U.S. Department of Labor

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

BRB No. 17-0681 BLA

CARROLL K. RUNYON, JR. (o/b/o the Estate of CARROLL RUNYON)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 08/30/2019
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06010) of Administrative Law Judge Monica Markley rendered pursuant to 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 24, 2011.[1]

The administrative law judge accepted the parties' stipulation the miner had fourteen years of coal mine employment and, therefore, found claimant[2] could not invoke the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). She also found no evidence of complicated pneumoconiosis, and therefore claimant could not 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) (2012); 20 C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without presumptions, the administrative law judge found claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2) and, thus, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). She further found claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established the miner had legal pneumoconiosis and his total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The

[1] The miner filed four prior claims, all of which were finally denied. Director's Exhibits 1-3. The miner's most recent prior claim, filed on February 14, 2005, was denied by the district director on December 2, 2005, because he did not establish total respiratory disability. Director's Exhibit 3. No further action was taken by the miner until filing the current claim on May 24, 2011. Director's Exhibit 5.

[2] Claimant is the son of the miner, who died on July 27, 2014. He is pursuing the claim on behalf of the miner's estate. [ALJ] Order Granting Substitution of Party of Record [February 2, 2016] at 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Director, Office of Workers' Compensation Programs, did not file a response brief. In reply to claimant's response, employer reiterates its contentions.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 under 20 C.F.R. Part 718, 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 (1986) (en banc).

Existence of Legal Pneumoconiosis

To establish legal pneumoconiosis,[6] claimant must prove the miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge considered the medical opinions of Drs. Rasmussen, Cohen, Fino and Zaldivar.[7] Decision

[4] We affirm, as unchallenged, the administrative law judge's findings that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[6] The administrative law judge found claimant did not establish the existence of clinical pneumoconiosis. Decision and Order at 29-31.

[7] The administrative law judge also considered the medical opinion evidence submitted with the miner's prior claims. She accorded little weight to the medical opinions submitted in the first two claims because they were remote in time and pneumoconiosis is a progressive disease. Decision and Order at 31-32. She accorded no weight to Dr.

and Order at 9-22. Drs. Rasmussen and Cohen diagnosed legal pneumoconiosis in the form of an obstructive impairment related to coal mine dust exposure and cigarette smoking. Director's Exhibit 11; Claimant's Exhibit 1. In contrast, Drs. Fino and Zaldivar opined the miner did not have legal pneumoconiosis, but suffered from an obstructive impairment related to cigarette smoking. The administrative law judge determined the opinions of Drs. Rasmussen and Cohen are well-reasoned and documented, but the opinions of Drs. Fino and Zaldivar are not well-reasoned and documented, and contrary to the regulations. Decision and Order at 34. The administrative law judge therefore found the weight of the medical opinion evidence establishes the miner had legal pneumoconiosis.

Employer asserts the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Fino and Zaldivar. Employer's Brief at 18. Employer's assertion has merit, in part.

Initially, we reject employer's assertion the administrative law judge erred in discrediting Dr. Fino's opinion. Employer's Brief at 17. Dr. Fino noted the miner's breathing medication suggested he was treated for chronic obstructive pulmonary disease (COPD) or asthma. Employer's Exhibit 7 at 11. Noting that the pulmonary function studies he reviewed from 1996 to 2005 showed variability in obstruction, Dr. Fino opined the miner had a mild obstructive impairment related to cigarette smoking. *Id*. at 22. Dr. Fino stated, "I would not [expect] variability over time due to coal mine dust inhalation." *Id*. at 22. He further stated, "I can explain everything with cigarette smoking." *Id*. at 23. The administrative law judge permissibly discredited Dr. Fino's opinion, however, because she found the doctor failed to adequately explain why the miner's years of coal dust exposure did not significantly contribute, along with other factors, to his obstructive impairment.[8] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 33.

Hussain's opinions submitted in the third and fourth claims because they are not well-reasoned or documented. Decision and Order at 32.

[8] Because the administrative law judge provided a valid reason for discrediting Dr. Fino's opinion, any error in discrediting his opinion for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We therefore need not address employer's remaining arguments regarding the weight accorded to Dr. Fino's opinion.

We agree, however, with employer's assertion that the administrative law judge erred in discrediting Dr. Zaldivar's opinion. Employer's Brief at 17. Dr. Zaldivar opined the miner had a totally disabling pulmonary impairment due to cigarette smoking and asthma unrelated to coal mine dust exposure. Employer's Exhibits 3, 8. The administrative law judge found, however, that even assuming the miner had asthma unrelated to coal dust exposure, Dr. Zaldivar failed to explain why he could not have suffered from a chronic lung disease arising out of coal dust exposure. Decision and Order at 33. Contrary to the administrative law judge's finding, however, Dr. Zaldivar explained that the miner's pattern of "impairment," including his variability on spirometry and improvement of blood gases with exercise, is "not typical at all of COPD caused by coal workers' pneumoconiosis." Employer's Exhibit 8 at 31-33; *see Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

The administrative law judge also mischaracterized Dr. Zaldivar's opinion by finding that he relied on generalities about "the small number of coal miners who actually develop pneumoconiosis" as evidence the miner did not have pneumoconiosis. Decision and Order at 34; *see Tackett*, 7 BLR at 1-706. Contrary to the administrative law judge's finding, Dr. Zaldivar did not rely on the statistic that "only 10 percent of miners developed pneumoconiosis" in reaching his conclusion the miner's obstructive impairment did not arise out of coal dust exposure. Decision and Order at 34. Rather, Dr. Zaldivar used that statistic to explain why he responded "no" when asked if a history of twenty-three years of coal dust exposure is "always" sufficient to produce a coal dust-induced lung disease. Employer's Exhibit 8 at 9.

Employer next asserts the administrative law judge erred in finding the opinions of Drs. Rasmussen and Cohen sufficient to meet claimant's burden to establish legal pneumoconiosis. Employer's Brief at 8-13. Employer argues the administrative law judge's crediting of their opinions is unexplained and thus does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *Id.* at 8-11. Employer's arguments have merit.

The administrative law judge noted that Dr. Rasmussen's diagnosis of COPD/emphysema and Dr. Cohen's diagnosis of COPD are based on physical examinations and the results of pulmonary function testing. Decision and Order at 34. She also noted their opinions are based on the miner's work, smoking, and medical histories. *Id*. Further, the administrative law judge noted Dr. Rasmussen's view that a coal dust-induced versus smoking-induced emphysema cannot be distinguished, and Dr. Cohen's conclusion that the miner's condition was not caused by cirrhosis because he did not have pulmonary edema. *Id*. She then concluded the opinions of Drs. Rasmussen and Cohen are well-reasoned and documented. *Id*. As employer accurately notes, however, the administrative law judge failed to explain why the opinions of Drs. Rasmussen and Cohen

are well-reasoned and documented. Employer also correctly points out that the administrative law judge did not address the significance of Dr. Rasmussen's reliance on twenty-three years, as opposed to her finding of fourteen years, of coal mine employment. Consequently, the administrative law judge's analysis does not comply with the APA, which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

Because the administrative law judge did not accurately characterize Dr. Zaldivar's opinion, and did not adequately explain all of her findings as required by the APA, we vacate her finding that claimant established the existence of legal pneumoconiosis, and instruct her to reconsider this issue on remand. 20 C.F.R. §718.202(a)(4). The administrative law judge must consider all the relevant medical opinions in determining whether claimant has met his burden of proof. *See 2*0 C.F.R. §718.202(a)(4).

Total Disability Due to Pneumoconiosis

To establish the miner was totally disabled due to pneumoconiosis, claimant must prove pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment.[9] 20 C.F.R. §718.204(c)(1). The administrative law judge credited the opinions of Drs. Rasmussen[10] and Cohen as well-reasoned and documented, but discredited the opinions of Drs. Fino and Zaldivar as not well-reasoned and documented. Relying on the opinions of Drs. Rasmussen and Cohen, the administrative law judge found that claimant established the miner was totally disabled due to pneumoconiosis.

As employer correctly asserts, however, the administrative law judge applied an erroneous standard in her analysis of whether the medical opinion evidence met claimant's burden on this issue. Instead of focusing on the contribution that legal pneumoconiosis

[9] Pneumoconiosis is a "substantially contributing cause" of total disability 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); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001).

[10] Dr. Rasmussen opined the miner's legal pneumoconiosis was a significant contributing cause of his disability. Director's Exhibit 11.

made to the miner's total respiratory disability at 20 C.F.R. §718.204(c)(1), the administrative law judge revisited the question of the extent to which his respiratory impairment was attributable to coal mine dust exposure, which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Decision and Order at 36. Specifically, the administrative law judge stated claimant established that the miner's totally disabling pulmonary or respiratory impairment was caused "at least in part" by coal dust exposure. Decision and Order at 36. Having determined that legal pneumoconiosis was established, in the form of the miner's obstructive impairment, the administrative law judge should have considered whether that condition was a "substantially contributing cause" of the miner's disabling respiratory or pulmonary impairment.[11] 20 C.F.R. §718.204(c)(1); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 490, 25 BLR 2-135, 2-154-55 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001); 20 C.F.R. §718.204(c)(1). Consequently, we vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of this issue.

[11] In *Groves*, the Sixth Circuit held the administrative law judge erred in stating the miner need only establish that legal pneumoconiosis was a contributing cause of his totally disabling respiratory or pulmonary impairment, when the regulatory standard requires that pneumoconiosis be a substantially contributing cause. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014).

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge