U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0586 BLA

RANDOLPH LARGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/29/2018
	)	
Employer-Petitioner	)	
	)	
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 Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert (Shelton, Branham & Halbert) Lexington, Kentucky, for employer.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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 appeals the Decision and Order Awarding Benefits (2014-BLA-05908) of Administrative Law Judge Lee J. Romero, Jr., rendered on a miner's claim filed on October 18, 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 thirteen and one-half years of underground coal mine employment,[1] and found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).[2] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of clinical and legal pneumoconiosis. Employer also contends that the administrative law judge erred in finding that claimant's total respiratory disability was caused by pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits. The Director also requests, however, that if the Board remands this case for any reason, the administrative law judge be instructed to reconsider his finding that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

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

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[1] Under Section 411(c)(4) of the Act, there is a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has fifteen or more years of underground, or substantially similar surface, coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. The administrative law judge correctly determined that because claimant established less than fifteen years of coal mine employment, he is not eligible for the Section 411(c)(4) presumption. Decision and Order at 16-17.

[2] The administrative law judge found that the evidence is insufficient to establish complicated pneumoconiosis and thus found that claimant is not able to invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Decision and Order at 26-27.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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 that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total 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, 1-2 (1986) (en banc).

Pneumoconiosis

The administrative law judge found that claimant established that he has clinical pneumoconiosis[4] based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Employer's sole argument with respect to this finding is that the administrative law judge erred in not treating the x-rays contained in the treatment records as negative for clinical pneumoconiosis. We disagree.

The administrative law judge correctly noted that the treatment records contain x-ray readings that do not mention the presence or absence of clinical pneumoconiosis. Contrary to employer's assertion, while an administrative law judge may conclude that a treatment record x-ray that is silent as to the existence of pneumoconiosis is a negative reading for the disease, the administrative law judge is not required to do so. *See generally Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). As employer raises no other error with regard to the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] "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).

Pursuant to 20 C.F.R. §718.202(a)(4),[5] the administrative law judge found that claimant established the existence of both clinical[6] and legal pneumoconiosis, based on the opinions of Drs. Al-Jaroushi, Green, and Shamma-Othman, and rejected the contrary opinions of Drs. Tuteur and Rosenberg. Decision and Order at 20-23.

Employer does not challenge the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on the opinions of Drs. Al-Jaroushi, Green, and Shamma-Othman. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23. Rather, employer maintains that because Drs. Al-Jaroushi, Green, and Shamma-Othman stated either that they could not differentiate, or that it was difficult to determine, how much of claimant's respiratory condition was due to smoking versus coal dust exposure, their opinions are not sufficiently reasoned to establish legal pneumoconiosis. We disagree.

A physician need not apportion a precise percentage of a miner's lung disease to cigarette smoking versus coal dust exposure in order to establish the existence of legal pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[7] 20 C.F.R. §718.201(a)(2), (b); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them). In this case, the administrative law judge correctly noted that Drs. Al-Jaroushi,[8] Green, and Shamma-Othman each opined that

[5] The administrative law judge found that there is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions at 20 C.F.R. §718.202(a)(3) for establishing the existence of pneumoconiosis are not applicable. Decision and Order at 16-17, 19, 26-27.

[6] The administrative law judge found that while there are no specific findings of pneumoconiosis on the CT scan evidence, "it does not detract from my conclusion that the x-ray evidence establishes the existence of pneumoconiosis." Decision and Order at 19.

[7] Legal pneumoconiosis includes any chronic pulmonary disease or respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

[8] Employer asserts that "it is unclear what Dr. Al-Jaroushi considered as [claimant's] smoking history" since the physician described that claimant is a "current smoker. He

claimant's disabling respiratory impairment was caused primarily by his 50-pack year history of smoking but that claimant's 13.5 years of coal mine employment was at least a significant aggravating or contributing factor. Decision and Order at 8, 13, 14; Director's Exhibit 11; Claimant's Exhibits 2, 3. Thus, we see no error in the administrative law judge's finding that the opinions of Drs. Al-Jaroushi, Green, and Shamma-Othman are reasoned and sufficient to support a finding that claimant has legal pneumoconiosis.[9] Decision and Order at 21.

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Tuteur's opinion that claimant does not have legal pneumoconiosis. As noted by the administrative law judge, Dr. Tuteur opined that claimant has severe chronic obstructive pulmonary disease (COPD) due to a combination of factors, which include smoking, exposure to second-hand smoke, and exposure to "fossil fuel combustion fumes" as a child. Dr. Tuteur estimated that there is a "20 to 1 probability" that claimant's COPD is due to smoking rather the coal dust exposure. The administrative law judge permissibly assigned less weight to Dr. Tuteur's opinion to the extent that he relied on statistics to exclude coal dust exposure as a causative factor for claimant's respiratory impairment,

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started smoking in the early 60s. He smokes mainly cigarettes. He used to smoke [one] pack per day but now he cut down to only 1-2 cigarettes a day." Employer's Brief at 6, *quoting* Director's Exhibit 11. Contrary to employer's assertion, the administrative law judge noted Dr. Al-Jaroushi's description of claimant's smoking history along with the histories reported by the other physicians, and found that all of the evidence is "consistent with a conclusion that [claimant] has smoked for at least fifty years, at the rate of up to a pack a day, and that he is currently smoking. Decision and Order at 5. The administrative law judge rationally credited Dr. Al-Jaroushi's opinion because the physician understood that claimant "smoked for long periods of time." *Id*. at 8; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

[9] The administrative law judge permissibly found that the opinions of Drs. Al-Jaroushi and Green are "well-reasoned" and that their diagnoses of legal pneumoconiosis are "consistent with [claimant's] pulmonary function and arterial blood gas study results, his symptoms, examination findings, and significant coal dust exposure during his 13.5 years of coal mine work." Decision and Order at 20. The administrative law judge appears to have given Dr. Shamma-Othman's opinion some weight but does not specifically find her opinion well-reasoned. *Id.* at 20-21. Although employer maintains that the administrative law judge erred in giving any weight to Dr. Shamma-Othman's opinion, any error is harmless, since substantial evidence supports the administrative law judge's finding of legal pneumoconiosis, based on the opinions of Drs. Al-Jaroushi and Green. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

rather than the facts of claimant's particular case. *See Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830 (10th Cir. 2017); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge rationally concluded that Dr. Tuteur did not address the additive effects of smoking and coal dust exposure and that he did not adequately explain "why [claimant] could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure." Decision and Order at 22. Despite employer's assertions to the contrary, the administrative law judge has discretion to determine the credibility of the evidence, and his discrediting of Dr. Tuteur's opinion was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that Dr. Tuteur's opinion is entitled to less weight on the issue of legal pneumoconiosis.

With regard to Dr. Rosenberg's opinion, employer generally asserts that "unlike [claimant's] proffered physicians, Dr. Rosenberg explains explicitly why the specific changes evident in [claimant's] lungs were related to cigarette smoke exposure and not coal dust exposure." Employer's Brief at 8-9. Employer has not identified, however, any specific error of law or fact in the administrative law judge's rejection of Dr. Rosenberg's opinion regarding the etiology of claimant's "primary linear interstitial lung disease."[10] Director's Exhibit 12; *see* Decision and Order at 21. Because the Board is not empowered to reweigh the evidence, or engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore reject employer's assertion that Dr. Rosenberg's opinion is entitled to determinative weight.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative

[10] Dr. Rosenberg cited to the findings of linear interstitial changes and ground-glass opacities on x-ray and CT scans, and restrictive impairment, as the bases for his opinion that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibit 12.

law judge's finding that claimant established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, based on a weighing of the evidence as a whole, under 20 C.F.R. §718.202(a).

Disability Causation

Employer does not challenge that administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment. *See Skrack*, 6 BLR at 1-711. The next question that must be addressed, then, is whether claimant's total disability is due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[11] The administrative law judge credited the opinions of Drs. Al-Jaroushi, Green, and Shamma-Othman that claimant's respiratory disability was caused by clinical and legal pneumoconiosis. Decision and Order at 26. The administrative law judge further noted that "Dr. Rosenberg concluded that [the] qualifying arterial blood gas results obtained by Dr. Al-Jaroushi related to the linear interstitial lung disease, which was the basis for the [administrative law judge's] findings of [clinical] pneumoconiosis on x-ray." *Id.*

Employer asserts that Drs. Al-Jaroushi, Green, and Shamma-Othman do not credibly satisfy claimant's burden of proving disability causation, as "they could not separate the impact of [claimant's] combined exposures to coal mine dust and cigarette smoke" in causing claimant's disabling respiratory impairment. Employer's Brief at 9. Because we have already rejected employer's identical argument in our consideration of legal pneumoconiosis, and since employer raises no other specific error with regard to the

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[11] The regulation at 20 C.F.R. §718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially 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).

administrative law judge's weighing of the evidence on the issue of disability causation, we affirm the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Williams*, 453 F.3d at 622; *Cornett*, 227 F.3d at 576-77; *Cox*, 791 F.2d at 445; *Sarf*, 10 BLR at 1-120-21.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[12]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[12] Because we have affirmed the award of benefits, we need not address the Director's argument regarding the administrative law judge's finding that claimant does not have complicated pneumoconiosis.