U.S. Department of Labor

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

BRB No. 17-0410 BLA

RONALD MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/30/2018
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05843) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim filed on December 22, 2011 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Based on his determination that claimant had fourteen years of coal mine employment, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering whether claimant established entitlement to benefits without the presumption, the administrative law judge found that claimant has pneumoconiosis, his pneumoconiosis arose out of his coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204.[3] Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed three prior claims. His most recent prior claim, filed on May 15, 2001, was denied by Administrative Law Judge Mollie W. Neal because he failed to establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he was totally disabled by pneumoconiosis. Director's Exhibit 1 at 552. Claimant requested modification of the denial, and Administrative Law Judge Larry W. Price concluded that claimant failed to establish a basis for modification. Director's Exhibit 1 at 78, 571. Claimant appealed, and the Board affirmed the denial of modification. *R.M. v. National Mines Corp.*, BRB No. 08-0536 BLA (Apr. 28, 2009) (unpub.); Director's Exhibit 1 at 5. Claimant took no further action until filing the current subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The administrative law judge also found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309(c). 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 that "one of the applicable conditions of entitlement . . . has changed since the date upon which the

On appeal, employer challenges the administrative law judge's findings that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the 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).

Employer asserts that the administrative law judge erred in finding that the medical opinion evidence establishes that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] Legal pneumoconiosis includes any chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The administrative law judge considered the opinions of Drs. Baker, Vernon, Klayton, and Jarboe, along with claimant's treatment

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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).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fourteen years of coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 21.

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

[6] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found the x-ray evidence insufficient to establish the existence of clinical pneumoconiosis. Decision and Order at 13. The administrative law judge further found that there is no biopsy or autopsy evidence for consideration pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions at 20 C.F.R. §718.202(a)(3) were not applicable because complicated pneumoconiosis was not established, and claimant had less than fifteen years of coal mine employment. *Id*. at 11. The administrative law judge also found the medical opinion evidence insufficient to establish the existence of clinical pneumoconiosis. *Id*. at 13.

records. Decision and Order at 13-19. Dr. Baker diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to cigarette smoking and coal dust exposure. Director's Exhibit 12. Dr. Vernon also diagnosed legal pneumoconiosis in the form of COPD and emphysema, and stated that "the contribution of the . . . dust exposure versus tobacco usage cannot be determined," but coal dust "is likely to have contributed." Claimant's Exhibit 2. Similarly, Dr. Klayton diagnosed "very severe obstructive lung disease," which he opined was due to cigarette smoking and coal dust exposure, but he could not "state the relative contributions of each." Claimant's Exhibit 3. Conversely, Dr. Jarboe opined that claimant does not have legal pneumoconiosis, but suffers from pulmonary emphysema and chronic bronchitis attributable solely to cigarette smoking. Director's Exhibit 16. Finally, the administrative law judge noted that claimant's treatment records contain diagnoses of COPD and emphysema, but do not address whether coal dust or smoking is the cause of those conditions. Decision and Order at 18-19; Director's Exhibit 11; Claimant's Exhibit 4.

The administrative law judge accorded little weight to the opinions of Drs. Vernon and Klayton because neither doctor was able to say whether claimant's respiratory impairments were substantially aggravated by coal mine dust exposure. Decision and Order at 14-15. Similarly, because claimant's treatment records did not address whether coal dust caused claimant's respiratory conditions, the administrative law judge gave them little weight. *Id*. at 18-19. The administrative law judge found Dr. Jarboe's opinion unreasoned and entitled to no weight, but relied on Dr. Baker's "well-reasoned and well-documented" opinion to find that the medical opinion evidence establishes that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 13-19.

Employer contends that the administrative law judge erred in finding Dr. Baker's opinion sufficient to meet claimant's burden to establish legal pneumoconiosis. Employer's Brief at 16-22. Employer asserts that Dr. Baker's opinion is unreasoned and "acknowledged only the possibility of causation – coal dust exposure can cause COPD – not actual causation." *Id*. at 18-19, 21. Employer's arguments lack merit.

The administrative law judge correctly noted that Dr. Baker based his diagnosis of legal pneumoconiosis on a review of claimant's work and medical histories, and on the results of the pulmonary function testing and physical examination he performed. Decision and Order at 13-14; Director's Exhibit 12. Dr. Baker attributed claimant's COPD and chronic bronchitis to both claimant's coal mine dust exposure and his cigarette smoking. Director's Exhibit 12. He explained that "[w]hen both exposures are present the literature suggest [*sic*] they may be either additive or synergistic, implying that the [miner's] condition would be worse than if [he] had one exposure or the other and not both." Decision and Order at 13, *quoting* Director's Exhibit 12. Moreover, Dr. Baker specifically concluded, "[o]n this basis . . . [claimant's] condition has been significantly contributed to

and substantially aggravated by dust exposure in his coal mine employment." Decision and Order at 13-14, *quoting* Director's Exhibit 12. Contrary to employer's assertion, Dr. Baker attributed claimant's COPD and chronic bronchitis to both smoking and coal mine dust exposure, and his specific opinion that coal dust exposure "significantly contributed" to claimant's impairment, is sufficient to support a finding that claimant has legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Employer's Brief at 21. Moreover, finding that Dr. Baker set forth the rationale for his findings based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's disabling COPD and bronchitis are due to both smoking and coal dust exposure, the administrative law judge permissibly credited his opinion as well-reasoned and well-documented. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 13-14. We, therefore, affirm the administrative law judge's finding that Dr. Baker's diagnosis of legal pneumoconiosis is sufficient to satisfy claimant's burden of proof. Decision and Order at 14.

Employer also argues that the administrative law judge provided invalid reasons for discrediting the opinion of Dr. Jarboe that claimant's obstructive lung disease is due solely to smoking. Employer's Brief at 23-24. We disagree.

Dr. Jarboe concluded that claimant does not have legal pneumoconiosis based, in part, on his view that claimant's markedly decreased FEV1 and severely reduced FEV1/FVC ratio constituted a pattern of impairment that is characteristic of obstruction related to cigarette smoking, not coal dust exposure.[7] Decision and Order at 16; Director's Exhibit 16 at 12-13. The administrative law judge permissibly discounted this aspect of Dr. Jarboe's opinion as inconsistent with the regulations and the Department of Labor's (DOL) recognition that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see* 20 C.F.R. §718.204(b)(2)(i)(C); *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 16-17. In addition, noting that studies found credible by the DOL in the preamble

[7] Dr. Jarboe stated that "a disproportionate reduction of FEV1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma, and not coal dust exposure." Director's Exhibit 16 at 12. Dr. Jarboe further stated that "when the inhalation of coal mine dust causes an impairment there tends to be a proportionate or parallel reduction of FVC and FEV1." *Id.* at 13.

to the revised regulations recognize that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited Dr. Jarboe's opinion because he did not explain why coal dust exposure did not contribute, along with cigarette smoking, to claimant's obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007) (administrative law judge rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 17, *referencing* 65 Fed. Reg. at 79,940; *see also* 20 C.F.R. §718.201(b).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical opinion evidence establishes that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and therefore establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). We further affirm, as supported by substantial evidence, his finding that all of the evidence of record, when weighed together,[8] establishes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[9] *See Dixie Fuel Co.*

[8] Noting that the medical evidence generated in the miner's prior claims is "considerably older," the administrative law judge permissibly accorded greater weight to the evidence submitted with the current claim, as more indicative of claimant's current condition. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 19.

[9] We reject employer's argument that reversal is required because the administrative law judge failed to consider the computed tomography (CT) scan evidence, which employer asserts is negative for the existence of pneumoconiosis. Employer's Brief at 22-23. Contrary to employer's assertion, the administrative law judge noted that the hospitalization records from Highland Regional Medical Center contained CT scan reports that diagnosed emphysema and chronic obstructive pulmonary disease. Decision and Order at 18-19; Director's Exhibit 11. However, the administrative law judge permissibly gave them little weight because they failed to address the etiology of the diagnosed conditions. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129

v. Director, OWCP [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012); Decision and Order at 19.

We also reject employer's argument that the administrative law judge erred in finding Dr. Baker's opinion sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's disabling respiratory impairment.[10] Prior to evaluating the medical opinions at 20 C.F.R §718.204(c), the administrative law judge articulated the proper regulatory standard for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001); Decision and Order at 22. Contrary to employer's argument, the administrative law judge correctly applied this standard in finding that Dr. Baker's opinion meets claimant's burden on this issue. Employer's Brief at 21-22.

As set forth above, Dr. Baker diagnosed legal pneumoconiosis in the form of COPD and chronic bronchitis that are "significantly contributed to and substantially aggravated by [coal mine] dust exposure." Director's Exhibit 12 at 33. Dr. Baker further opined that claimant's COPD and chronic bronchitis "fully" contribute to his disability.[11] *Id*. at 37. As claimant's totally disabling COPD and chronic bronchitis are legal pneumoconiosis, the

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(6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 19.

[10] We affirm, as unchallenged on appeal, the administrative law judge's rejection of Dr. Jarboe's opinion on the cause of claimant's disabling impairment because the physician failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that claimant has the disease. *See Skrack*, 6 BLR at 1-711; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 22-23.

[11] In his accompanying narrative report, Dr. Baker stated that claimant is totally disabled from a respiratory standpoint and that his "legal pneumoconiosis, severe obstructive airway disease and chronic bronchitis all have an adverse effect on his respiratory system and contributes [sic] to his total pulmonary impairment due at least in part to his coal dust exposure." Director's Exhibit 12 at 33.

administrative law judge properly determined that Dr. Baker's opinion meets claimant's burden to establish that his pneumoconiosis is a substantially contributing cause of his totally disabling impairment pursuant to 20 C.F.R. §718.204(c). *See Hensley*, 820 F.3d at 847-48, 25 BLR at 2-816-18; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489-90, 25 BLR 2-135, 2-154-55 (6th Cir. 2012); Decision and Order at 22. As employer raises no other allegation of error, we affirm the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge