U.S. Department of Labor

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

BRB No. 15-0512 BLA

FREDERICK M. JORDAN Claimant-Petitioner v. ROYALTY SMOKELESS COAL COMPANY and A.T. MASSEY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2016 DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Frederick M. Jordan, Roderfield, West Virginia, *pro se*.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2013-BLA-05120) of Administrative Law Judge Pamela J. Lakes 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 subsequent claim[2] filed on January 18, 2012.

The administrative law judge credited claimant with 12.22 years of underground coal mine employment, which is insufficient to establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge found that the new evidence is sufficient to establish total respiratory disability and a change in an applicable condition of entitlement since the denial of claimant's prior claim filed in February 1999. Considering all of the evidence on the merits, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The current claim is claimant's third. Claimant's initial claim, filed on February 22, 1999, was denied by the district director on January 13, 2000 because claimant failed to establish any element of entitlement. Decision and Order at 7; Director's Exhibit 1. Claimant did not further pursue the February 1999 claim. The record reflects that claimant filed a second claim in 2011 which was withdrawn and, therefore, is considered not to have been filed. 20 C.F.R. §725.306(b); Hearing Tr. at 8; Decision and Order at 12. The documents pertaining to this claim are not contained in the record file.

[3] If a miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 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 (1986) (en banc).

Length of Coal Mine Employment

Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). 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 determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Here, the administrative law judge noted that employer stipulated to "at least" six years of coal mine employment. The administrative law judge also noted that claimant asserts in the current claim that he worked in coal mines for twelve years, as was found by the district director. In his prior claim filed in February 1999, however, he asserted that he had sixteen years of coal mine employment. Decision and Order at 4; Director's Exhibits 1, 3. The administrative law judge further considered claimant's Social Security Administration (SSA) earnings records, reflecting periods of coal mine employment from 1972-1984, as well as claimant's coal mine employment history forms from his 1999 and

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

current claims, which list additional coal mine employment from September 1987 to January 1988. Decision and Order at 5-8; Director's Exhibits 1, 3, 4, 6, 7, 8.

Relying on claimant's SSA earnings records, the administrative law judge divided claimant's yearly income by the coal mine industry's average daily earnings for that year reported by the Bureau of Labor Statistics (BLS), consistent with the formula set forth in 20 C.F.R. §725.101(a)(32)(iii). Then, citing 20 C.F.R. §725.101(a)(32)(i), she divided that number by 125, to conclude that claimant worked for 12.22 years in underground coal mine employment. Decision and Order at 8. Because the administrative law judge's finding that claimant did not establish at least 15 years of coal mine employment is supported by substantial evidence in the record, including claimant's SSA earnings records and his coal mine employment history forms, we affirm her finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See* 30 U.S.C. §921(c)(4); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Director's Exhibits 1, 4.

The Existence of Pneumoconiosis

In evaluating the x-ray evidence relevant to the existence of clinical pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten interpretations of three analog x-rays dated January 25, 2012, June 5, 2012, and May 2, 2013; two interpretations of a digital x-ray dated December 13, 2012; and an interpretation of a May 31, 2013 x-ray contained in claimant's treatment records. Decision and Order at 9-10.

Drs. Alexander and Miller, who are dually-qualified as Board-certified radiologists and B readers, interpreted the January 25, 2012 x-ray as positive for pneumoconiosis, whereas Drs. Meyer and Tarver, who are also dually-qualified, and Dr. Forehand, a B reader, interpreted it as negative. Director's Exhibit 23; Claimant's Exhibit 2; Employer's Exhibits 1, 5. Based on the equal number of positive and negative readings by the dually-qualified readers, to whom she accorded the greatest weight, the administrative law judge permissibly found this x-ray to be in equipoise. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir.

[5] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 9.

Dr. Miller interpreted the June 5, 2012 x-ray as positive for pneumoconiosis, Director's Exhibit 23, while Drs. Meyer and Tarver interpreted it as negative, Employer's Exhibits 2, 6. Based on the preponderance of the negative readings by dually-qualified readers, the administrative law judge permissibly found that this x-ray did not support the existence of pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; Decision and Order at 9.

Dr. Alexander interpreted the May 2, 2013 x-ray as positive, while Dr. Meyer read it as negative. Claimant's Exhibit 1; Employer's Exhibit 11. Based on their equal qualifications, the administrative law judge permissibly concluded that this x-ray was in equipoise. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 10.

Dr. Meyer interpreted the December 13, 2012 digital x-ray, submitted as "other medical evidence" pursuant to 20 C.F. R. §718.107, as negative for pneumoconiosis. Dr. DePonte, also a dually-qualified reader, interpreted it as positive. Claimant's Exhibit 3; Employer's Exhibit 3. Consequently, the administrative law judge permissibly found it to be inconclusive. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 10.

Finally, Dr. Subramanian, whose qualifications are not in the record, interpreted the May 31, 2013 x-ray contained in claimant's treatment records as reflecting "small calcific densities in the lungs" that "may be related to old granulomatous disease." Decision and Order at 15; Claimant's Exhibit 7. Noting that the x-ray was not read for opacities of pneumoconiosis, the administrative law judge properly found that this x-ray did not support the existence of the disease. *Id.* Having found none of the x-rays to be positive, the administrative law judge reasonably concluded that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6] Decision and Order at 10, 15.

Because the administrative law judge explained why she found the x-ray evidence insufficient to establish the existence of pneumoconiosis in light of the quantity of evidence and the qualifications of the readers, we affirm her finding that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(a)(1). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling*

[6] The administrative law judge also noted that all eight x-ray interpretations from the prior claim filed in February 1999 were negative. Decision and Order at 10.

Smokeless Coal Co. v. Akers, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Turning to the medical opinion evidence, the administrative law judge correctly found that none of the physicians diagnosed clinical pneumoconiosis in this or in claimant's 1999 claim and none of the treatment records submitted in either claim contain such a diagnosis. Decision and Order at 11; Director's Exhibit 13; Employer's Exhibits 4, 7, 10, 13. As it is supported by substantial evidence, we affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(4); s*ee Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

With respect to the existence of legal pneumoconiosis,[7] the administrative law judge considered the medical opinions and qualifications of Drs. Fino, Castle, and Forehand.[8] The administrative law judge found that Drs. Fino and Castle offered well-reasoned opinions that claimant suffers from a disabling pulmonary impairment due to cigarette smoke-induced emphysema and does not suffer from any coal mine dust-related disease or impairment. Decision and Order at 12-13; Employer's Exhibits 4, 7. Employer's Exhibits 1, 2.

In contrast, the administrative law judge noted that Dr. Forehand's opinion was inconsistent. In the current claim, Dr. Forehand initially diagnosed legal pneumoconiosis, in the form of obstructive lung disease and a gas exchange impairment due to both cigarette smoking and coal mine dust exposure. During his deposition,

[7] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] The administrative law judge correctly determined that Drs. Fino and Castle are Board-certified in both Internal Medicine and Pulmonary Disease, whereas Dr. Forehand is Board-certified in Pediatrics and Allergy/Immunology. Decision and Order at 13; Employer's Exhibits 4; 7; 8 at 5. The administrative law judge acknowledged, however, that Dr. Forehand "had a long and distinguished career" in evaluating and treating coal miners for pulmonary conditions. Decision and Order at 13. Thus, the administrative law judge permissibly concluded that Dr. Forehand's lack of Board-certifications in Internal Medicine or Pulmonary Disease did not undermine the probative value of his opinion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); Decision and Order at 13.

however, Dr. Forehand retracted his diagnosis after being shown an earlier report that he authored, apparently in connection with claimant's withdrawn claim, in which he attributed claimant's impairment solely to smoking. Decision and Order at 13; Director's Exhibit 13; Employer's Exhibit 8. Thus, based on Dr. Forehand's retraction of his diagnosis, the administrative law judge concluded that his opinion was equivocal and did not ultimately constitute a diagnosis of legal pneumoconiosis. Decision and Order at 14. Because "none of the physicians diagnosed a chronic restrictive or obstructive pulmonary disease or impairment arising out of coal mine employment" the administrative law judge concluded that claimant failed to establish the existence of legal pneumoconiosis.[9] 20 C.F.R. §718.202(a)(4); Decision and Order at 14.

We conclude that the administrative law judge erred in her consideration of Dr. Forehand's opinion because it was based in part on evidence developed in claimant's withdrawn claim that is not in the record. In accordance with 20 C.F.R. §725.414, each party is allowed to submit "no more than two medical reports" in its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Section 725.414(a)(2)(i), (3)(i) also provides, in relevant part, that "[a]ny . . . physicians' opinions that appear in a medical report must each be admissible under this paragraph . . . ." 20 C.F.R. §725.414(a)(2)(i), (3)(i). While the regulations further provide that a physician who has prepared a "medical report" may testify with respect to a claim, a physician's testimony as to the miner's condition is also limited to admissible evidence.[10] 20 C.F.R. §§725.414(c), 725.457(c)(2), (d), 725.458. As discussed above, in formulating his opinion, Dr. Forehand reviewed a prior medical opinion during his deposition that was not admitted into evidence in the current claim pursuant to Section 725.414.[11] Because the administrative law judge did not address Dr.

[9] The administrative law judge also noted that neither the medical treatment notes in the current claim, nor the medical opinion evidence in the prior claim filed in February 1999, contain a diagnosis of legal pneumoconiosis. Decision and Order at 14-15; Director's Exhibit 1; Claimant's Exhibit 7.

[10] Section 725.458 provides, in pertinent part, that "[t]he testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of the testimony contained in [20 C.F.R.] §725.457(d)." 20 C.F.R. §725.458. Section 725.457(d) provides, in pertinent part, that "[a] physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible." 20 C.F.R. §725.457(d).

[11] We note that Dr. Forehand's April 6, 2011 report was not admitted into evidence by either party, pursuant to 20 C.F.R. §725.414, and is not physically present in the record. Furthermore, the record reflects that Dr. Forehand's April 6, 2011 report may

Forehand's reference to a report that had not been admitted into evidence when she analyzed his opinion, we vacate her finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and we remand this case for the administrative law judge to consider the evidentiary issue.

On remand, the administrative law judge should determine whether Dr. Forehand's April 6, 2011 report is admissible under 20 C.F.R. §725.414(a)(3)(i) and, if not, whether employer has established good cause for its admission, under 20 C.F.R. §725.456(b)(1). If the administrative law judge finds that good cause is demonstrated, claimant must be provided an opportunity to respond to that evidence. 20 C.F.R. §725.456(b)(4); *see also North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

If Dr. Forehand's April 6, 2011 report is not admitted into the record on remand, the administrative law judge should determine, as is within her discretion, what action to take with respect to Dr. Forehand's September 9, 2014 testimony, to the extent that it references evidence that is inadmissible or that has not properly been admitted into the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring & dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring & dissenting). Such action may include redacting the objectionable content, asking the physician to submit a new report, factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled, and, although not the favored option, excluding Dr. Forehand's September 9, 2014 deposition. *Harris*, 23 BLR at 1-108.

Further, when reconsidering on remand whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge is instructed to reconsider the explanations for the physicians' conclusions, the documentation underlying their medical judgments, and the

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have been developed in connection with claimant's withdrawn claim. Decision and Order at 12; Hearing Tr. at 8. Unlike the regulation pertaining to subsequent claims, which explicitly provides that any evidence submitted in connection with any prior claim must be made part of the record in the subsequent claim, *see* 20 C.F.R. §725.309(c)(2); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc), there is no comparable provision pertaining to the evidence developed in a withdrawn claim. Rather, the regulation provides that the claim will be considered not to have been filed. *See* 20 C.F.R. §725.306.

sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276.

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

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge