U.S. Department of Labor

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

BRB No. 16-0626 BLA

TERRY K. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
K & K COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 08/30/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5744) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim[1] filed on February 7, 2013, 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 13.74 years of underground coal mine employment[2] and adjudicated the claim under 20 C.F.R. Part 718. The administrative law judge found that new evidence established that claimant has clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), and thus found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c)(3), (4). The administrative law judge further found that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed two previous claims for benefits, both of which were finally denied. Director's Exhibits 1, 2. Claimant's second claim, filed on May 20, 1997, was denied by the district director on October 31, 1997, for failure to establish any element of entitlement. Director's Exhibit 2.

[2] Claimant's most recent coal mine employment was in West Virginia. Director's Exhibits 1, 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "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).

On appeal, employer contends that the administrative law judge erred in finding that claimant has clinical pneumoconiosis. Employer also contends that the administrative law judge erred in finding that claimant's totally disabling impairment is due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, arguing that the administrative law judge erred in weighing the medical opinions with respect to disability causation. The Director takes no position on the administrative law judge's finding that claimant has clinical pneumoconiosis, but argues that if the Board vacates that finding, the administrative law judge must determine on remand whether claimant has legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4).[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. 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).

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 the totally disabling respiratory or pulmonary impairment 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, 1-2 (1986) (en banc).

[4] "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).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has 13.74 years of underground coal mine employment, and that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 14-16; Director's Exhibits 1, 2. Because claimant established that he is totally disabled, we also affirm as a matter of law the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c)(3), (4), even though the administrative law judge found a change in condition based on his determination that claimant has pneumoconiosis. Decision and Order at 10.

Employer first contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer's Brief at 8-11. The administrative law judge considered a total of five interpretations of two analog x-rays by four physicians. Drs. DePonte and Alexander read an x-ray taken in March 2013 as positive for pneumoconiosis, and Dr. Meyer read it as negative. Director's Exhibit 18; Claimant's Exhibit 1; Employer's Exhibit 2. Dr. Crum read an x-ray from February 2016 as positive, while Dr. Meyer read it as negative. Claimant's Exhibit 4; Employer's Exhibit 5. The administrative law judge also considered two interpretations of a digital x-ray taken in December 2013,[6] which Dr. DePonte read as positive and Dr. Fino read as negative. Claimant's Exhibit 2; Employer's Exhibit 1. After summarizing the x-ray evidence, the administrative law judge concluded:

> Based upon the totality of the evidence, including the qualifications of the various readers and the fact that three of five analog X-ray readings, by three different physicians, were positive for coal workers' pneumoconiosis and that the digital X-ray readings were in equipoise, the undersigned finds that Claimant has proven by a preponderance of the evidence that he has coal worker's [*sic*] pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Decision and Order at 10.

Employer argues that although the administrative law judge briefly referred to the credentials of the physicians who interpreted the x-rays, he failed to consider their credentials when weighing the evidence and impermissibly found that the x-ray evidence was positive for clinical pneumoconiosis based only on a "headcount." Employer's Brief at 9. Employer further contends that the administrative law judge did not explain why he did not accord more weight to the negative readings of Dr. Meyer, given the administrative law judge's recognition of Dr. Meyer's additional credentials. *Id.* at 9-11.

Employer's argument has merit. An administrative law judge must consider physicians' radiological qualifications when weighing conflicting x-ray interpretations, and may not rely solely on the number of interpretations on each side to resolve the conflict. *See* 20 C.F.R. §§718.202(a)(1), 718.102(e)(2); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-273-74 (4th Cir. 1997). Here, the administrative law judge noted the radiological qualifications of some, but not all, of the

[6] The administrative law judge noted that because both readings of the digital x-ray occurred before May 19, 2014, they would be considered "other medical evidence" pursuant to 20 C.F.R. §718.107. Decision and Order at 10; *see* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11.

physicians who provided conflicting readings, and his analysis does not allow us to discern "how, or if, he weighed the x-ray readings in light of the readers' qualifications." *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256, 25 BLR 2-779, 2-793 (4th Cir. 2016).

The four physicians who interpreted the analog x-rays — Drs. DePonte, Alexander, Crum, and Meyer — are all dually-qualified as Board-certified radiologists and B readers, although the administrative law judge mistakenly determined that Dr. Alexander's qualifications are "unknown."[7] Decision and Order at 9. The administrative law judge also listed additional professional qualifications of Drs. DePonte, Crum, and Meyer. *Id*. at 8. Although the administrative law judge stated that he took the "qualifications of the various readers" into account, he offered no explanation or analysis as to how the physicians' qualifications factored into his determination that the x-ray evidence is positive for pneumoconiosis, contrary to the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Furthermore, in determining that the conflicting digital x-ray readings by Drs. DePonte and Fino were in equipoise, the administrative law judge failed to note that while Dr. DePonte is dually-qualified, Dr. Fino is a B reader only. Decision and Order at 10; Claimant's Exhibit 2; Employer's Exhibit 1 at 34.

In short, the administrative law judge's finding appears to be based solely on the fact that "three of five analog X-ray readings" were positive for clinical pneumoconiosis, without adequate consideration of the physicians' credentials. Decision and Order at 10. This is error. *See Addison*, 831 F.3d at 256-57, 25 BLR at 2-793; *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Therefore, we must vacate the administrative law judge's finding that claimant established that he has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because we have vacated the administrative law judge's finding of clinical pneumoconiosis, we must also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 16-19.

On remand, the administrative law judge must reconsider the analog and digital x-ray evidence and determine whether claimant has established that he has clinical pneumoconiosis. In weighing the analog and digital x-ray evidence, the administrative law judge must explain his findings, taking into account both the number of positive and

[7] Dr. Alexander's interpretation of the March 2013 x-ray indicates that he is dually-qualified, and employer acknowledges his qualifications in its brief. Decision and Order at 8-9; Claimant's Exhibit 1; Employer's Brief at 9.

negative readings and the physicians' credentials and qualifications.[8] *See Addison*, 831 F.3d at 256-57, 25 BLR at 2-793.

We also agree with the Director that the administrative law judge, on remand, must weigh the opinions of Drs. Habre, Green, and Fino to determine whether claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Director's Brief at 1-3. Drs. Habre and Green both concluded that claimant has legal pneumoconiosis,[9] while Dr. Fino reached the opposite conclusion, diagnosing claimant with asthma unrelated to his coal dust exposure. Director's Exhibit 18; Claimant's Exhibit 4; Employer's Exhibits 1, 4. The administrative law judge must evaluate the credibility of those physicians' opinions in light of their qualifications, the explanations for their findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34, 21 BLR 2-323, 2-334-35 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On the issue of disability causation at 20 C.F.R. 718.204(c), employer and the Director argue that the administrative law judge erroneously found that Dr. Fino's diagnosis of asthma was a diagnosis of legal pneumoconiosis. Employer's Brief at 15-17; Director's Brief at 2 n.5. We agree. Although Dr. Fino concluded that claimant has asthma unrelated to his coal mine dust exposure, the administrative law judge determined that Dr. Fino's opinion establishes disability causation because the preamble to the 2001

[8] Employer argues that "it is readily apparent that Dr. Meyer is more highly credentialed and qualified than any other reader of record" because he is "affiliated with teaching universities and has published and lectured extensively." Employer's Brief at 10. To the extent employer is asking the Board to hold that Dr. Meyer's x-ray readings are entitled to greater weight than the readings of the other physicians, we decline to do so, as weighing the evidence and making credibility determinations are functions of the administrative law judge, not the Board. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310, 25 BLR 2-115, 2-122 (4th Cir. 2012); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-346 (1985).

[9] Dr. Habre diagnosed claimant with legal pneumoconiosis in the form of chronic bronchitis "correlated with his work history." Director's Exhibit 18. Dr. Green diagnosed "[c]oal worker's pneumoconiosis and chronic obstructive pulmonary disease" based on claimant's reported 17.5 years of coal mine employment. Claimant's Exhibit 4 at 3.

regulatory revisions "directly links, rightly or wrongly, asthma to coal mine dust exposure even though Dr. Fino does not[.]" Decision and Order at 18-19. As employer and the Director assert, the administrative law judge erred by assuming that any diagnosis of asthma equates to a diagnosis of legal pneumoconiosis. Asthma does not constitute legal pneumoconiosis unless it arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2). As a result, we vacate the administrative law judge's finding that Dr. Fino's opinion establishes disability causation pursuant to 20 C.F.R. §718.204(c).

We further agree with the Director that the administrative law judge erred in discounting the opinions of Drs. Habre and Green that pneumoconiosis is a substantially contributing cause of claimant's total disability. Director's Brief at 3-4. The administrative law judge determined that Dr. Habre's opinion was "conclusory" and unsupported by "references to specific diagnostic testing results," and thus unpersuasive. Decision and Order at 17. Dr. Habre, however, examined claimant for the Department of Labor and conducted an x-ray, a pulmonary function study, and an arterial blood gas study, all of which he referred to in his report explaining his opinion. Director's Exhibit 18. Therefore, we agree with the Director that the administrative law judge failed to adequately explain that credibility determination. *See Wojtowicz*, 12 BLR at 1-165.

Similarly, the administrative law judge discredited Dr. Green's opinion because Dr. Green wrote in his report that claimant never smoked and had 17.5 years of coal mine employment, contrary to the administrative law judge's findings that claimant had "a very short smoking history" and 13.74 years of coal mine employment. Decision and Order at 4, 6, 18. We agree with the Director that the administrative law judge failed to explain why those "minor" and "modest" differences affect the credibility of Dr. Green's opinion. *See Wojtowicz*, 12 BLR at 1-165; Director's Brief at 4.

On remand, if the administrative law judge finds that claimant has neither clinical nor legal pneumoconiosis, he must deny benefits because of claimant's failure to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. If the administrative law judge finds that claimant has clinical or legal pneumoconiosis, or both, however, he must reconsider whether pneumoconiosis is a "substantially contributing cause" of claimant's totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(c).[11] Claimant must establish the cause of his total disability "by means of a

[11] Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i),(ii).

physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006). Therefore, if the administrative law judge reaches the issue of disability causation, he must reconsider the opinions of Drs. Habre, Green, and Fino[12] in light of their reasoning and documentation, and explain his findings and credibility determinations. *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.

[12] As the Director contends, if the administrative law judge finds that claimant has pneumoconiosis, he must consider Dr. Fino's opinion on disability causation in light of Dr. Fino's opinion that claimant does not have either clinical or legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-06, 25 BLR 2-713, 2-720-23 (4th Cir. 2015); Director's Brief at 3.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge