U.S. Department of Labor

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

BRB Nos. 17-0307 BLA
and 17-0307 BLA-A

HYLE E. JOHNSTON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
(Self-insured through) EAST COAST RISK MANAGEMENT	)	DATE ISSUED: 02/28/2018
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

J. Lawson Johnston and Michael A. Muha (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2016-BLA-5288) of Administrative Law Judge Steven D. Bell rendered 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 miner's claim filed on September 25, 2013.

The administrative law judge found that claimant had 14.2 years of coal mine employment and, therefore, could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Addressing whether claimant could establish entitlement under 20 C.F.R. Part 718 without the assistance of the Section 411(c)(4) presumption, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge further found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge applied an incorrect legal standard and further erred in his evaluation of the medical opinion evidence in finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject employer's assertion that the administrative law judge applied

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is 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.

an incorrect legal standard in finding disability causation established. Employer filed a reply brief, reiterating its contentions on appeal.

In his cross-appeal, claimant contends that the administrative law judge erred in finding less than fifteen years of qualifying coal mine employment and, therefore, that claimant cannot invoke the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment. The Director did not file a response brief to the cross-appeal.[2]

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.[3] 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).

Employer challenges the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Because the issues of legal pneumoconiosis and disability causation are related, we will summarize the administrative law judge's finding that claimant established legal pneumoconiosis before addressing the disability causation issue raised by employer. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the opinions of Drs. Feicht and Grodner. Decision and Order at 12-14, 19-21. Dr. Feicht opined that claimant's coal mine dust exposure was a significant contributing factor, along with cigarette smoking, to his chronic obstructive pulmonary disease (COPD). Director's Exhibit 11; Claimant's Exhibit 3. The administrative law judge found that Dr. Feicht's opinion constitutes a diagnosis of legal pneumoconiosis under the regulations. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 19. Dr. Grodner also diagnosed COPD, but stated that cigarette smoking is the primary cause of this impairment and that claimant's coal mine dust exposure did "not contribute in any

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] 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 Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 8-9.

significant degree." Employer's Exhibit 2 at 4. At his deposition, Dr. Grodner reiterated that while there was a minor contribution by coal mine dust to claimant's COPD, his disability is due to COPD from cigarette smoking. Employer's Exhibit 4 at 18, 24, 26. The administrative law judge found that Dr. Feicht's opinion was reasoned and documented, whereas Dr. Grodner's opinion was not persuasive because of defects in his reasoning and explanation. Decision and Order at 20-21. The administrative law judge therefore found that claimant established that his COPD constitutes legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).[4] *Id*.

Considering whether the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge discredited Dr. Grodner's opinion, in part, because Dr. Grodner did not diagnose legal pneumoconiosis. Decision and Order at 18, 25. In contrast, the administrative law judge credited Dr. Feicht's opinion to find that claimant met his burden to establish disability causation pursuant to 20 C.F.R. §718.204(c). *Id.* at 25.

Employer contends that in discrediting Dr. Grodner's opinion that claimant's disabling impairment is not due to pneumoconiosis, the administrative law judge has mischaracterized it. Employer's Brief at 7-8. Employer argues that Dr. Grodner did not contest the existence of legal pneumoconiosis and that his opinion that coal dust contributed to claimant's COPD, albeit not significantly, constitutes a diagnosis of legal pneumoconiosis as a matter of law. *Id.* Thus, employer asserts that the administrative law judge's determination to discredit Dr. Grodner's opinion with respect to disability causation is based on an erroneous premise and cannot be affirmed. Employer's Brief at 4. Employer's contention lacks merit.

Under the regulations, 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). In addition, 20 C.F.R. §718.201(b) provides that, for 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(b) (emphasis added). Contrary to employer's assertion, as Dr. Grodner explicitly stated that claimant's coal dust exposure *did not significantly* contribute to his COPD and that his disability is due to COPD from cigarette smoking, the administrative law judge rationally determined that Dr. Grodner did not diagnose legal pneumoconiosis. *See* 20 C.F.R.

[4] We affirm the administrative law judge's finding that claimant's chronic obstructive pulmonary disease (COPD) is legal pneumoconiosis as unchallenged on appeal. *See Skrack*, 7 BLR at 1-711; Employer's Brief at 5-6.

§718.201; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 25. Thus, having found that claimant's COPD constituted legal pneumoconiosis, the administrative law judge rationally discredited Dr. Grodner's opinion on disability causation because he did not diagnose legal pneumoconiosis.[5] *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 25.

Employer next asserts that the administrative law judge relied on an incorrect legal standard in finding Dr. Feicht's opinion sufficient to satisfy claimant's burden to establish that pneumoconiosis is a substantially contributing cause of claimant's disability. Employer's Brief at 14-15. Employer also asserts that Dr. Feicht's opinion is conclusory and does not constitute substantial evidence to support the administrative law judge's determination. We disagree.

Prior to evaluating the medical opinions at 20 C.F.R §718.204(c), as employer acknowledged, the administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001); Decision and Order at 24; Employer's Brief at 14.

[5] Moreover, even assuming Dr. Grodner diagnosed legal pneumoconiosis, employer has not explained how this would help employer's case. There is no dispute between Drs. Feicht and Grodner that claimant's totally disabling respiratory impairment is due to COPD, and the administrative law judge found that claimant's disabling COPD is legal pneumoconiosis. As the record reveals no condition that could have caused claimant's disabling respiratory impairment other than his COPD if, as employer asserts, Dr. Grodner also opined that claimant's COPD is legal pneumoconiosis, his opinion would support disability causation at 20 C.F.R. §718.204(c). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847, 25 BLR 2-799, 2-816-18 (6th Cir. 2016).

Further, contrary to employer's arguments, the administrative law judge correctly applied this standard in finding that Dr. Feicht's opinion met claimant's burden on this issue. As set forth above, Dr. Feicht diagnosed legal pneumoconiosis in the form of COPD due, in significant part, to coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibit 3 at 2. Dr. Feicht further opined that claimant's COPD is a substantially contributing cause of his disability. Thus, as claimant's COPD is legal pneumoconiosis, the administrative law judge properly determined that Dr. Feicht's opinion met claimant's burden to establish that his pneumoconiosis is a substantially contributing cause of his disability, pursuant to 20 C.F.R. §718.204(c). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847-48, 25 BLR 2-799, 2-816-18 (6th Cir. 2016); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489-90, 25 BLR 2-135, 2-154-55 (6th Cir. 2012); Decision and Order at 25; Director's Exhibit 11; Claimant's Exhibit 3. Moreover, because all of the physicians agreed that claimant's disabling pulmonary impairment is due to his COPD, and the administrative law judge found (based on Dr. Feicht's opinion) that claimant's COPD constitutes legal pneumoconiosis, he permissibly credited Dr. Feicht's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Hensley*, 820 F.3d at 847-48, 25 BLR at 2-816-18; Decision and Order at 19, 21. As employer raises no other allegation of error, we affirm the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[6]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[6] In view of our affirmance of the award of benefits, we need not address claimant's argument, on cross-appeal, that the administrative law judge erred in finding less than fifteen years of qualifying coal mine employment and that claimant is unable to invoke the Section 411(c)(4) presumption.