U.S. Department of Labor

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

BRB No. 19-0079 BLA

HURLEY C. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 02/11/2020
Self-insured through PITTSTON COMPANY	)	
c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05282) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 3, 2014.[1]

The administrative law judge credited claimant with thirty years of underground coal mine employment, as stipulated by the parties and supported by the record, and found he has a totally disabling respiratory or pulmonary impairment. She therefore determined claimant established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's finding it failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

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[1] Claimant filed two prior claims. Director's Exhibits 1, 2. The district director denied his most recent prior claim, filed on June 1, 1995, because he failed to establish any element of entitlement. Director's Exhibit 2.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied for failure to establish any element. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement.

[3] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant established thirty years of qualifying coal mine employment, total disability, invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 24, 25, 41.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis[6] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found employer failed to rebut the presumption by either method. Decision and Order at 2.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to rebut legal pneumoconiosis, the administrative law judge considered the new opinions of Drs. Sargent and Fino.[7] Decision and Order at 28-33; Director's Exhibit 12; Employer's

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] "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). "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." 20 C.F.R. §718.201(a)(1).

[7] The administrative law judge also evaluated the opinions of Dr. Ajjarapu and claimant's treating physicians and found they supported the existence of legal pneumoconiosis. Decision and Order at 12-14, 19-23, 29-31; Director's Exhibit 11; Claimant's Exhibit 7. Because these opinions do not assist employer in rebutting the Section 411(c)(4) presumption, we decline to address its arguments regarding the weight

Exhibits 3-5. They diagnosed claimant with an obstructive impairment/emphysema attributable solely to cigarette smoking. Director's Exhibit 12; Employer's Exhibits 3-5. The administrative law judge gave little weight to their opinions because she found they are contrary to the regulations. Decision and Order at 31-33. Thus, she found employer did not rebut the existence of legal pneumoconiosis. *Id*. at 43.

As employer correctly argues, the administrative law judge erred in her evaluation of the opinions of Drs. Sargent and Fino. The administrative law judge accurately noted that chronic bronchitis, emphysema and asthma "*may* fall under the regulatory definition of pneumoconiosis *if* they are related to coal dust exposure." Decision and Order at 32 (emphasis added); *see* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). She erroneously concluded, however, that emphysema is a form of pneumoconiosis and that, therefore, the opinions of Drs. Sargent and Fino attributing claimant's emphysema to cigarette smoking are inconsistent with the regulations.[8] *See* Decision and Order at 32-33. Contrary to the administrative law judge's conclusion, whether a particular miner's emphysema or chronic obstructive pulmonary disease (COPD) is due to coal mine dust exposure must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record. *See* 65 Fed. Reg. at 79,938; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323-24 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012).

The administrative law judge further erroneously discredited the opinions of Drs. Sargent and Fino as "not consistent with the preamble, which states that the effects of exposure to coal mine dust and cigarette smoking cannot be separated." Decision and Order at 32-33; *see* Employer's Brief at 13-18. While the preamble recognizes that dust-induced emphysema and smoke-induced emphysema occur through *similar* mechanisms, and that the effects of cigarette smoking and coal mine dust exposure can be *additive*, it does not state that the effects of coal dust exposure and smoking cannot be separated. *See* 65 Fed. Reg. at 79,940, 79,943. Nor is there support for the administrative law judge's assertion that a medical opinion stating that coal dust-related obstructive disease is distinguishable from smoking-related disease is contrary to the premises underlying the

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accorded to their opinions. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Employer's Brief at 18-21.

[8] The administrative law judge found "Dr. Sargent's opinion is not consistent with the regulations that provide emphysema is a form of pneumoconiosis." Decision and Order at 32. She noted Dr. Fino also diagnosed claimant with emphysema due only to cigarette smoking and provided: "[a]s stated above, emphysema is considered a form of pneumoconiosis pursuant to the regulations." *Id*. at 33.

regulations. *See* 65 Fed. Reg. at 79,940-43; Decision and Order at 32. We therefore vacate the administrative law judge's determination to discredit the opinions of Drs. Sargent and Fino relevant to the existence of legal pneumoconiosis.

There is also merit to employer's argument the administrative law judge erred in finding the computed tomography (CT) scan evidence supportive of legal pneumoconiosis. Employer's Brief at 7-8. The administrative law judge considered the November 20, 2014 treatment notes of Dr. Breeding, in which he diagnosed COPD and referenced an "abnormal CT of the lung," and an October 2, 2017 CT scan Dr. DePonte interpreted as showing "mild emphysematous change." Director's Exhibit 12; Employer's Exhibit 7. She found "[p]er the regulations," the COPD and emphysema are coal dust related diseases that fall within the definition of pneumoconiosis. Decision and Order at 28. As noted, *supra*, whether a particular miner's COPD or emphysema is due to coal mine dust exposure must be determined on a case-by-case basis. *Looney*, 678 F.3d at 314-16. Further, employer correctly argues the administrative law judge failed to consider and weigh the August 8, 2013 CT scan Dr. Sargent read and the August 3, 2011, January 19, 2012, and July 13, 2012 CT scans Dr. Fino read. Director's Exhibit 12; Employer's Exhibit 3. An administrative law judge is required to consider all relevant evidence in the record. 30 U.S.C. §923(b). Thus, the administrative law judge erred in her consideration of the CT scan evidence.

Because the administrative law judge erred in weighing the medical opinion and CT scan evidence, we vacate her determination that employer failed to rebut legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A).

Clinical Pneumoconiosis

Employer next asserts the administrative law judge erred in her evaluation of the x-ray and CT scan evidence in finding that employer did not rebut clinical pneumoconiosis. Employer's arguments have merit, in part. Initially, we reject employer's assertion the administrative law judge erred in weighing the x-ray evidence.[9] Employer's Brief at 3-6.

[9] The administrative law judge considered ten interpretations of five x-rays. Dr. DePonte, dually-qualified as a Board-certified radiologist and B reader, interpreted the April 9, 2014 x-ray as positive for pneumoconiosis, while Dr. Wolfe, also dually-qualified, interpreted it as negative. Director's Exhibits 11, 13, 14; Claimant's Exhibit 2. Dr. DePonte and Dr. Alexander, who is dually-qualified, interpreted the July 9, 2014 x-ray as positive for pneumoconiosis, while Dr. Wolf interpreted it as negative. Director's Exhibit 15. Dr. Alexander interpreted the January 9, 2015 x-ray as positive for pneumoconiosis, while Dr. Wolfe interpreted it as negative. Director's Exhibit 12; Claimant's Exhibit 3. Dr. DePonte interpreted the February 29, 2016 x-ray as positive, while Dr. Adcock, dually-

Giving more weight to the interpretations of readers who are dually-qualified as B readers and Board-certified radiologists, the administrative law judge found the readings of the April 9, 2014, January 9, 2015, and February 29, 2016 x-rays in equipoise. Decision and Order at 27-28. She also determined the July 9, 2014 x-ray is positive, based on the conflicting interpretations of equally qualified readers. *Id*. at 27. She further found the October 19, 2016 x-ray negative based on an uncontradicted interpretation. *Id*. at 28. Because the record contains one positive, one negative, and three inconclusive x-rays, the administrative law judge found employer failed to rebut clinical pneumoconiosis. *Id*.

Contrary to employer's argument, the administrative law judge permissibly found the reading of the July 9, 2014 x-ray is positive. She properly considered the physicians' radiological qualifications and permissibly assigned equal weight to the readings from the dually-qualified readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 27-28. Because she performed both a qualitative and quantitative review, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the x-ray readings, we affirm both her finding that the reading of the July 9, 2014 x-ray is positive for pneumoconiosis and her overall conclusion that the x-ray evidence does not rebut clinical pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52.

There is merit, however, to employer's contention the administrative law judge erred in evaluating the CT scan evidence relevant to the existence of clinical pneumoconiosis. Employer's Brief at 6-9. As explained *supra*, the administrative law judge failed to consider and weigh the August 8, 2013 CT scan Dr. Sargent read and the August 3, 2011, January 19, 2012, and July 13, 2012 CT scans Dr. Fino read. Director's Exhibit 12; Employer's Exhibit 3. In light of the administrative law judge's failure to consider all relevant evidence, we must vacate her determination that employer failed to rebut the existence of clinical pneumoconiosis. 30 U.S.C. §923(b); *see* 20 C.F.R. §718.305(d)(1)(i)(B).

Disability Causation

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 41-42. The administrative law judge found the same reasons she discredited the conclusions of Drs. Sargent and Fino on the issue of legal pneumoconiosis also undercut their opinions that no part of claimant's

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qualified, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 6. Dr. Fino, a B reader, interpreted the October 19, 2016 digital x-ray as negative. Employer's Exhibit 3.

disabling impairment is caused by legal pneumoconiosis. *Id.* Because we have vacated the administrative law judge's findings concerning rebuttal of legal pneumoconiosis, we must also vacate her determination that employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii).

On remand, the administrative law judge should begin her analysis by determining whether the opinions of Drs. Sargent and Fino are sufficient to carry employer's burden to establish that claimant does not have legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. In doing so, she must address all relevant evidence, including the medical opinions, the CT scan evidence,[10] and claimant's treatment records.[11] She must also determine whether employer rebutted clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 154-56.

If the administrative law judge finds employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and she need not reach the issue of disability causation. But if employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii).

The administrative law judge should address the explanations the physicians have provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438,

[10] Because computed tomography scan interpretations are considered "other evidence" pursuant to 20 C.F.R. §718.107, the administrative law judge must determine whether employer satisfied its burden to "demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b); *see also Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

[11] We note the administrative law judge erroneously attributed to Dr. Cusano, claimant's primary care physician, the diagnoses of pneumoconiosis set forth in Nurse Practitioner Janice Ewing's August 12, 2014 and August 12, 2015 treatment notes and Dr. Byrd's August 12, 2016 treatment notes. *See* Decision and Order at 29-31; Claimant's Exhibit 7.

441 (4th Cir. 1997). She must set forth her findings in detail, including the underlying rationale for her decision as the Administrative Procedure Act requires. 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).

Accordingly, the administrative law judge's Decision and Order Awarding 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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge