, but not an obstructive impairment.[5] Decision and Order at 31; Claimant's Exhibit 1; Employer's Exhibits 1, 6, 7; *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

With respect to the opinion of Dr. Houser, the administrative law judge rationally determined that the physician's attribution of claimant's restrictive impairment to "coal workers' pneumoconiosis" and obesity was not a diagnosis of legal pneumoconiosis separate from his finding of clinical pneumoconiosis. Decision and Order at 32; Claimant's Exhibit 6. As Dr. Houser diagnosed coal workers' pneumoconiosis, category 1, based upon his review of the x-ray and CT scan evidence, and the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis, the administrative law judge permissibly concluded that Dr. Houser's opinion failed to persuasively link claimant's restrictive impairment to dust exposure in coal mine employment. *Id.*; *see* 20 C.F.R. §718.201(a)(2). While Dr. Houser additionally diagnosed chronic obstructive pulmonary disease (COPD), the administrative law judge determined that the physician did not expressly attribute this condition to dust exposure in coal mine employment and that, even if he had, he failed to persuasively explain and support the diagnosis.[6] Decision and Order at 32-33; *see* 20 C.F.R. §718.201(a)(2);

[5] Dr. Repsher opined that Dr. Chavda's pulmonary function studies were "improperly performed" and invalid, and testified that, even if the values obtained were accepted as valid, they reflected only a restrictive impairment. Employer's Exhibits 1, 6 at 11). Similarly, Drs. Houser and Selby testified that Dr. Chavda's pulmonary function studies did not support a finding of obstructive impairment. Claimant's Exhibit 6 at 43-44; Employer's Exhibit 7 at 8.

[6] The administrative law judge noted that Dr. Houser acknowledged in his deposition that claimant's FEV_1/FVC ratio was above the lower limits of normal; he referred to claimant's low lung volumes to support a finding of small airway obstruction

Director, OWCP v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *see also Andersen v. Director, OWCP*, 455 F.3d 1102, 1105, 23 BLR 2-332, 2-340-341 (10th Cir. 2006). As substantial evidence supports the administrative law judge's credibility determinations with regard to the opinions of Drs. Chavda and Houser, and the remaining opinions of Drs. Repsher and Selby do not support claimant's burden, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a).

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded.[7] *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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and an early sign of chronic obstructive pulmonary disease, but then stated that he did not test for lung volumes; and he conceded that lung volumes obtained by Dr. Selby were normal. Decision and Order at 33; Claimant's Exhibit 6 at 8-11.

[7] Claimant's failure to establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address his argument that the administrative law judge erred in failing to find disability causation established under 20 C.F.R. §718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge