U.S. Department of Labor

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

BRB Nos. 15-0514 BLA
and 16-0039 BLA

JANIS JONES (o/b/o and Widow of JOHN JONES) Claimant-Respondent v. NOR, INCORPORATED and TRAVELERS INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/23/2016 DECISION and ORDER

Appeals of the Decisions and Orders of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Clayton Daniel Scott (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders (09-BLA-5575, 11-BLA-6026) of Administrative Law Judge Alice M. Craft awarding benefits on claims 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 subsequent claim filed on May 16, 2008, and a survivor's claim filed on August 19, 2010.[1]

In a Decision and Order dated August 25, 2015, the administrative law judge considered the miner's 2008 subsequent claim.[2] After crediting the miner with twelve years of coal mine employment,[3] the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis and legal pneumoconiosis. 20 C.F.R. §718.202(a). The administrative law judge, therefore, found that claimant[4] established that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered the miner's 2008 claim on the merits. The administrative law judge found that the evidence, as a whole, established the existence of clinical and legal pneumoconiosis. After finding that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose

[1] Employer's appeal in the miner's claim was assigned BRB No. 16-0039 BLA, and its appeal in the survivor's claim was assigned BRB No. 15-0514 BLA. By Order dated November 19, 2015, the Board consolidated these appeals for purposes of decision only.

[2] The miner filed three previous claims in 1992, 2000, and 2002, all of which were finally denied. Director's Exhibits 1-331, 1-381, 1-587. An administrative law judge denied the miner's most recent prior claim on February 16, 2006, because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1-40.

[3] 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 the miner with less than fifteen years of coal mine employment, she found that claimant was not entitled to consideration under Section 411(c)(4). Decision and Order at 3-4. Therefore, the administrative law judge addressed whether the miner satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

[4] Claimant is the surviving spouse of the miner, who died on June 1, 2010. Director's Exhibit 60.

out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

In a Decision and Order dated August 26, 2015, the administrative law judge addressed the survivor's claim. The administrative law judge noted that Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, with respect to the miner's claim, employer contends that the administrative law judge erred in crediting the miner with twelve years of coal mine employment. Employer also argues 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 miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Employer finally contends that the administrative law judge erred in finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Regarding the survivor's claim, employer contends that, because the administrative law judge erred in awarding benefits in the miner's claim, claimant is not entitled to survivor's benefits pursuant to Section 932(*l*). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30

[5] Because employer does not challenge the administrative law judge's finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

[6] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in crediting the miner with twelve years of coal mine employment. The miner bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act, nor the regulations, provides specific guidelines for the computation of the number of years of coal mine employment. An administrative law judge may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In addressing the length of the miner's coal mine employment, the administrative law judge considered the miner's testimony, reported work histories, Social Security records, and affidavits. The administrative law judge noted that the miner alleged various lengths of coal mine employment when he submitted his claims for benefits.[7] Decision and Order at 5. Moreover, although the miner consistently claimed coal mine employment with J & E Coal Company (J&E) and NOR, Incorporated (NOR), the administrative law judge noted that the miner's accounts of the length of time that he worked for these companies varied, ranging from eight years (1978-1986) to over fifteen years (March 1970 to November 1986). *Id.*

The administrative law judge found that the miner's Social Security records were also of little use in determining the length of time that the miner worked for J&E and NOR. Decision and Order at 6. The administrative law judge noted that, from 1971 to 1986, the miner's Social Security records reveal three years of earnings from J&E (1977 to 1980), as well as earnings from self-employment. *Id.* Despite confirmation in the record that the miner worked for NOR during this time period, the administrative law

[7] In his 1992 and 2000 claims, the miner alleged fifteen years of coal mine employment. Director's Exhibits 1-471, 1-587. The miner next alleged eight years of coal mine employment in his 2002 claim, before claiming twelve years of coal mine employment in his current 2008 claim. Director's Exhibits 1-331, 1-3.

judge noted that the miner's Social Security records did not document any earnings from NOR. *Id.* The administrative law judge, therefore, concluded that "the Social Security records are incomplete and unreliable as evidence of the [m]iner's employment history." *Id.*

The administrative law judge also considered affidavits contained in the record. In an affidavit dated October 22, 2008, Lowell Ferguson, president of J&E from January 1974 to December 1980, stated that the miner worked for J&E from January 1974 to September 1980. Director's Exhibit 7-4. Harry Jones, president of NOR from January 1980 to August 1982, completed an affidavit dated October 22, 2008, wherein he stated that the miner worked for NOR from October 1980 to October 1986. Director's Exhibit 7-2. William D. Fannin, a subsequent president of NOR, completed an affidavit dated October 3, 1994, wherein he stated that the miner worked for NOR from September 1982 to October 1986. Director's Exhibit 7-6. Noting that employer had not submitted any evidence challenging the validity of the affidavits, the administrative law judge relied upon this evidence, and credited the miner with a total of twelve years of coal mine employment from 1974 to 1986. Decision and Order at 6.

Employer contends that the administrative law judge erred in relying on the affidavit evidence to establish twelve years of coal mine employment. Employer specifically argues that the administrative law judge did not consider evidence calling into question the accuracy of the affidavit evidence. For example, because the record reveals that J&E and NOR were incorporated on November 17, 1975 and November 3, 1981 respectively, employer contends that the miner could not have worked for these companies prior to their dates of incorporation. Employer's Brief at 9; Director's Exhibits 1-353, 1-411. We disagree. The date that a business entity is incorporated does not necessarily mean that it was not in operation prior to that date. Employer has not submitted any evidence that J&E and NOR were not in operation prior to their dates of incorporation, or that the miner did not work for these companies during the periods of time attested to by their respective presidents.[8] Consequently, the administrative law judge accurately found that employer had not submitted any evidence challenging the validity of the affidavits. Decision and Order at 6.

[8] There is evidence that the miner and the persons who submitted affidavits had an ongoing business relationship. For example, the Articles of Incorporation for J&E Coal Company list the miner as the initial agent for process, as well as one of the four directors of the organization. Director's Exhibits 1-348, 1-350. The other listed directors include two of the persons providing affidavits in this case, Lowell Ferguson, president of J&E from January 1974 to December 1980, and Harry Jones, president of NOR from January 1980 to August 1982. Director's Exhibits 7-2, 7-4.

Employer also contends that the administrative law judge failed to address inconsistencies between affidavits submitted by Harry Jones. As previously noted, Harry Jones, president of NOR from January 1980 to August 1982, completed an affidavit dated October 22, 2008, wherein he stated that the miner worked for NOR from October 1980 to October 1986. Director's Exhibit 7-2. However, on that same date, Harry Jones submitted a second affidavit stating that the miner was an employee of NOR from "1980 through 1981." Director's Exhibit 7-7. Employer, however, ignores the additional explanation accompanying the first affidavit, wherein Harry Jones explained:

> During the years 1980-1981 NOR had in its employ [the miner]. He was a drill [and] dozer operator. [The miner] was in the employ of NOR from October 1980 thru October 1986. When I left as president of NOR Mr. William Fannin took my place as president. [The miner] stayed in the employ of NOR [through] October 1986.

Director's Exhibit 7-3. Thus, in both affidavits, Harry Jones states that NOR employed the miner form 1980 to 1981, but also indicated, in the first affidavit, that the miner worked for NOR from October 1980 to October 1986. Harry Jones's description of the miner's coal mine employment with NOR appears to encompass the period of time during which Mr. Jones was president of NOR, as well as the time that the miner was employed by NOR after Mr. Jones ceased being president of the corporation. Notably, William D. Fallin, who served as president of NOR after Harry Jones, corroborated that the miner worked for NOR from September 1982 to October 1986.[9] Director's Exhibit 7-6.

Having found that the Social Security records were "incomplete and unreliable," and that the miner's reported work histories were inconsistent, the administrative law judge elected to rely primarily upon the sworn affirmations of the presidents of J&E and NOR to establish the length of the miner's coal mine employment. Decision and Order at 5-6. Because the administrative law judge's computation was permissible and is supported by substantial evidence, we affirm her finding that the miner had at least

[9] Employer notes the "Directory of Mines Pikeville District, Pike County" does not list Harry Jones as "the Official of the company" for NOR until 1983. Employer's Brief at 10. Employer, however, fails to explain how the lack of such a designation in a directory undermines the statements made by Harry Jones in his affidavits.

twelve years of coal mine employment.[10] *See* 20 C.F.R. §725.101(a)(32); *Muncy*, 25 BLR at1-27; *Vickery*, 8 BLR at 1-432.

The Miner's Claim

Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established that the miner suffered from legal pneumoconiosis[11] pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Baker, Jarboe and Broudy. Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), hypoxemia, and chronic bronchitis due to coal mine dust exposure and cigarette smoking. Director's Exhibit 14. Drs. Jarboe and Broudy, however, opined that the miner did not suffer from legal pneumoconiosis. Director's Exhibits 17, 18. Although Drs. Jarboe and Broudy agreed that the miner suffered from a disabling obstructive pulmonary impairment, they attributed the impairment solely to cigarette smoking and asthma. *Id.*

In weighing the conflicting evidence, the administrative law judge found that Dr. Baker diagnosed the miner with legal pneumoconiosis, in the form of COPD, chronic bronchitis, and hypoxia, all due to coal mine dust exposure and cigarette smoking. Decision and Order at 28. The administrative law judge found that Dr. Baker's opinion was "reasoned and documented." *Id.* Conversely, the administrative law judge found that the opinions of Drs. Jarboe and Broudy that the miner did not suffer from legal pneumoconiosis were not reasoned, because neither physician adequately explained why the miner's coal mine dust exposure did not contribute, along with his cigarette smoking, to his disabling obstructive pulmonary impairment. *Id.* at 28-29. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[10] The administrative law judge credited the miner with work in the mines from 1974 to 1986. We note that the affidavits credited by the administrative law judge indicate that the miner was engaged in coal mine employment from January 1974 to October 1986, a period that actually exceeds the twelve years of coal mine employment credited by the administrative law judge.

[11] "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).

Employer argues that the administrative law judge erred in failing to consider that Dr. Baker's diagnosis of legal pneumoconiosis was based upon inaccurate coal mine employment and smoking histories. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Dr. Baker relied upon a twelve year history of coal mine dust exposure. In light of our affirmance of the administrative law judge's finding of twelve years of coal mine employment, we reject employer's contention that Dr. Baker relied upon an inaccurate length of coal mine dust exposure.

Although the administrative law judge acknowledged that Dr. Baker relied upon a "lesser smoking history" than she found established,[12] she concluded that "the difference [was] not so great as to decrease the reliability of his opinion, as it was still a significant history of smoking." Decision and Order at 28. Because the miner had more than ten years of coal mine dust exposure, Dr. Baker opined that the miner's coal mine dust exposure was the most significant cause of his pulmonary impairment. Director's Exhibit 14-21. The effect of an inaccurate smoking history on the credibility of a medical opinion is a determination is to be made by the administrative law judge. *See Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54. The administrative law judge in this case took the discrepancy regarding the length of claimant's smoking history into account when she weighed Dr. Baker's opinion, and acted within her discretion in finding that the discrepancy was not so great as to detract from the probative value of Dr. Baker's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Sellards*, 17 BLR at 1-80-81. Because the Board is not empowered to substitute its opinion for that of the administrative law judge regarding the weight to accord the conflicting medical evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989), we affirm the administrative law judge's credibility determination.

Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Broudy. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Jarboe and Broudy, that the miner's obstructive lung disease was due solely to smoking and asthma, because she found that neither physician adequately explained how he eliminated the miner's coal dust exposure as a source of the miner's obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at

[12] The administrative law judge found that the miner had a twenty-eight pack-year smoking history, Decision and Order at 5, while Dr. Baker relied upon a smoking history of eleven to twelve pack-years. Director's Exhibits 14-22, 14-24.

28-29. The administrative law judge, therefore, permissibly accorded less weight to the opinions of Drs. Jarboe and Broudy.[13] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because it is based upon substantial evidence, we 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).[14] We, therefore, affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge accurately noted that Drs. Baker, Jarboe and Broudy agreed that the miner was totally disabled due to his obstructive airway disease. Decision and Order at 17-22. Having found that the miner's obstructive airways disease constituted legal pneumoconiosis, the administrative law judge rationally discounted the opinions of Drs. Jarboe and Broudy because they did not diagnose legal pneumoconiosis, i.e. attribute the miner's obstructive airway disease to his coal mine dust exposure. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 32-33. Because all of the physicians agreed that the miner's disabling pulmonary impairment was due to his obstructive airways disease,[15] and the administrative law judge found (based on Dr. Baker's opinion) that the miner's obstructive airways disease constituted legal pneumoconiosis, there was

[13] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Jarboe and Broudy, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[14] In light of our affirmance of the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, we need not address the administrative law judge's finding that the evidence also established the existence of clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[15] Dr. Baker opined that the miner was totally disabled due to chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis. Director's Exhibit 14 at 26. Dr.

no need for the administrative law judge to analyze Dr. Baker's opinion a second time.[16] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 848 (6th Cir. 2016); Director's Exhibit 14. Further, the reasoning of the administrative law judge in finding that legal pneumoconiosis substantially contributed to the miner's disability is obvious and supported by substantial evidence. *Lane Hollow Coal Co.* v. *Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998). Consequently, we affirm the administrative law judge's finding that the evidence established that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order (Survivor's Claim) at 3-4. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932)(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Jarboe opined that the miner was totally disabled due to "severe airflow obstruction." Director's Exhibit 17 at 5. Dr. Broudy opined that the miner was totally disabled due to "severe chronic obstructive airways disease." Director's Exhibit 18 at 4-5.

[16] Dr. Baker also opined that the miner's legal pneumoconiosis had "an adverse effect on his respiratory condition and contribute[d] to his class 3 pulmonary impairment." Director's Exhibit 14. Dr. Baker's opinion, therefore, supports a finding that the miner's legal pneumoconiosis was a substantially contributing cause of his total disability. *See* 20 C.F.R. §718.204(c)(1)(i).

Accordingly, the administrative law judge's Decisions and Orders awarding benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge