U.S. Department of Labor

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

BRB No. 18-0076 BLA

DORSIE WIREMAN (o/b/o DONALD WIREMAN)	)	
Claimant-Petitioner	)	
v.	)	
HBK CORPORATION	)	
and	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 12/31/2018
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jennifer L. Conner (Law Office of John C. Collins), Salyersville, Kentucky, for claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2011-BLA-06304) of Administrative Law Judge Larry W. Price, rendered on a miner's claim filed on February 22, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on his determination that the miner had nine years of coal mine employment, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[2] Considering whether claimant could establish entitlement to benefits in the miner's claim without the aid of the Section 411(c)(4) presumption,[3] the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that she did not establish the existence of pneumoconiosis, based on the x-rays, biopsy evidence and medical opinions. Employer responds, urging affirmance of the denial of benefits.

[1] Claimant is the widow of the miner, who died on October 16, 2012, while his claim was pending before the Office of Administrative Law Judges. Claimant's Exhibit 4. Claimant is pursuing the miner's claim on his behalf.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if she establishes that the miner had 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); 20 C.F.R. §718.305.

[3] Although the issue was not addressed by the administrative law judge, the record does not contain evidence that the miner had complicated pneumoconiosis and therefore claimant is not able to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[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).

Without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions, claimant has the burden to establish that the miner had pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he had a totally disabling respiratory or pulmonary impairment, and the totally disabling respiratory or pulmonary impairment was 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).

X-ray Evidence – Clinical Pneumoconiosis

The administrative law judge found that claimant did not establish the existence of clinical pneumoconiosis,[6] based on the x-ray evidence. Claimant contends that the

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had nine years of coal mine employment and that claimant did not invoke the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[6] "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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

administrative law judge improperly relied on the numerical superiority of the negative x-ray readings. Claimant's Brief at 12. We disagree.

The administrative law judge considered four readings of three x-rays. Dr. Forehand, a B reader, read the March 18, 2010 x-ray as positive, while Dr. Wiot, a dually-qualified Board-certified radiologist and B reader, indicated that the film was unreadable. Director's Exhibits 15, 16. Dr. Tarver, who is also dually-qualified, read the May 26, 2011 x-ray as negative. Employer's Exhibit 1. Dr. Tarver and Dr. Shipley, who is also dually-qualified, read the April 17, 2012 x-ray as negative. *Id.*

Contrary to claimant's contention, in resolving the conflict in the x-ray evidence, the administrative law judge did not merely count the number of negative readings. Rather, he properly took into account the radiological qualifications of the physicians and permissibly credited the readings by the dually-qualified radiologists. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 12. As the administrative law judge properly conducted both a quantitative and qualitative analysis of the x-ray evidence, we affirm his finding that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 12.

Biopsy Evidence – Clinical Pneumoconiosis

The miner underwent a biopsy on May 9, 2012, and tissue samples were obtained from the right mediastinal lymph node and the right and left paratracheal lymph nodes. Claimant's Exhibit 3. Dr. Combs prepared the surgical biopsy report and noted that the tissue samples showed "varying degrees of sinus histiocytosis . . . containing brown to black refractile pigment." *Id.* She also noted that "[a] few scattered hyalinized nodules [were] seen consistent with silica nodules." *Id.* Dr. Combs diagnosed anthracosilicosis and opined that the biopsy was negative for malignant cells. *Id.*

Dr. Caffrey reviewed the four biopsy slides and indicated that he was unable to diagnose clinical pneumoconiosis or any lung disease because the slides contained lymph node tissue and not lung tissue. Employer's Exhibit 2. Dr. Caffrey noted a "mild to moderate amount of anthracotic pigment"[7] and disagreed with Dr. Comb's use of the term "anthracosilicosis" to describe the biopsy findings. *Id.*

[7] The regulations provide that a "finding in an autopsy or biopsy of anthracotic pigmentation . . . must not be considered sufficient, by itself, to establish the existence of [clinical] pneumoconiosis." 20 C.F.R. §718.202(a)(2).

In addressing whether claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge summarily stated: "The sole biopsy evidence submitted does not contain lung tissue but rather lymph nodes. Lymph nodes samples are not sufficient to diagnos[e] clinical pneumoconiosis. There is no autopsy evidence." Decision and Order at 12.

We agree with claimant that the administrative law judge's summary conclusion does not satisfy the Administrative Procedure Act (APA).[8] The administrative law judge did not provide a basis for his conclusion and he did not explain how he resolved the conflict in the opinions of Drs. Combs and Caffrey regarding whether the miner had biopsy findings consistent with clinical pneumoconiosis.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 132 (4th Cir. 1989). Because the administrative law judge's finding that the biopsy evidence is insufficient to establish the existence of clinical pneumoconiosis is not adequately explained, we must vacate his finding pursuant to 20 C.F.R. §718.202(a)(2). *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 12.

Medical Opinion Evidence – Clinical and Legal Pneumoconiosis

Under 20 C.F.R. §718.202(a)(4), the administrative law judge considered five medical opinions. The administrative law judge rejected Dr. Ammisetty's opinion that the miner had clinical pneumoconiosis because it was based on Dr. Comb's biopsy finding of anthracosilicosis. Decision and Order at 13; Claimant's Exhibit 2. As we have vacated the administrative law judge's finding that the biopsy evidence is insufficient to support a finding of clinical pneumoconiosis, we also vacate the administrative law judge's discrediting of Dr. Ammisetty's opinion. Decision and Order at 13. We therefore vacate the administrative law judge's finding that claimant did not establish the existence of clinical pneumoconiosis, based on the medical opinion evidence. *Id.* at 14.

[8] The Administrative Procedure Act 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).

[9] Although the administrative law judge appears to credit Dr. Caffrey's statement that lymph node tissue is not adequate to diagnose pneumoconiosis, he gave no basis for his reliance on Dr. Caffrey's opinion at 20 C.F.R §718.202(a)(2).

The administrative law judge also determined that the medical opinion evidence was insufficient to establish that the miner had legal pneumoconiosis.[10] Decision and Order at 13. Contrary to claimant's contention, we see no error in the administrative law judge's determination.

Dr. Ammisetty diagnosed chronic obstructive pulmonary disease, bronchial asthma, chronic bronchitis, diabetes mellitus, "HTN," legal pneumoconiosis, and clinical pneumoconiosis. Claimant's Exhibit 1. Because Dr. Ammisetty did not discuss the etiology of the miner's respiratory conditions and he did "not provide any basis for listing legal pneumoconiosis as a diagnosis," we affirm the administrative law judge's finding that Dr. Ammisetty's opinion is not sufficiently reasoned to satisfy claimant's burden of proof.[11] Decision and Order at 13; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As there are no other medical opinions in the record to support claimant's burden of proof,[12] we affirm the administrative law judge's finding that claimant did not establish

[10] In order to establish the existence of legal pneumoconiosis, claimant must establish that the miner had "a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] We reject claimant's argument that Dr. Ammisetty's opinion must be considered reasoned to the extent that he conducted objective testing, and reported the miner's work history and symptoms. Claimant's Brief at 10, *citing Fields v. Island Creek Coal Co.*, 10 BLR, 1019, 1022 (1987) (A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions). The administrative law judge permissibly determined that Dr. Ammisetty's opinion was not sufficiently reasoned because the physician did not adequately explain how the objective studies or the miner's symptoms and physical findings supported a diagnosis of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (an administrative law judge has the duty to determine if a physician's opinion is adequately reasoned).

[12] Having affirmed the administrative law judge's determination that Dr. Ammisetty's opinion is not sufficiently reasoned on the issue of legal pneumoconiosis, we reject claimant's contention that the administrative law judge erred in not giving Dr. Ammisetty's opinion additional weight because he treated the miner. *See* 20 C.F.R. §718.104(d)(5) (treating physician's opinion gets additional weight based on the credibility of the physician's opinion in light of its reasoning and documentation); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (holding that treating physicians' opinions get the deference they deserve based on their power to persuade).

the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[13] Decision and Order at 14.

Remand Instructions

We therefore vacate the administrative law judge's findings that claimant did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and further vacate the denial of benefits. On remand, the administrative law judge is instructed to explain how he resolves the conflict in the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2) and set forth the bases for his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge must also reconsider Dr. Ammisetty's opinion on the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(4). If claimant establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge must further consider whether the evidence is sufficient to establish that the miner's total disability was due to clinical pneumoconiosis under 20 C.F.R. §718.204(c).[14] If claimant does not establish the existence of clinical pneumoconiosis, the administrative law judge may reinstate the denial of benefits.

[13] Because we affirm the administrative law judge's discrediting of Dr. Ammisetty's opinion on the issue of legal pneumoconiosis, we need not address claimant's arguments regarding the weight accorded the opinions of Drs. Rosenberg, Dahhan, and Broudy that the miner did not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 8-11.

[14] The parties agreed that the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 11, *citing* Claimant's post-hearing brief at 16; Employer's post-hearing brief at 16.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge