U.S. Department of Labor

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

BRB No. 15-0495 BLA

STEVEN DEWAYNE MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 08/08/2016
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2012-BLA-05804) of Administrative Law Judge Alan L. Bergstrom, 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 thirteen and one-half years of coal mine employment, as stipulated by the parties, and adjudicated this claim under the regulations at 20 C.F.R. Part 718. Finding that the newly submitted evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge concluded that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in weighing the x-ray evidence on the issue of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1), and in rejecting the medical opinion of Dr. Forehand on the issue legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(4). Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.[4]

[1] Claimant filed an initial claim for benefits on September 4, 2003, which was denied by Administrative Law Judge Thomas M. Burke on October 14, 2008, because claimant failed to establish the existence of clinical or legal pneumoconiosis. Director's Exhibit 1.

[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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[3] 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).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirteen and one-half years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4. Because claimant established less than fifteen years of coal mine employment, claimant is not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner 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."[6] 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, in order to obtain a review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(c).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed seven readings of two x-rays dated April 26, 2011 and October 26, 2011. Decision and Order at 22-23, 31-32. The April 26, 2011 x-ray was read as positive for pneumoconiosis by Dr. Forehand, a B reader, and Dr. Miller, dually qualified as a Board-certified radiologist and B reader, but was read as negative by Dr. Scott, also a dually qualified radiologist.[7] Director's Exhibits 9, 10, 11. The October 26, 2011 x-ray was read as positive for pneumoconiosis by Drs. Alexander and Smith, both dually qualified

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant'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 28; Director's Exhibit 4.

[6] 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 his respiratory or pulmonary disability 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).

[7] Dr. Barrett read this x-ray for quality purposes only. Director's Exhibit 9.

radiologists, and as negative by Drs. Wheeler and Shipley, also both dually qualified radiologists. Claimant's Exhibits 1, 4; Employer's Exhibits 1, 2.

In resolving the conflict in the x-ray evidence, the administrative law judge indicated that he assigned greatest weight to the readings by the dually qualified radiologists. Decision and Order at 31. The administrative law judge gave "little probative weight" to Dr. Forehand's positive reading of the April 26, 2011 x-ray because he is not dually qualified and failed to diagnose "other abnormalities such as atherosclerotic aorta, or atherosclerosis, which is noted in every other x-ray considered at this stage[.]" *Id*. at 32. The administrative law judge law judge concluded that both the April 26, 2011 and October 26, 2011 x-rays were in equipoise, based on the equal number of positive and negative readings by the dually qualified radiologists of those films. *Id*. at 32-33. Therefore, he found that claimant failed to establish clinical pneumoconiosis by a preponderance of the x-ray evidence. *Id*. at 33.

Claimant argues that the administrative law judge erroneously required Dr. Forehand to identify "other abnormalities" when weighing his reading of the April 26, 2011 x-ray. Decision and Order at 32; Claimant's Brief at 9. Claimant asserts that the regulations do not require radiologists to identify conditions other than pneumoconiosis in order for an x-ray reading to support the existence of pneumoconiosis. *See* 20 C.F.R. §§718.102, 718.202(a)(1). However, it is not necessary to specifically address claimant's argument, as we consider any error by the administrative law judge in considering whether Dr. Forehand identified "other abnormalities" to be harmless, as the administrative law judge permissibly assigned less weight to Dr. Forehand's x-ray reading because he is not a Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant next argues that the administrative law judge erred in failing to discount Dr. Wheeler's reading of the October 26, 2011 x-ray. Claimant asserts that the recent investigation by the Center for Public Integrity (CPI) and ABC News, and the Department of Labor's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 14-09,[8] call into question the credibility of Dr. Wheeler's x-ray readings. The administrative law judge addressed this issue as follows:

> The Solicitor submitted a form request that the presiding Judge take official notice that the [district directors] have been "instructed to (1) take notice of

[8] The BLBA Bulletin No. 14-09 was issued by the Department of Labor on June 2, 2014.

> [reports by the [CPI] and ABC News reiteration of the CPI report] and (2) not credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence challenging the CPI and ABC conclusions or otherwise rehabilitating [Dr.] Wheeler's findings." Such direction may be appropriate for those ILO reports completed by Dr. Wheeler wherein he merely checks two boxes indicating no abnormalities related to pneumoconiosis, because such check-mark conclusions are not supported by sufficient medical rationale when similarly qualified physicians report and classify opacities they observe in terms of size, shape, location and perfusion, or there is other conflicting clinical evidence, such as high-resolution chest CT scans, biopsy or autopsy evidence presented for consideration. In this case Dr. Wheeler did not merely check-mark two boxes; he recorded other radiological findings related to the [claimant's] health similar to the findings set forth by other physicians, thus indicating that he did indeed review the chest x-ray in issue. Accordingly, the Solicitor's implied request to discard the chest x-ray reading of Dr. Wheeler is denied in this case.

Decision and Order at 32 n. 18, *citing* BLBA Bulletin No. 14-09.

It is for the administrative law judge to assess the credibility of the evidence and the Board is not empowered to reweigh the evidence. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015); *Troup v. Reading Anthracite Coal Co*., 22 BLR 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge fully considered the argument raised by claimant that Dr. Wheeler's x-ray readings are not credible. Under these specific facts, we conclude that the administrative law judge acted within his discretion in refusing to "discard" Dr. Wheeler's x-ray reading, based solely on the findings of the CPI and ABC News investigation. Decision and Order at 32 n. 18; *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, 21 BLR 2-269 (4th Cir. 1997). Thus, because the administrative law judge acted within his discretion in resolving the conflicts in the x-ray evidence to find the x-ray evidence to be in equipoise, we affirm his finding that claimant is unable to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred in concluding that Dr. Forehand's opinion was insufficient to support

claimant's burden to establish that he has legal pneumoconiosis.[9] The administrative law judge summarized Dr. Forehand opinion, as set forth in his April 26, 2011 report and September 14, 2014 deposition testimony. Decision and Order at 35; Director's Exhibit 9; Claimant's Exhibit 2. In his report, Dr. Forehand indicated that claimant suffers from an obstructive ventilatory impairment, evidenced by the pulmonary function studies and his symptom of shortness of breath. Director's Exhibit 9. Dr. Forehand recorded no history of cigarette smoking, based on what claimant reported. *Id*. Therefore, Dr. Forehand attributed the obstructive respiratory impairment to claimant's coal dust exposure and concluded that he suffers from legal pneumoconiosis. *Id*.

During his deposition, however, Dr. Forehand was informed that claimant "testified that he smoked for 40 years, quitting in 2009," and was asked if this would change his opinion. Claimant's Exhibit 2 at 13. He responded that it "might" change his opinion, and stated that claimant's pattern of obstructive impairment was consistent with one that could be caused either by cigarette smoking or his thirteen year history of coal dust exposure. *Id*. at 14-15. Dr. Forehand also testified that it is very difficult to differentiate between the pattern associated with cigarette smoking-related obstructive impairments and coal dust-related obstructive impairments, and disputed the opinions of Drs. Ghio and Rosenberg that a decreased FEV1/FVC ratio allowed them to exclude coal dust exposure as a causative factor in claimant's impairment. *Id*. at 20-22. Dr. Forehand opined that coal dust exposure is a substantially contributing cause of claimant's obstructive respiratory impairment. *Id*. at 25.

The administrative law judge rejected Dr. Forehand's opinion, as set forth in his April 26, 2011 report, finding that it "is conclusory and does not explain why obstructive lung disease is based on coal mine dust exposure" and that "the report is of limited value given that it is from before the doctor's discovery of [claimant's] extensive smoking history." Decision and Order at 36. The administrative law judge then weighed Dr. Forehand's September 14, 2014 deposition testimony and noted as follows:

> Dr. Forehand stated that [claimant's] coal mine dust exposure alone could have been sufficient to cause his degree of impairment in a susceptible individual, but also testified that [claimant's] smoking history alone could have caused his impairment and that there is no way to say that one or the other is the only cause. Dr. Forehand testified that the difference between [claimant's] case and the case of other miners he had seen who were

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that the medical opinion evidence fails to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711.

> disabled from a pulmonary perspective is that [claimant's] coal mine employment was the type of work most highly associated with occupational lung disease.

Id. at 35. The administrative law judge found that Dr. Forehand "fails to address whether this specific miner has pneumoconiosis. Dr. Forehand's testimony that [claimant's] work is statistically shown to be highly associated with occupational lung disease is not sufficient to meet the preponderance of the evidence standard necessary to establish that [claimant] has pneumoconiosis." *Id*. at 36.

We agree with claimant that the administrative law judge erred in finding that Dr. Forehand "fails to address whether this specific miner has pneumoconiosis." Decision and Order at 36; *see Justice v. Island Creek Coal Co*., 11 BLR 1-91, 1-93 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295, 1-297 (1984). When asked the basis for his diagnosis of legal pneumoconiosis in this miner, Dr. Forehand identified the following:

> Well [claimant] had a very, very significant work history of inhaling high levels of dust, based on his description, a description of cough, choking when he's working and *then the findings of crackles on his physical examination and then the findings of obstructive ventilatory pattern on his* [*pulmonary function study*] *or his breathing test*.

Claimant's Exhibit 2 at 19 (emphasis added). Dr. Forehand explained how coal dust exposure can cause claimant's obstructive ventilatory impairment:

> Well the dust that is inhaled is retained in the terminal airway and the respiratory bronchial and alveolar duct which causes a centrilobular type of emphysema and these are in the part of the lung called the small airways and this causes a small airway disease, or small airway impairment and it is manifested as an obstructive ventilatory pattern or obstructive lung disease.

Id. Dr. Forehand agreed that "there are different phenotypes for difference sources" of obstructive impairments, and "they can overlap if someone has more than one risk factor[.]" *Id*. at 48. He reiterated that in claimant's case, there is "a history of . . . shortness of breath . . . [and] an irreversible obstructive ventilatory pattern," which he explained is a "phenotype that is [not] specific to any one cause or risk factor." *Id*.

Furthermore, when asked why he did not attribute claimant's obstructive respiratory impairment exclusively to his cigarette smoking history, Dr. Forehand

explained why claimant was at particular risk for developing pneumoconiosis based on his work as a mine operator and roof bolter.[10] He stated:

> [W]hen you're diagnosing obstructive lung disease[,] you think in terms of risks. . . . [I]t's not a multiple choice. You're not thinking in terms of what is the one most likely cause. You consider all likely causes and *in this case*[,] I considered all likely causes and felt that the type of exposure, not just the tenure of [thirteen] years, that was the type of exposure working at the face, miner operator, roof bolter. These individuals are not just dealing in coal dust, they are dealing in silica dust. A miner operator has to cut hard rock in addition to the coal seam. A roof bolter is cutting into hard rock. He's drilling into hard rock every day. These types of jobs have the highest incidence of occupational lung disease because of the fact they are breathing not only coal but hard rock dust.

Id. at 26-27 (emphasis added). On cross-examination, Dr. Forehand agreed that only a minority of miners who work for thirteen years develop coal workers' pneumoconiosis, but reiterated that there was a "susceptibility factor" to be taken into account. *Id*. at 31. He also noted that claimant informed him that he "tried wearing a respirator[,] but because it was so dusty that the respirator would get plugged up, the filters would get plugged . . . he couldn't wear it, he couldn't breath." *Id*. at 31-32. Dr. Forehand indicated that the fact that claimant could not wear protection was an "interesting observation." *Id*. at 32.

Because Dr. Forehand identified factors specific to claimant to support his opinion that claimant suffers from legal pneumoconiosis, the administrative law judge's credibility finding is not supported by substantial evidence. *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Justice*, 11 BLR at 1-93; *Hess*, 7 BLR at 1-297. Thus, we vacate the administrative law judge's determination that Dr. Forehand's deposition testimony is not particular to claimant and that it is insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Moreover, we vacate the

[10] On cross-examination, Dr. Forehand stated that claimant informed him that when he was working in the mines, "ventilation was poor and because of that the dust was extremely [high]" and "he was coughing up the type of material he was coughing, feeling short of breath, feeling heavy in the chest." Claimant's Exhibit 2 at 29. Dr. Forehand stated that the "descriptions that [claimant] gave and [that Dr. Forehand] also know[s] from what [Mine Safety and Health Administration (MSHA)] reports that the highest rates of occupational lung disease do occur at the face and those operating cutting machines, continuous miners, roof bolters." *Id*. at 29-30.

administrative law judge's finding that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309.

On remand, the administrative law judge must reconsider the weight to accord Dr. Forehand's opinion diagnosing legal pneumoconiosis in view of the explanations he provided in his deposition, and as outlined in this decision.[11] In rendering his findings under 20 C.F.R. §718.202(a)(4), the administrative law judge is instructed to evaluate the credibility of the medical opinions in light of the physicians' qualifications and the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions.[12] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23, 25 BLR 2-255, 2-263 (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. In rendering his Decision and Order on remand, the administrative law judge must explain the bases for all of his findings of fact and credibility determinations in accordance with the Administrative Procedure Act.[13] *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162 (1989).

[11] We note that a physician's attribution of an obstructive respiratory or pulmonary impairment to a combination of smoking and coal dust exposure is sufficient to support a finding of legal pneumoconiosis. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23, 25 BLR 2-255, 2-263 (4th Cir. 2013); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gross v. Dominion Coal Corp.*, 23 BLR 1-18 (2003).

[12] The administrative law judge rejected Dr. Ghio's opinion, that claimant does not suffer from legal pneumoconiosis, based on the physician's reliance on statistical averaging. Decision and Order at 36; Director's Exhibit 11. The administrative law judge noted that Dr. Rosenberg opined that claimant does not suffer from legal pneumoconiosis and initially determined that his opinion was reasoned and documented. Decision and Order at 36-37; *see* Employer's Exhibits 3, 8, 10. However, the administrative law judge also suggested that Dr. Rosenberg erred in relying on the reduction in the FEV1/FVC ratio to exclude legal pneumoconiosis, taking into consideration Dr. Forehand's discussion on the significance of the FEV1/FVC ratio. *Id*. On remand, the administrative law judge must determine the weight to accord both Dr. Forehand's opinion and Dr. Rosenberg's opinion.

[13] The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis

If the claimant establishes the existence of legal pneumoconiosis, he has demonstrated, as a matter of law, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Then, the administrative law judge must consider whether claimant is entitled to benefits pursuant to 20 C.F.R. Part 718, based on his consideration of all of the record evidence, including that submitted with the previous claims. If the administrative law judge finds that claimant has not met his burden to establish the existence of legal pneumoconiosis, the administrative law judge may reinstate the denial of benefits.

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therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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