U.S. Department of Labor

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

BRB No. 16-0196 BLA

LLOYD E. LAMBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY (SELF-INSURED THROUGH PITTSON COMPANY)	)	DATE ISSUED: 02/02/2017
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-06045) of Administrative Law Judge Dana Rosen awarding benefits on a miner's claim filed on September 23, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 10.50 years of underground coal mine employment, determined that he had a smoking history of fifty-three pack-years, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found that, although claimant did not establish the existence of clinical pneumoconiosis,[2] he established the existence of legal pneumoconiosis[3] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). Based on the parties' stipulation, the administrative law judge also found that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Upon determining that claimant established that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c), the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not properly calculate claimant's coal mine employment and smoking histories, which affected the administrative law judge's weighing of the medical opinion evidence relevant to the

[1] Because the administrative law judge credited claimant with less than fifteen years of underground coal mine employment or employment in substantially similar conditions, she found that claimant was not entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[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).

[3] Legal pneumoconiosis includes "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." 20 C.F.R. §718.201(a)(2).

existence of legal pneumoconiosis and disability causation under 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is 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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

I. Length of Coal Mine Employment

Claimant bears the burden of proving the number of years that he worked as a coal miner. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the regulations provide only limited guidance for the computation of the length of coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. 20 C.F.R. §725.101(a)(32); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

The administrative law judge considered claimant's Social Security Administration (SSA) earnings records, and claimant's work histories as reported to the Department of Labor (DOL) and to Drs. Forehand, Gallai, Klayton, Fino, and Rosenberg. Decision and Order at 4-7; Director's Exhibits 3-6, 11, 28-29; Claimant's Exhibits 3-4; Employer's Exhibits 1-4, 7, 12-13. The administrative law judge found that the SSA records showed that "[c]laimant first worked in a coal mine in 1964, and last worked in a coal mine in 1974," and that he "worked at least [eight] years and 8.1 months, or 8.675 years" in coal mine employment. Decision and Order at 5-6. The administrative law judge then observed that the record contained additional "probative evidence" in the form of claimant's "consistent work history reports to his one-time examining and treating doctors," and his employment history form. *Id*. at 7. The administrative law judge stated that claimant "reported an average underground coal mine employment of ten to twelve and a half years" and "fifteen to sixteen years of total coal mine employment." The administrative law judge determined:

> Based on this additional credible evidence, it is reasonable for the undersigned to conclude that [c]laimant worked more than the 8.675 years of underground coal mine employment found in his Social Security Administration records and therefore credit him with a longer employment history. Therefore, it is reasonable for the undersigned to utilize an average value between the amount of coal mine employment reported to [c]laimant's doctors and the amount of coal mine employment reported on [c]laimant's [SSA] records.

Id. Without further explanation, the administrative law judge found that claimant "worked for a total of 10.50 years in underground coal mine employment."[6] *Id*.

Employer asserts that the administrative law judge's finding is erroneous because she impermissibly relied on claimant's unsworn and inherently unreliable reports of his coal mine employment. Employer further maintains that the administrative law judge's method of computation did not adequately account for all relevant evidence, including employer's records. Employer's allegations of error have merit, in part.

[6] The administrative law judge appears to have not made a specific finding regarding the overall length of claimant's coal mine employment, both underground and aboveground. Her initial finding was "10.50 years in *underground* coal mine employment." Decision and Order at 7 (emphasis added). However, she later refers to having found "10.50 years of coal mine employment" without explanation as to whether that figure represents just underground coal mine employment, or both underground and aboveground work. Decision and Order at 23 n.17, 43, 44, 48.

We affirm, as supported by substantial evidence, the administrative law judge's finding that claimant's SSA records reflect a total of eight years of coal mine employment from 1965 through 1972. *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-433. We further affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's SSA records for 1964, 1973, and 1974 establish a total of 8.1 additional months of coal mine employment, for a total of 8.675 years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6. In addition, we reject employer's assertion that 20 C.F.R. §725.101(a)(32)(ii) requires that any testimonial evidence be sworn and that the administrative law judge, therefore, was prohibited from considering the employment histories claimant reported to the physicians of record. To the contrary, the regulation provides, "[t]he dates and length of employment may be established by *any credible evidence including* (*but not limited to*) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." 20 C.F.R. §725.101(a)(32)(ii) (emphasis added).

We agree with employer, however, that the administrative law judge erred by failing to make a finding as to whether the recitations of claimant's coal mine employment history included in the medical opinions and treatment records constituted credible evidence, particularly when compared to the documentary evidence of record. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988). We also agree that the administrative law judge's decision to credit claimant with 10.50 years of coal mine employment, based on "additional probative evidence," cannot be affirmed. Decision and Order at 7. The administrative law judge indicated that the additional evidence consisted of claimant's DOL employment history form and the coal mine employment histories claimant related to the treating and examining physicians of record. *Id*. Nevertheless, the administrative law judge did not actually consider the DOL employment history form nor did she identify the method of calculation she used to arrive at "the amount of coal mine employment reported to [c]laimant's doctors."[7] *Id*. She also did not specify whether she

[7] The administrative law judge summarized the coal mine employment histories recorded by these physicians as follows:

> Dr. Forehand noted from [c]laimant's CM-911a Employment History Form that [c]laimant worked thirteen years total, ten of which included underground coal mining. Director's Exhibit 11. Dr. Gallai stated that [c]laimant reported 15 years of coal mine employment. Claimant's Exhibit 3. Dr. Klayton, based on [c]laimant's reporting, found that [c]laimant worked for 15 years in coal mine employment. Claimant's Exhibit 4. Dr. Fino stated that [c]laimant reported working for 16 years in coal mines, 12 of which involved underground coal mine employment. Director's Exhibit

was relying on claimant's reports of underground coal mine employment or total coal mine employment, and she rendered her ultimate finding of 10.50 years of underground coal mine employment without indicating how she calculated "the average value" between claimant's reported coal mine employment and the 8.675 years established by claimant's SSA records. *Id*. In light of these omissions, the administrative law judge's resolution of the issue of the length of claimant's coal mine employment does not satisfy the Administrative Procedure Act (APA), §500 *et seq.*, which requires that every decision 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).

Accordingly, we vacate the administrative law judge's finding of 10.50 years of coal mine employment and remand this case for reconsideration of this issue. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, the administrative law judge must reconsider all relevant evidence, including employer's records of claimant's coal mine employment[8] and claimant's DOL work history form,[9] and set forth her findings in detail, including the underlying rationale, in accordance with the APA. In particular, the administrative law judge must render specific credibility determinations, identify the method of computation she uses, and explain how she arrives at her ultimate finding as to the length of claimant's coal mine employment, underground and aboveground combined.

> 29. Dr. Rosenberg stated that [c]laimant reported approximately 15 years of coal mine employment, of which 12.5 years was underground. Employer's Exhibit 7.

Decision and Order at 7 n.7.

[8] In a letter dated June 22, 1978, employer confirmed that the miner worked for employer from October 23, 1964 to January 16, 1973. Director's Exhibit 4.

[9] A handwritten entry on claimant's 2010 CM-911a Employment History Form, reflects that he worked for employer from 1964 to 1973. Director's Exhibit 4. The other handwritten entry appears to identify "Colmbs Coal" as an employer for whom claimant worked in the "early 60s." *Id.*

II. Smoking History

Employer also argues that the administrative law judge erred by failing to make a specific finding with regard to claimant's smoking history, asserting that she did not consider all relevant evidence or resolve the discrepancies in the record. Employer's Brief at 4-6. These contentions are without merit. Contrary to employer's allegation, the administrative law judge considered all of the smoking histories claimant reported to the treating and examining physicians. Decision and Order at 8. She acknowledged that Dr. Patel's treatment records supported a finding of a fifty-three pack-year smoking history, while "[t]he other medical experts in the record found that [c]laimant smoked one pack of cigarettes per day from [forty] to more than [fifty] years." *Id*. The administrative law judge acted within her discretion in resolving the conflicting histories by relying on Dr. Patel's treatment record, based on the fact that he regularly examined claimant and, therefore, his records contained the most comprehensive review of claimant's cigarette smoking history. *Id*.; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we affirm the administrative law judge's determination that claimant had a fifty-three pack-year smoking history.

III. Legal Pneumoconiosis and Total Disability Due to Pneumoconiosis

In addressing the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the reports of Drs. Forehand, Gallai, Klayton, Fino, and Rosenberg. Decision and Order at 16-27, 34-44; Director's Exhibits 11, 15, 17, 29; Claimant's Exhibits 3, 4; Employer's Exhibits 7, 11, 12, 13. The administrative law judge noted that Drs. Forehand, Gallai, and Klayton concluded that claimant has legal pneumoconiosis, while Drs. Fino and Rosenberg stated that claimant does not suffer from the disease and instead attributed claimant's obstructive pulmonary disease solely to cigarette smoking.[10] Decision and Order at 16-27. The administrative law judge gave

[10] Dr. Forehand diagnosed legal pneumoconiosis, in the form of obstructive pulmonary disease and hypoxemia, related to coal dust exposure and cigarette smoking. Director's Exhibit 11. Dr. Klayton diagnosed legal pneumoconiosis, in the form of a severe obstructive lung disease and hypoxia, caused by coal dust exposure and smoking. Claimant's Exhibit 4. Dr. Gallai diagnosed legal pneumoconiosis, in the form of severe obstructive lung disease and bronchitis with severe hypoxemia, related to coal dust exposure and smoking. Claimant's Exhibit 3. Dr. Fino diagnosed "very, very severe emphysema" related to smoking, and opined that claimant does not have legal pneumoconiosis. Director's Exhibit 29; Employer's Exhibit 12. Similarly, Dr. Rosenberg diagnosed obstructive lung disease with emphysema, related to smoking, and

great weight to the opinions of Drs. Forehand, Gallai, and Klayton because she found that they were well-documented and well-reasoned. Decision and Order at 35-36. In contrast, the administrative law judge gave little weight to the opinions of Drs. Fino and Rosenberg because their opinions are inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions, and are based on medical literature that focuses on miners and smokers in general, rather than claimant's specific respiratory condition. *Id*. at 36. Based on these findings, the administrative law judge concluded that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Rosenberg, and in giving determinative weight to the diagnoses of legal pneumoconiosis made by Drs. Forehand, Gallai, and Klayton. Employer maintains that the opinions diagnosing legal pneumoconiosis are entitled to little weight, because they are based on inaccurate coal mine employment and smoking histories.

Initially, we reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Fino and Rosenberg. The administrative law judge correctly noted that both physicians eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because there was a significant reduction in claimant's FEV1/FVC ratio which, in their view, is inconsistent with obstruction due to coal dust exposure.[11] Decision and Order at 21, 24-25, 37-40; Director's Exhibit 29; Employer's Exhibits 7, 11-13. The administrative law judge permissibly discredited their opinions because their rationale conflicts with DOL's recognition that coal dust exposure can cause clinically significant obstructive disease, as shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20,

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further opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 7, 11, 13.

[11] In attributing claimant's obstructive pulmonary disease to cigarette smoking instead of coal mine dust exposure, Dr. Fino opined that "the significant reduction in the ratio of the FEV1 to the FVC has not been described in coal miners." Director's Exhibit 29 at 11. Dr. Fino indicated that, in claimant's case, the preservation of the FVC and disproportionate reduction of the FEV1 was indicative of causation by smoking. *Id.* at 10-13. Dr. Rosenberg specifically stated, "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved." Employer's Exhibit 7 at 8. Specific to claimant's situation, Dr. Rosenberg noted that claimant's reduced FEV1/FVC ratio was indicative of an obstruction entirely related to cigarette smoking. *Id.* at 8-9.

2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 26.[12]

There is merit, however, in employer's contention that the administrative law judge did not fully consider the documentation underlying the medical opinions of Drs. Forehand, Gallai, and Klayton before determining that they are sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because we have vacated the administrative law judge's finding of 10.50 years of coal mine employment, we must also vacate the administrative law judge's determination that the opinions of Drs. Forehand, Gallai, and Klayton are supported by claimant's coal mine employment history. In addition, although the administrative law judge noted the coal mine employment and smoking histories recorded by Drs. Forehand, Gallai, and Klayton,[13] she did not acknowledge the discrepancies between her findings and the histories they relied on, or make a finding as to whether the discrepancies affected the credibility of their opinions. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Thus, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).

On remand, the administrative law judge must reconsider the medical opinions of Drs. Forehand, Gallai, and Klayton in light of her finding on remand regarding claimant's coal mine employment history and her prior finding of a fifty-three pack-year smoking history. She must acknowledge any discrepancies between her findings and the histories relied on by the physicians, and determine whether they affect the credibility of their opinions on the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998);

[12] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Fino and Rosenberg, we decline to address employer's remaining arguments regarding the weight accorded to these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] Dr. Forehand initially relied on a thirteen-year coal mine employment history, with ten years underground, and a forty-year smoking history. Director's Exhibit 11. He subsequently reiterated his diagnosis of legal pneumoconiosis, based on an assumption that claimant had 8.25 years of underground coal mine employment. Director's Exhibit 15. Dr. Gallai relied on a fifteen-year coal mine employment history and a forty-six pack-year smoking history. Claimant's Exhibit 3. Dr. Klayton recorded a fifteen-year coal mine employment history and a fifty-year smoking history. Claimant's Exhibit 4.

Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984).

Finally, because we have vacated the administrative law judge's weighing of the opinions diagnosing legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we must also vacate her findings on the issue of disability causation at 20 C.F.R. §718.204(c), as her findings on remand with respect to the existence of legal pneumoconiosis may impact her findings on the issue of disability causation. If the administrative law judge again determines that claimant has established that he suffers from legal pneumoconiosis, the administrative law judge must reconsider her finding on the issue of total disability causation, in light of her weighing of the medical opinions under 20 C.F.R. §718.202(a)(4) on remand.

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge