U.S. Department of Labor

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

BRB No. 17-0155 BLA

BENNY BRODIS GARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BELL COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 01/23/2018
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2013-BLA-05245) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to 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 November 18, 2011, and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with more than ten, but less than fifteen, years of coal mine employment,[1] and found that the x-ray evidence did not establish the existence of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, however, found that the medical opinion evidence established the existence of legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and cigarette smoking, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also 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.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, and remanded the case for further consideration. *Garrison v. Bell Cnty. Coal Corp.*, BRB No. 15-0435 BLA, slip op. at 4-5 (June 30, 2016) (unpub.). Specifically, the Board held that the administrative law judge failed to address the bases for the opinions of Drs. Burrell and Fernandes that claimant's COPD is due in part to coal

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 4; Hearing Transcript (Tr.) at 37. 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 (1989) (en banc).

[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. 20 C.F.R. §718.201(a)(2).

mine dust exposure. *Id*. Further, the Board held that the administrative law judge did not explain how he calculated the length of claimant's coal mine employment,[4] a determination that could affect the credibility of the opinions of Drs. Burrell and Fernandes that coal mine dust exposure contributed to claimant's COPD.[5] *Id*. at 5-6.

Therefore, the Board instructed the administrative law judge, on remand, to consider all the relevant evidence, explain fully his determination of the length of claimant's coal mine employment, and reassess the medical opinions of Drs. Burrell and Fernandes in light of that determination.[6] *Id*. at 7. Because the Board vacated the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the Board also vacated the administrative law judge's finding that claimant's total

[4] The Board noted that the administrative law judge found that claimant's testimony established more than the seven years and eleven months of coal mine employment documented by claimant's Social Security Administration (SSA) earnings records, but without explaining how he calculated the length of the additional coal mine employment. *Garrison v. Bell Cnty. Coal Corp.*, BRB No. 15-0435 BLA, slip op. at 6 (June 30, 2016) (unpub.). The Board noted further that the administrative law judge failed to address discrepancies in claimant's reported coal mine employment. *Id*. The Board therefore held that the administrative law judge's decision did not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *Id*.

[5] The Board noted that although Dr. Fernandes relied upon a history of seven years and eleven months of coal mine employment, Dr. Burrell relied upon a history of fourteen years of coal mine employment. *Garrison*, BRB No. 15-0435 BLA, slip op. at 5 n.8. The administrative law judge noted that the estimates of claimant's smoking history by the physicians of record "var[ied] from about 40 pack years to 60 pack years." 2015 Decision and Order at 8.

[6] The Board, however, rejected employer's allegations of error in the administrative law judge's decision to discount the opinions of Drs. Dahhan and Jarboe that claimant's chronic obstructive pulmonary disease (COPD) is due solely to smoking. The Board held that the administrative law judge permissibly found that neither physician adequately explained how he eliminated coal mine dust exposure as a cause of claimant's COPD. *Garrison*, BRB No. 15-0435 BLA, slip op. at 4.

disability[7] is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for reconsideration of that issue, if reached. *Id*.

On remand, the administrative law judge again found that claimant had more than ten but less than fifteen years of coal mine employment. The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's length of coal mine employment determination. Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer has filed a reply brief in which it reiterates its previous contentions.

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. 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).

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's finding if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

[7] The Board affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Garrison*, BRB No. 15-0435 BLA, slip op. at 7.

The administrative law judge noted that claimant's Social Security Administration (SSA) earnings records documented "[i]n excess of seven years" of coal mine employment[8] from 1969 through 1982. Decision and Order on Remand at 5. The administrative law judge noted further that the earnings records revealed no coal mine employment in 1974, and documented periods of non-coal mine employment in 1969, 1971, 1972, 1973, 1974, 1979, 1980, 1981, 1982 and 1983. Additionally, the administrative law judge summarized claimant's statements regarding when he worked in coal mine employment for employer,[9] and noted that claimant provided a history of fourteen years of coal mine employment to Dr. Burrell, and a history of 14.5 years to Dr. Dahhan. The administrative law judge further considered claimant's testimony that he worked in coal mine employment for approximately fourteen and a half years, during which he was "in and out of" several "dog holes," by which he meant small coal mining operations. Decision and Order on Remand at 3, *citing* Hearing Transcript at 13. The administrative law judge summarized portions of claimant's hearing testimony regarding his work with the coal mining companies listed on the SSA earnings records, and considered claimant's testimony that to the best of his knowledge, all the coal companies that employed him withheld Social Security taxes. *Id*. at 3-4.

The administrative law judge found that claimant's testimony was credible, and established that claimant's coal mine employment "exceeds the documented Social Security record." Decision and Order on Remand at 4. Specifically, the administrative law judge "accept[ed] that claimant began mining in July of 1969 and ended in 1982," and "worked for over 10 dog hole mines during the periods in 1969, 1971, 1972, 1973, 1974, 1979, 1980, 1981, and 1982, when there are no [SSA] records to substantiate coal mining." *Id*. The administrative law judge found that claimant was not "regularly employed at dog hole mines during this period . . . the work was intermittent and off the books to avoid FICA taxes." *Id*. The administrative law judge noted that, for periods in 1969, 1971-74, and 1979-82, claimant's earnings records did not document either coal

[8] The administrative law judge apparently relied upon the district director's determination that the SSA earnings records established seven years, eleven months of coal mine employment from 1969 through 1982. *See* Director's Exhibit 29 at 7 (unpaginated); 2015 Decision and Order at 4.

[9] The administrative law judge noted claimant's initial statement that he worked for employer from August 22, 1978 until October 16, 1979, and his later statements that he worked for employer from 1980 to 1982, or from 1978 to 1980. Decision and Order on Remand at 2, *citing* Director's Exhibits 3, 4, 23. The administrative law judge noted that the SSA earnings records reflected that claimant received income from employer from 1978 to 1980. *Id.*, *citing* Director's Exhibit 10 at 5.

mine employment or "other work that would have precluded the alleged work in dog hole mines." *Id*. at 5. The administrative law judge credited claimant with "at least three years of coal mine employment during his dog hole period" which, when added to the over seven years of coal mine employment documented by the SSA earnings records, yielded more than ten but less than fifteen years of coal mine employment. *Id*.

Employer contends that the administrative law judge did not adequately explain the basis for his length of coal mine employment finding. Employer's Brief at 10-13. We agree.

A miner's testimony may constitute substantial evidence to support computation of the length of coal mine employment. *See Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984); *see also Wensel v. Director, OWCP*, 888 F.2d 14, 17, 13 BLR 2-88, 2-93 (3d Cir. 1989) (holding that the absence of Social Security records does not necessarily prove that claimant was not employed in coal mines). Here, however, the Board is unable to discern how the administrative law judge determined that claimant had at least three additional years of coal mine employment between 1969 and 1982. The administrative law judge did not set out the length of additional coal mine employment he credited for each of the years he specified from 1969, 1971 through 1974, and 1979 through 1982. Based on his finding that the SSA earnings records document seven years, and eleven months of coal mine employment from 1969 through 1982, it is unclear when three more years of coal mine employment would have occurred during that period.

Initially, the administrative law judge did not explain how additional coal mine employment could be credited to claimant in 1969, given the administrative law judge's finding that claimant did not begin working in the coal mining industry until July of 1969.[10] As for the rest of the time frame at issue, the administrative law judge stated that he credited claimant with additional coal mine employment for periods during which the SSA earnings records reflected neither coal mine employment already counted nor any significant non-coal mining work, but he did not identify those periods, nor does a review of the earnings records disclose three years of available time gaps.[11] Because the

[10] Claimant was already credited with coal mine employment for the third and fourth quarters of 1969. Consistent with that finding, claimant testified that he was in the United States Marine Corps until April of 1969, Tr. at 17, and the SSA records report earnings in coal mine employment commencing with KOK Coal Company in the third quarter of 1969. Director's Exhibit 10 at 5. The SSA earnings records report non-coal mine employment earnings in the second quarter of that year. *Id*.

[11] A review of the SSA earnings records reflects that between the third quarter of 1969, when the administrative law judge found that claimant began his coal mine

administrative law judge did not adequately explain his reasons for crediting claimant with three additional years of coal mine employment, his decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we must vacate the administrative law judge's finding that claimant had more than ten years of coal mine employment, and remand this case for the administrative law judge to explain fully his findings as to the length of claimant's coal mine employment. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017).

Entitlement Under 20 C.F.R. Part 718

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 (1986) (en banc).

In determining whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge reconsidered the medical opinions of Drs. Burrell, Fernandes, Dahhan, and Jarboe. Drs. Burrell and Fernandes diagnosed claimant with legal pneumoconiosis, in the form of COPD/emphysema due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 14; Claimant's Exhibits 2, 3. Drs. Dahhan and Jarboe both opined that claimant does not have legal pneumoconiosis, but suffers from COPD due solely to smoking. Director's Exhibit 15; Employer's Exhibits 2, 4.

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employment, and the end of 1982, claimant's last year of coal mine employment, the following periods contain no reported earnings: the second quarter of 1971, the fourth quarter of 1973, and the first two quarters of 1974. Director's Exhibit 10 at 5, 6. The remaining quarters listed through 1977 contain earnings for coal mine employment already counted, or earnings in non-coal mine employment. After 1977, when claimant's earnings were no longer reported by quarter, the SSA records report earnings in both coal mine employment and non-coal mine employment in the years 1979, 1980, and 1981. *Id.* at 6-7.

The administrative law judge noted that "the main reason why Drs. Burrell and Fernandes diagnosed legal pneumoconiosis is due to the exposure." Decision and Order on Remand at 8. The administrative law judge considered that Dr. Burrell relied on a history of fourteen years of coal mine employment, while Dr. Fernandes relied on a history of seven years and eleven months of coal mine employment. The administrative law judge found that the difference between those exposure histories and his finding of more than ten years of coal mine employment was not significant, given that "there is no set standard to determine how much exposure is competent to produce legal pneumoconiosis." *Id*. at 7. The administrative law judge "attributed significant weight" to the opinions of Drs. Burrell and Fernandes because he found them to be "rational, and therefore, 'reasoned,' as the term in defined in the law." *Id*. at 6. Conversely, the administrative law judge discounted the opinions of Drs. Dahhan and Jarboe, because he again found that neither physician adequately explained how he eliminated claimant's coal mine dust exposure as a cause of his COPD.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Burrell and Fernandes. Employer's Brief at 14-24. We agree. As discussed above, we have vacated the administrative law judge's finding of more than ten years of coal mine employment. Dr. Burrell relied on a history of fourteen years of coal mine employment. Moreover, the administrative law judge did not explain his determination that Dr. Burrell's reliance on a history of fourteen years of coal mine employment was not a significant difference from the length of coal mine employment found established, whether it was seven or ten years.[12] Decision and Order on Remand at 7; *see Wojtowicz*, 12 BLR at 1-165.

Dr. Fernandes relied on a history of seven years, and eleven months of coal mine employment in diagnosing legal pneumoconiosis, which is the same amount of coal mine employment the administrative law judge found to be documented by claimant's SSA earnings records. The administrative law judge, however, gave no specific basis for finding Dr. Fernandes's opinion to be reasoned, beyond stating that any discrepancy between the length of coal mine employment the physicians relied upon and that found by the administrative law judge was not critical. In this regard, the administrative law judge noted, but did not address, employer's argument that even if Dr. Fernandes relied on a more accurate coal mine employment history, she gave no explanation for her opinion that claimant's COPD is due both to smoking one and a half packs of cigarettes a day from 1958 until 2007, and to seven years, and eleven months of coal mine

[12] The administrative law judge stated that "without a medical opinion otherwise, I find that there is not much difference in an exposure of 7 years or ten years or 14 years." Decision and Order on Remand at 7.

employment.[13] Because the administrative law judge did not adequately address the reasoning for Dr. Fernandes's opinion, we are unable to affirm his decision to credit it. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We must therefore vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As we instructed previously, on remand, the administrative law judge should consider all of the relevant evidence and determine the length of claimant's coal mine dust exposure, then reassess the medical opinion evidence in light of his determination. Further, when considering whether the opinions of Drs. Burrell and Fernandes establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he should then weigh together all the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a).[14] *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012).

Employer argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 14-24. Because we have vacated the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding that claimant's total disability is due to

[13] Dr. Fernandes's opinion is set forth in an Office Visit Chart Note dated April 29, 2014, and a Chart Update dated May 16, 2014. Claimant's Exhibits 2, 3.

[14] We reject employer's argument that the administrative law judge erred in declining to credit the opinions of Drs. Dahhan and Jarboe that claimant does not have pneumoconiosis. The administrative law judge again permissibly found that Drs. Dahhan and Jarboe did not adequately explain why they concluded that coal mine dust did not contribute to, or aggravate, claimant's COPD. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). That finding was the same credibility determination that we affirmed previously, *Garrison*, BRB No. 15-0435 BLA, slip op. at 4, and employer has not shown that an exception to the law-of-the-case doctrine applies. *See Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-246 (2003); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and instruct him to reconsider this issue, if necessary, on remand.[15]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[15] Employer requests that we remand this case to a different administrative law judge because it believes the case requires a "fresh look" at the evidence. Employer's Brief at 23-24. The record does not reflect recalcitrance by the administrative law judge, or that he has demonstrated bias against employer. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we decline to order that this case be reassigned to another administrative law judge.