U.S. Department of Labor

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

BRB No. 15-0051 BLA

BILLY J. RICHARDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J. SMITH COAL, INCORPORATED	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD, C/O ARROWPOINT CAPITAL	)	DATE ISSUED: 12/14/2015
	)	
Employer/Carrier-Respondents	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5545) of Administrative Law Judge John P. Sellers, III (the administrative law judge) rendered on a subsequent claim[1] filed 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 adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with thirteen years and seven months of coal mine employment.[2] The administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)[3] and total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find disability causation established pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter and avers that because the administrative law judge found that claimant's chronic obstructive pulmonary disease constitutes legal pneumoconiosis, and as this pulmonary disease is the sole cause of claimant's total disability, claimant has established that his pneumoconiosis is a substantially contributing cause of the disability. Consequently, the Director contends that the denial of benefits should be reversed and that benefits should be awarded to claimant. Claimant responds to both employer's brief and the Director's

[1] Claimant's first application for benefits, filed on July 31, 2008, was denied by the district director on March 12, 1997, because claimant withdrew this claim on December 2, 2008. Claimant filed the current claim for benefits on April 5, 2011. Director's Exhibit 2.

[2] Because claimant established less than fifteen years of coal mine employment, claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[3] Although the administrative law judge did not specifically cite to 20 C.F.R. §718.203(b), he found that claimant also established that his pneumoconiosis arose out of coal mine employment based upon his determination that a finding of legal pneumoconiosis is subsumed into the issue of whether the disease arose out of coal mine employment. *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 18.

letter, and reiterates his arguments on appeal. Employer responds to the Director's letter, arguing that the Director's argument lacks merit because it conflates separate legal issues and misrepresents the administrative law judge's findings. Hence, employer contends that the administrative law judge's disability causation determination should be affirmed.[4]

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.[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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is caused by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 17-20. While employer generally asserts that "there has been no good diagnosis of pneumoconiosis in this claim" and that "no doctor in this case has actually relied upon a presumptively qualifying medical test to determine that the claimant is totally disabled due to pneumoconiosis," Employer's Brief at 5, employer has not identified any substantive error of law or fact in the administrative law judge's weighing of the evidence relevant to the issues of pneumoconiosis and total respiratory disability. Consequently, we affirm the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See* 20 C.F.R. §§802.211(b), 802.212(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992)(en banc); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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

Claimant challenges the administrative law judge's weighing of the medical opinion evidence and contends that the administrative law judge erred in failing to find disability causation established at Section 718.204(c). Specifically, claimant maintains that the administrative law judge unfairly characterized Dr. Chavda's opinion as equivocal, when the physician unequivocally diagnosed legal pneumoconiosis and stated that this condition "fully" contributed to claimant's impairment. Claimant's Brief at 6-7; Director's Exhibit 11. Claimant further argues that, contrary to the administrative law judge's finding, Dr. Houser's opinion, that approximately 14% of claimant's impairment was caused by coal dust exposure and that this contribution was more than insignificant, is sufficient to establish that pneumoconiosis is a substantially contributing cause of disability. Claimant's Brief at 4-8; Employer's Exhibit 4 at 18-19. Lastly, claimant maintains that Dr. Baker, in his review of Dr. Houser's report, relied on medical literature to conclude that claimant's "disabling respiratory impairment has been substantially caused by his coal mine employment" and, thus, his opinion satisfies claimant's burden. Claimant's Brief at 7-8; Claimant's Exhibit 1 at 2.

Employer counters that claimant's arguments essentially amount to an impermissible request for the Board to reweigh the evidence, and employer urges the Board to affirm the administrative law judge's credibility determinations. Employer's Brief at 3-5.

The Director maintains that, because the administrative law judge found that claimant's chronic obstructive pulmonary disease constituted legal pneumoconiosis, and claimant's chronic obstructive pulmonary disease is the sole cause of claimant's totally disabling respiratory impairment, claimant has established, as a matter of law, that his legal pneumoconiosis is a "substantially contributing cause" of his disability pursuant to Section 718.204(c). Director's Letter Brief at 2. Consequently, the Director avers that the administrative law judge's finding that claimant did not establish disability causation must be reversed.

Prior to evaluating the medical opinions at Section 718.204(c), the administrative law judge, citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014), articulated the proper standard, consistent with the regulations, for establishing disability causation, *i.e.*, claimant must prove that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 20. However, the administrative law judge applied an erroneous standard in his analysis of whether the medical opinions of Drs. Chavda,[6] Baker,[7] and Houser[8] satisfy claimant's burden on this

[6] In his initial report of October 13, 2009, Dr. Chavda diagnosed legal pneumoconiosis and opined that this condition "fully" contributed to claimant's impairment. Director's Exhibit 11. In a report dated November 10, 2009, Dr. Chavda

issue under Section 718.204(c).[9] Instead of focusing on the contribution which *pneumoconiosis* makes to claimant's total respiratory disability at Section 718.204(c)(1),

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stated that claimant's "pulmonary compromise could be significantly contributed to and/or aggravated by dust exposure in the coal mine employment." Director's Exhibit 13.

[7] In his August 11, 2008 report, Dr. Baker opined that claimant's smoking history of one pack per day for 46 years was "more than likely the predominant cause of his chronic bronchitis and chronic obstructive airway disease" rather than his 14 years of coal mine employment. Employer's Exhibit 2. Dr. Baker concluded that claimant's Class III impairment was primarily due to cigarette smoking and not to coal dust exposure. Employer's Exhibit 2. On October 29, 2013, Dr. Baker reviewed various medical records, including Dr. Houser's report. Citing medical literature, Dr. Baker opined that claimant's degree of risk of impairment from his years spent in mining compared to his smoking history was greater than that found by Dr. Houser. Dr. Baker indicated that the percentage of claimant's impairment due to coal mine employment "was probably greater than 14%, possibly even up to 20 or 25%," and that claimant's "disabling respiratory impairment has been substantially caused by his coal mine employment." Claimant's Exhibit 1.

[8] In his October 27, 2011 report, Dr. Houser noted that claimant's spirometry showed moderately severe airway obstruction on submaximal effort. Dr. Houser diagnosed a mild respiratory impairment and indicated that there was evidence in the medical literature that one year of underground coal mining has a similar adverse effect with regard to the development of chronic obstructive pulmonary disease (COPD) as a one pack-year history of smoking. Considering claimant's 12 years as a surface miner and his 73-1/2 pack-year history of smoking, Dr. Houser concluded that 86% of claimant's risk for the development of COPD was due to smoking and 14% or less was due to coal mining. Employer's Exhibit 1.

[9] The administrative law judge discounted Dr. Chavda's opinion, finding that the physician's statement, that claimant's impairment "could be significantly contributed to" by coal dust exposure, to be equivocal in light of claimant's much greater smoking history and insufficient to establish that coal dust was a substantially contributing cause of disability. Decision and Order at 21, *citing* Director's Exhibit 11. Similarly, the administrative law judge discounted Dr. Baker's opinion, that coal dust exposure was responsible for "a significant impairment" and that coal dust "probably" constituted greater than 14%, "possibly even up to 20% or 25%" of the impairment, as equivocal and insufficient to meet claimant's burden. Decision and Order at 21, *citing* Claimant's Exhibit 1. The administrative law judge further found that Dr. Baker's failure to address and resolve the inconsistencies between his 2008 and 2013 reports diminished the

the administrative law judge revisited the question of the extent to which claimant's respiratory impairment is attributable to *coal dust exposure*,[10] which is the relevant

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probative weight of his opinion. Decision and Order at 21-22. Lastly, the administrative law judge determined that Dr. Houser failed to address the relevant legal standard, as he attributed 14% of claimant's impairment to his coal dust exposure, but failed to indicate whether coal dust substantially contributed to claimant's disability. Decision and Order at 22.

[10] The administrative law judge's confusion is understandable, as the questions posed in determining the existence of legal pneumoconiosis and disability causation are similar, but not identical.

The definition of legal pneumoconiosis, set forth at Sections 718.201(a)(2), (b) is:

> . . . any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment . . . For purposes of this section, a disease "arising out of coal mine employment" 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(a)(2), (b).

The definition of total disability due to pneumoconiosis (disability causation), set forth at Section 718.204(c)(1), states:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [20 C.F.R.] §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:
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> (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.

inquiry in establishing the existence of legal pneumoconiosis pursuant to Section 718.201(a)(2).[11] Decision and Order at 20-22. This was error. Having determined that legal pneumoconiosis was established, the administrative law judge should have considered whether that condition is a substantially contributing cause of claimant's disability.

We disagree with the Director's argument that the facts of this case warrant reversal of the administrative law judge's denial of benefits. Reversal would be appropriate if chronic obstructive pulmonary disease, which the administrative law judge found to be legal pneumoconiosis, was the only respiratory or pulmonary impairment suffered by claimant that could cause his total disability. However, a review of the record reveals evidence of alternate pulmonary diseases or conditions that could potentially cause or contribute to claimant's disability. Specifically, CT scans dated May 22, 2013 and August 13, 2013 were interpreted by Drs. Bauer and Harrison as showing changes from a previous left upper lobectomy, and Dr. Bauer noted claimant's "history of squamous cell carcinoma." Claimant's Exhibit 2; Employer's Exhibit 3 at 47, 70. Claimant testified that he was diagnosed with lung cancer in January of 2013, and that his cancer was in remission at the time of the hearing. Hearing Transcript at 50. Because the administrative law judge is required to examine and weigh all relevant medical evidence and render findings that comport with the proper legal standard, we vacate the administrative law judge's findings at Section 718.204(c) and remand this case for the administrative law judge to consider all of the relevant evidence of record and determine whether claimant has established disability causation. In assessing the credibility of the medical opinion evidence at Section 718.204(c), the administrative law judge must set

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20 C.F.R. §718.204(c)(1).

Consequently, the proper place for the inquiry regarding the contribution of *coal dust exposure* is in the determination as to the existence of legal pneumoconiosis.

[11] A physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke versus coal dust exposure in order to establish the existence of legal pneumoconiosis. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 922, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-605-06 (4th Cir. 1999). However, the administrative law judge must find from the evidence that the chronic lung disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014).

forth a rationale that comports with the requirements of the Administrative Procedure Act in determining whether each opinion is well-reasoned and sufficient to meet claimant's burden. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Additionally, we note that the examining doctors in this case rendered opinions in 2008, 2009, and 2011, before claimant's 2013 diagnosis of lung cancer. Claimant's Exhibit 1; Director's Exhibits 11, 13; Employer's Exhibit 1. In light of this fact, the administrative law judge may, within his discretion, order the further development of evidence. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge