U.S. Department of Labor

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

BRB No. 14-0241 BLA

RONNIE G. COOMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY/ CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 02/12/2015
CONSOL ENERGY	)	
	)	
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ronnie G. Coomes, Covel, West Virginia, *pro se*.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2011-BLA-5099) of Administrative Law Judge Adele Higgins Odegard denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on January 27, 2010.

Applying amended Section 411(c)(4),[1] the administrative law judge found that claimant established only fourteen years of qualifying coal mine employment.[2] The administrative law judge, therefore, found that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge also considered whether claimant could establish entitlement to benefits, without the assistance of the Section 411(c)(4) presumption. Although the administrative law judge found that the evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), she found that the evidence 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 generally contends that the administrative law judge erred in denying benefits. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

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

To invoke the Section 411(c)(4) presumption, claimant must establish that he had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine" if claimant demonstrates that he "was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In determining the length of claimant's qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption, the administrative law judge accepted employer's stipulation that it employed claimant at an underground mine for fourteen years from 1972 to 1986. Decision and Order at 2 n.4; Director's Exhibit 3; Hearing Tr. at 13-14, 23. The administrative law judge next considered whether claimant was entitled to additional qualifying coal mine employment for the time that he worked as a construction worker building a coal tipple from 1970 to 1971.

Claimant testified that he worked for about two years building a coal tipple for Allen & Garcia. Hearing Tr. at 18-19. Although the coal tipple was not active, claimant testified that there was an underground mine that was "[j]ust across the creek" from the tipple. *Id.* at 19, 21. Claimant testified that "there was coal dust," explaining that "[t]hey [were] hauling coal." *Id.* at 22. Claimant further testified that the he was exposed to dust "from the road." *Id.*

In finding that claimant's construction work at the tipple was not qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption, the administrative law judge explained:

> Although the Claimant would not be required to demonstrate substantially similar conditions if he worked aboveground at an underground coal mine, the Claimant's testimony regarding the relationship and proximity of the tipple to the underground coal mine was unclear and insufficient to establish that the Claimant worked aboveground at an underground mine. In addition, after reviewing the Claimant's testimony regarding his coal mine construction work, I find that the Claimant's unspecific reference to exposure to coal dust from trucks is insufficient to establish that he was regularly exposed to coal mine dust. Accordingly, I find that the Claimant did not establish that he worked in conditions substantially similar to those in an underground coal mine.

Decision and Order at 2 n.4 (case citations and regulatory references omitted).

The administrative law judge erred in not providing claimant with a presumption

that he was exposed to coal mine dust while working as a coal mine construction worker. The regulations provide that "[t]here shall be a rebuttable presumption that [a coal mine construction worker] was exposed to coal mine dust during all periods of such employment in or around a coal mine or coal production facility for purposes of . . . establishing the applicability of any of the presumptions described in [S]ection 411(c) of the Act and [P]art 718." 20 C.F.R. §725.202(b)(1)(i)-(ii). The party opposing entitlement may rebut the presumption by demonstrating either that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

Consequently, we vacate the administrative law judge's determination that claimant's coal mine construction work does not constitute qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. On remand, the administrative law judge must reconsider claimant's construction employment in light of the rebuttable presumption at Section 725.202(b)(1), that claimant was exposed to coal mine dust during this employment. *See* 20 C.F.R. §725.202(b)(1). The administrative law judge must also consider the length of claimant's construction employment with Allen & Garcia. While claimant testified that he worked for Allen & Garcia for "about two years," Hearing Tr. at 19, employer accurately notes that claimant's Social Security Earnings Record documents only three quarters of employment with Allen and Garcia. Director's Exhibit 5.

Because the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), should the administrative law judge, on remand, credit claimant with fifteen years of qualifying coal mine employment, claimant would be entitled to invocation of the presumption that his total disability is due to pneumoconiosis at Section 411(c)(4). Once claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

In the interest of judicial economy, we will address the administrative law judge's additional finding that the evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). Failure to establish any one of these elements

precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six interpretations of two x-rays taken on April 12, 2010 and July 28, 2010. Dr. Meyer, a B reader and Board-certified radiologist, and Dr. Rasmussen, a B reader, interpreted the April 10, 2010 x-ray as negative for pneumoconiosis. Director's Exhibit 11, Employer's Exhibit 3. Consequently, the administrative law judge properly found that this x-ray was negative for pneumoconiosis. Decision and Order at 9.

While Dr. Alexander, a B reader and Board-certified radiologist, interpreted the July 28, 2010 x-ray as positive for pneumoconiosis, Claimant's Exhibit 5, Dr. Meyer, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 2. Dr. Ahmed, a Board-certified radiologist, and Dr. Zaldivar, a B reader, also interpreted the July 28, 2010 x-ray. While Dr. Ahmed interpreted the x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, Dr. Zaldivar interpreted the x-ray as negative for the disease. Employer's Exhibit 1. In weighing this conflicting x-ray evidence, the administrative law judge stated:

> I give the most weight to the readings of Dr. Meyer and Dr. Alexander, based on their superior radiological qualifications. Dr. Meyer interpreted the film as negative for pneumoconiosis; Dr. Alexander reached the opposite conclusion. Although I do not give Dr. Ahmed's interpretation as much weight, as it has not been established that he was a B reader at the time he interpreted the [film], I find that his interpretation is entitled to some weight based on his status as a Board-certified radiologist. Weighing the interpretations together, I find that this X-ray is preponderantly positive for the presence of pneumoconiosis.
>
> The Claimant's X-rays were taken within close proximity to one another, approximately three months apart. As the readings of the Claimant's [April 12, 2010] X-ray were preponderantly negative and the readings [of] the Claimant's [July 28, 2010] X-ray were preponderantly positive, I find that the x-ray evidence is inconclusive as to whether the Claimant suffers from clinical pneumoconiosis.

Decision and Order at 9.

As the administrative law judge properly considered the contemporaneous nature of the x-rays, as well as the qualifications of the physicians, we affirm the administrative law judge's finding that claimant failed to meet her burden of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), as it is supported by substantial

evidence.[3] *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983).

Because there is no biopsy evidence of record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. Moreover, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Gaziano, Rasmussen, Zaldivar, and Castle regarding whether claimant suffers from either clinical or legal pneumoconiosis.[4] Because the administrative law judge accurately found that none of the physicians opined that claimant suffers from clinical pneumoconiosis, we affirm her finding that the medical opinion evidence does not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5]

[3] In finding that the July 28, 2010 x-ray was "preponderantly positive," the administrative law judge failed to explain what weight she accorded to Dr. Zaldivar's negative x-ray interpretation. The administrative law judge's error is harmless in regard to her ultimate determination that claimant failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

[5] Additionally, the administrative law judge considered two interpretations of a March 22, 2011 digital x-ray. Although Dr. Alexander, a B reader and Board-certified radiologist, interpreted the x-ray as positive for pneumoconiosis, Claimant's Exhibit 6, Dr. Meyer, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 8. Because the x-ray was interpreted as both positive and negative for pneumoconiosis by equally qualified physicians, the administrative law judge permissibly found that the digital x-ray evidence was "inconclusive" and, therefore, insufficient to establish the existence of pneumoconiosis. *See Adkins v.*

The administrative law judge next considered whether the medical opinion evidence established the existence of legal pneumoconiosis. Dr. Gaziano diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to both coal mine dust exposure and smoking. Claimant's Exhibit 1. Dr. Rasmussen also diagnosed legal pneumoconiosis in the form of COPD/emphysema, due to both coal mine dust exposure and smoking. Director's Exhibit 11. Conversely Drs. Zaldivar and Castle opined that claimant does not suffer from legal pneumoconiosis. Dr. Zaldivar attributed claimant's COPD to cigarette smoking and asthma. Employer's Exhibit 9 at 30. Dr. Castle diagnosed asthma and "tobacco smoke induced emphysema."[6] Employer's Exhibits 5, 11 at 26-27.

In evaluating the conflicting evidence, the administrative law judge accorded less weight to Dr. Gaziano's diagnosis of legal pneumoconiosis because she found that the doctor's opinion was not sufficiently reasoned. Decision and Order at 17-18. The administrative law judge accorded less weight to Dr. Rasmussen's opinion, that claimant suffers from legal pneumoconiosis, because she found that the doctor's opinion was equivocal. *Id.* at 18. The administrative law judge also discredited Dr. Rasmussen's opinion because the doctor failed to address the cause of the partial reversibility of claimant's respiratory impairment. *Id.* The administrative law judge also questioned the opinions of Drs. Zaldivar and Castle because neither physician adequately explained how they eliminated claimant's coal mine dust exposure as a cause of his obstructive lung disease. *Id*. at 19. Having found that all of the medical opinions "suffer[ed] from various insufficiencies," the administrative law judge found that claimant failed to establish, by a preponderance of the medical opinion evidence, that he suffers from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Although Dr. Gaziano opined that claimant's COPD/emphysema was due in part to his coal mine dust exposure, the administrative law judge found that the doctor did not provide the basis for his opinion, or reference what findings led him to his conclusion. Decision and Order at 17-18. Consequently, the administrative law judge permissibly found that Dr. Gaziano's diagnosis was not sufficiently reasoned to establish the existence of legal pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Decision and Order at 18; Claimant's Exhibit 1.

Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17.

[6] Drs. Zaldivar and Castle also suggested that claimant's airway obstruction could be due to Alpha-1 Antitripsin deficiency. Employer's Exhibits 1, 5, 9 at 31.

The administrative law judge accorded less weight to Dr. Rasmussen's opinion, that claimant's COPD/emphysema was due in part to his coal mine dust exposure because she found that it was undermined by the doctor's "equivocal deposition testimony." Decision and Order at 18. During his deposition, Dr. Rasmussen identified a number of problems with claimant's lungs, including emphysema and fibrosis, and opined that "the whole gamut" of claimant's exposures, "including coal mine dust" contributed to his pulmonary impairment. Employer's Exhibit 7 at 31-32. The administrative law judge did not adequately explain how Dr. Rasmussen's deposition testimony was equivocal. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (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 (1989).

The administrative law judge also accorded Dr. Rasmussen's opinion less weight because he "did not meaningfully address the cause of the partial reversibility of the [c]laimant's respiratory impairment." Decision and Order at 18. However, the administrative law judge did not explain why Dr. Rasmussen's failure to account for the partial reversibility of claimant's respiratory impairment undermines his opinion that coal mine dust contributed to that impairment. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge's bases for according less weight to Dr. Rasmussen's opinion cannot stand, we vacate her finding that the medical evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand the administrative law judge should address whether Dr. Rasmussen's opinion supports a finding that claimant suffers from a "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).

In sum, on remand, the administrative law judge must reconsider the length of claimant's qualifying employment for the purpose of invoking the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Should the administrative law judge find that claimant has established fifteen years of qualifying coal mine employment, claimant would be entitled to invocation of the presumption that his totally disability is due to pneumoconiosis at Section 411(c)(4). If the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption, she must determine whether employer has rebutted the presumption. If the administrative law judge finds that claimant cannot invoke the presumption, or that employer has rebutted the presumption, she must reconsider whether claimant can establish entitlement to benefits under 20 C.F.R. Part 718, without the assistance of the presumption.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge