BRB No. 89-1875 BLA

EUGENE TAYLOR)
)
Claimant-Respondent)
)
v.)
)
BETH-ELKHORN CORPORATION)
)
Employer-Petitioner)
)
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Richard D. Cooper, Hazard, Kentucky, for claimant.

Larry A. Sykes (Stoll, Keenon & Park), Lexington, Kentucky, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-9520) of Administrative Law Judge John C. Holmes awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). This case is on appeal to the Board

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

for the second time. In his original Decision and Order, the administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with twenty-seven years of qualifying coal mine employment as stipulated to by the parties. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's finding of total disability pursuant to Section 718.204(c) as unchallenged on appeal, but vacated his finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remanded this case for the administrative law judge to weigh all of the x-ray evidence of record and provide a rationale for his findings pursuant to Section 718.202(a)(1); to determine whether the medical opinions of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4); to determine whether the opinion of Dr. O'Neill established rebuttal pursuant to Section 718.203(b); and to determine whether

claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). On remand, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), that employer failed to establish rebuttal of the presumption found at Section 718.203, and that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b). Consequently, benefits were awarded. Employer appeals, challenging the administrative law judge's findings pursuant to Sections 718.202(a)(1) and (a)(4), and 718.204(b). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally

[1] The administrative law judge's findings under Section 718.203(b) are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Williams, Wright, Myers and Nash to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), as these opinions were based on positive x-ray interpretations, whereas the weight of the x-ray evidence was negative for pneumoconiosis. Employer's argument is without merit. Even assuming arguendo that the weight of the x-ray evidence is negative for pneumoconiosis, the administrative law judge must consider a medical report as a whole and may not reject a medical opinion pursuant to Section 718.202(a)(4) solely because it is based on a positive x-ray. See Fitch v. Director, OWCP, 9 BLR 1-45, 1-47 n.2 (1986); Taylor v. Director, OWCP, 9 BLR 1-22 (1986). The administrative law judge acted within his discretion in finding that the opinions of Drs. Williams,[2]

[2] We reject employer's contention that the administrative law judge mischaracterized the opinion of Dr. Williams by stating that the physician included a diagnosis of pneumoconiosis in his findings. See Decision and Order at 2. Dr. Williams diagnosed "COPD with 0/1 T S pneumoconiosis four lower zones and a bronchitis." Director's Exhibit 8. Although an x-ray classification of 0/1 is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), a physician is not so constrained in rendering an opinion under Section 718.202(a)(4). See 20 C.F.R. §§718.201, 718.202(a)(4), (b).

Wright, Myers and Nash were reasoned, supported by objective medical evidence, and based on a physical examination, as well as work and medical histories. See generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). The administrative law judge therefore permissibly accorded less weight to the opinion of Dr. O'Neill, the sole examining physician who found that claimant did not have pneumoconiosis, because Dr. O'Neill did not adequately explain how he reached his diagnoses in light of the objective data he relied on.[3] See generally Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989); Lucostic, supra; Oggero v. Director, OWCP, 7 BLR 1-860, 1-865 (1985); see also Snorton v. Zeigler Coal Co., 9 BLR 1-106, 1-107 (1986). Further, the administrative law judge acted within his discretion in according greater weight to the other examining physicians of record who provided a more thorough independent analysis of the laboratory data. Decision and Order at 2. See generally Hall v. Director, OWCP, 8 BLR 1-193 (1985). Thus, the administrative law judge's findings under Section 718.202(a)(4) are supported by substantial evidence, and we hereby affirm them. Inasmuch as claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we need not address employer's arguments

[3] We reject employer's arguments that the opinion of Dr. O'Neill merits greater weight. The weight to be assigned the evidence is the province of the administrative law judge. See Price v. Peabody Coal Co., 7 BLR 1-671 (1985). The administrative law judge's findings and inferences in the instant case are rational and based on substantial evidence, and we may not substitute our judgment. See Anderson, supra.

under Section 718.202(a)(1). See generally Dixon v. North Camp Coal Co., 8 BLR 1-344, 1-345 (1985).

Employer next contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Employer notes that the administrative law judge refused to apply the standard articulated in Wilburn v. Director, OWCP, 11 BLR 1-135 (1988), i.e., that the evidence establish that claimant's pneumoconiosis is, in and of itself, totally disabling. Employer argues that the opinion of Dr. Myers does not rise to that standard. We note that subsequent to the Board's decision in Wilburn, the United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction of this claim lies, held that a miner must affirmatively establish only that his totally disabling respiratory impairment was due at least in part to his pneumoconiosis. See Adams v. Director, OWCP, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In the instant case, the opinion of Dr. Myers, who found that claimant's pneumoconiosis and cardiovascular problems both contributed to his total disability, thus rises to the current standard in Adams, supra. See Director's Exhibits 13, 20, 21, 25. Contrary to employer's arguments, the administrative law judge acted within his discretion in giving greater weight to the opinion of Dr. Nash,[4] who stated that

[4] Employer maintains that the administrative law judge irrationally accorded weight to the opinion of Dr. Nash, as the physician stated that he was not familiar

most of claimant's respiratory problems resulted from coal mine employment exposure, as his report presented the most comprehensive medical analysis, and was supported by the opinion of Dr. Myers. See Hall, supra. The administrative law judge further permissibly accorded less weight to the opinion of Dr. O'Neill, who did not diagnose pneumoconiosis and who thus attributed claimant's total disability to smoking, obesity and hypertension, as the physician's underlying premise was inaccurate. See generally Trujillo v. Kaiser Steel Corp., 8 BLR 1-472 (1986). The administrative law judge noted, however, that even Dr. O'Neill acknowledged that coal dust exposure was a contributing factor to claimant's chronic bronchitis.[5] See

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with the publication "Guidelines for the use of ILO International Classification of Radiographs of Pneumoconiosis", and never used the standardized films for reference. Dr. Nash stated in his deposition, however, that in addition to personally reviewing the x-ray films, he included a Board-certified radiologist's positive interpretation with his report, and based his findings on the totality of his examination, histories, x-ray interpretations and objective studies. Director's Exhibit 25 at 19, 20, 23. Employer also notes that Dr. Nash was unfamiliar with the regulations and standards promulgated subsequent to January 1979; however, the physician's pulmonary function study results are qualifying pursuant to the standards at Part 718, and were not invalidated. See Director's Exhibit 13.

[5] Employer notes that Dr. O'Neill did not link coal mine employment exposure to an impairment but merely stated that it contributed to claimant's chronic bronchitis, and that smoking was a much greater contributing factor. Employer thus argues that the administrative law judge erred in finding that the opinion of Dr. O'Neill substantiated to a lesser extent [than the opinions of Drs. Myers and Nash] the regulatory requirement under 20 C.F.R. §718.201 that claimant's pulmonary impairment be significantly related to, or substantially aggravated by, dust exposure in coal mine employment. See Decision and Order at 5. Any error is harmless, however, inasmuch as the administrative law judge relied on the opinions of Drs. Nash and Myers to support his finding that claimant established causation pursuant to Section 718.204(b). See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

Decision and Order at 3; Director's Exhibit 26, deposition of October 29, 1982, at 26. The administrative law judge thus found that the preponderance of the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b), and we affirm the administrative law judge's findings thereunder as they are supported by substantial evidence. See Adams, supra.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge