U.S. Department of Labor

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

BRB No. 18-0444 BLA

CHARLES J. MATTAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY ALABAMA	)	
	)	DATE ISSUED: 08/13/2019
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-06032) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on February 4, 2016,

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 14.48 years of coal mine employment, as stipulated to by the parties.[1] He found claimant established legal pneumoconiosis and a totally disabling respiratory impairment but did not establish that his respiratory disability was caused by pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends the administrative law judge failed to rationally explain why the opinions of Drs. Fino and Basheda do not support a finding of disability causation. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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.[2] 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 he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is due to pneumoconiosis.[3] 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).

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[1] Because claimant established less than fifteen years of coal mine employment, he cannot invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-15.

Claimant asserts the administrative law judge erred in finding the opinions of Drs. Basheda and Fino sufficient to establish legal pneumoconiosis[4] but not sufficient to establish disability causation.[5] Claimant contends the administrative law judge did not explain his determination in accordance with the Administrative Procedure Act (APA).[6] We disagree.

The administrative law judge found claimant established legal pneumoconiosis based on the opinions of Drs. Lenkey, Basheda, and Fino, who diagnosed an obstructive respiratory impairment caused by asthma or chronic obstructive pulmonary disease (COPD)/asthma. 20 C.F.R. §718.202(a)(4); Decision and Order at 14; Claimant's Exhibit 3; Employer's Exhibits 3, 4. The administrative law judge did not resolve the conflict in their respective opinions regarding the etiology of claimant's obstructive respiratory impairment. He stated only that "[t]heir diagnoses [of asthma or COPD] equate to a finding of legal coal workers' pneumoconiosis" under the preamble to the 2001 regulatory revisions. Decision and Order at 14, *citing* 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).[7]

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[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Employer states "in reviewing the opinions of Drs. Basheda and Fino, there is no way that they can establish this element of entitlement." Employer's Brief at 7.

[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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 . . . ." 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).

[7] The Department of Labor recognized in the preamble to the 2001 regulatory revisions that the term chronic obstructive pulmonary disease "includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and asthma." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

In considering the issue of disability causation at 20 C.F.R. §718.204(c),[8] the administrative law judge rejected Dr. Lenkey's opinion that "roughly [twenty] percent" of claimant's respiratory disability was due to coal dust exposure because he found the doctor did not adequately explain the basis for his conclusion. Decision and Order at 24, *quoting* Claimant's Exhibit 3. The administrative law judge also found that because Drs. Basheda and Fino opined "[c]laimant's coal mine dust exposure has nothing to do with his pulmonary impairments," their opinions do "not prove [c]laimant's *prima facie* case that coal mine dust exposure was a 'substantially contributing cause' of his total pulmonary or respiratory disability." Decision and Order at 24.

At the outset, the administrative law judge incorrectly stated that a diagnosis of asthma or COPD, standing alone, establishes legal pneumoconiosis. Decision and Order at 14. In order for claimant's asthma or COPD to constitute legal pneumoconiosis, it must be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,938; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314 (4th Cir. 2012) (Whether a particular miner's COPD or asthma is significantly related to, or substantially aggravated by, dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record).

Although the administrative law judge gave claimant an improper presumption that his COPD or asthma is legal pneumoconiosis, he addressed the etiology of those conditions when weighing the evidence on disability causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The administrative law judge correctly found the opinions of Drs. Basheda and Fino do not support claimant's burden of proof, as they specifically exclude coal mine dust exposure as a causative factor for his disabling obstructive respiratory impairment. Decision and Order at 24-25; Employer's Exhibits 3, 4. Because the opinions of Drs. Basheda and Fino do not aid claimant in establishing legal pneumoconiosis or that legal pneumoconiosis is a substantially contributing cause of claimant's respiratory disability, we reject claimant's assertion the case must be remanded for further consideration of their opinions. *See Looney*, 678 F.3d at 316 (explaining that if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because claimant does not raise any other error with regard to the

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[8] To establish disability causation, claimant must prove his pneumoconiosis is a "substantially contributing cause" of his disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

administrative law judge's weighing of the medical opinions,[9] we affirm his finding claimant did not establish disability causation. 20 C.F.R. §718.204(c); *see Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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[9] We affirm, as unchallenged, the administrative law judge's determination that the opinions of Drs. Lenkey and Zlupko are not sufficiently reasoned on the issue of disability causation. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24; Director's Exhibits 12, 18; Claimant's Exhibit 3.