U.S. Department of Labor

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

BRB No. 17-0492 BLA

FRANK SCOTT LAKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK MOUNTAIN COAL MINING	)	
	)	DATE ISSUED: 07/23/2018
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2015-BLA-05284) 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 subsequent claim filed on May 6, 2013.[1]

After crediting claimant with at least twelve but less than fifteen years of coal mine employment,[2] the administrative law judge found that the new evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] He therefore found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the claim on its merits, the administrative law judge found that claimant's total disability is due to legal pneumoconiosis, and he awarded benefits accordingly.[4] 20 C.F.R. §718.202(a)(4); 20 C.F.R. §718.204(c).

On appeal, employer contends that the administrative law judge erred in admitting Dr. Ajjarapu's medical report into evidence. Employer also contends that the administrative law judge erred in finding that the evidence established that claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Worker's

[1] Claimant's prior claim, filed on November 28, 1994, was finally denied on May 6, 1998, because the evidence did not establish that claimant had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Claimant's last coal mine employment was in Kentucky. Hearing Transcript at 20; Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, he found that claimant was not entitled to the Section 411(c)(4) presumption.

[4] The administrative law judge noted that employer also stipulated that claimant has clinical pneumoconiosis. Decision and Order at 2.

Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge permissibly considered Dr. Ajjarapu's medical opinion.[5]

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Admission of Dr. Ajjarapu's Medical Report

The Department of Labor (DOL) is obligated to provide each claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *R.G.B.* [*Blackburn*] *v. S. Ohio Coal Co.*, 24 BLR 1-129 (2009) (en banc); *see also Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199 (6th Cir. 2009). Claimant selected Dr. Habre to provide his DOL-sponsored pulmonary evaluation. After performing his evaluation, Dr. Habre submitted a report dated July 19, 2013, as well as a supplemental report dated October 1, 2013. Director's Exhibits 12, 13.

The district director subsequently received additional medical evidence that was contrary to Dr. Habre's conclusions. Because Dr. Habre was unavailable to review this evidence, the district director had Dr. Ajjarapu re-examine claimant without performing additional objective testing. Based upon her examination of claimant, as well as her review of the reports of Drs. Habre and Dahhan, Dr. Ajjarapu prepared a July 14, 2014 report, wherein she diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 17. After reviewing the reports of Drs. Habre, Dahhan, and Rosenberg, Dr. Ajjarapu prepared another report on April 13, 2016, wherein she reiterated her diagnoses. Director's Exhibit 42. She also opined that claimant's totally disabling pulmonary impairment is due to both coal mine dust exposure and cigarette smoking. *Id.*

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

At the hearing, the Director's counsel sought to admit Dr. Habre's July 19, 2013 medical report as the DOL-sponsored pulmonary evaluation, as well as the "supplemental" reports of Dr. Ajjarapu. Hearing Transcript at 6-7. Employer objected to the admission of the reports prepared by Dr. Ajjarapu, arguing that the reports should not be admitted as supplemental reports since the doctor did not perform the DOL-sponsored pulmonary evaluation. In response to employer's objection, the Director's counsel explained that the supplemental reports were obtained from a different physician because Dr. Habre was unavailable. The administrative law judge admitted all of the reports into evidence "in an abundance of caution," but advised the parties that they could address the issue of the admissibility of the evidence in their post-hearing briefs. Hearing Transcript at 9. In its post-hearing brief, employer again objected to the admission of Dr. Ajjarapu's medical reports as supplemental reports, because Dr. Ajjarapu had not conducted the DOL-sponsored pulmonary evaluation. Employer's Post-Hearing Brief at 7 n.2. The administrative law judge resolved the evidentiary issue in his decision, wherein he admitted the reports of Dr. Ajjarapu, explaining that they were admissible as supplemental reports. Decision and Order at 2 n.1.

On appeal, employer argues that the administrative law judge erred in admitting Dr. Ajjarapu's medical reports as "supplemental" reports. Employer's Brief at 3. The regulations provide that "[s]upplemental reports prepared by the same physician must be considered part of the physician's original report." 20 C.F.R. §725.414(a)(1). Because Dr. Habre prepared the original report, the Director concedes that Dr. Ajjarapu's reports should not have been offered or admitted as "supplemental" reports. Director's Brief at 2. We agree that Dr. Ajjarapu's reports are not supplemental reports and we therefore remand the case for further consideration.[6]

Part 718 Entitlement

Without the Section 411(c)(4) presumption, 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

[6] The Director, Office of Workers' Compensation Programs (the Director), argues that the error was harmless because the administrative law judge did not rely on Dr. Habre's report to find that claimant has legal pneumoconiosis. Thus, the Director contends, it is as if Dr. Habre's report was withdrawn and Dr. Ajjarapu's report was offered and admitted as the Department of Labor-sponsored examination. We decline to address whether the error in admitting Dr. Ajjarapu's report was harmless. Because we are remanding this case for further consideration, the Director will have the opportunity to present any argument concerning her desire to redesignate evidence.

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).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[7] pursuant to 20 C.F.R. §718.202(a)(4). To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic dust 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).

Employer argues that the administrative law judge erred in relying on Dr. Ajjarapu's opinion to support a finding of legal pneumoconiosis. Employer specifically contends that the administrative law judge erred in not addressing evidence calling into question the accuracy of the smoking history relied upon by Dr. Ajjarapu. Employer's Brief at 4. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Dr. Ajjarapu relied upon a smoking history of twenty-four to twenty-six pack-years.[8] Director's Exhibit 7 at 3. While Dr. Rosenberg reported a smoking history of twenty-five pack-years from 1975 to 2000, the administrative law judge did not address the fact that Dr. Rosenberg opined that claimant had elevated carboxyhemoglobin levels at the time of his examination in July of 2015.[9] Employer's Exhibits 2-3. The administrative law judge erred in failing to address all of the relevant evidence regarding the length of

[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).

[8] Dr. Dahhan recorded a smoking history of thirty pack-years. Director's Exhibit 14 at 1.

[9] Dr. Rosenberg noted that there was evidence of the use of tobacco products at the time of his 2015 examination. Employer's Exhibit 2 at 11. Dr. Rosenberg explained that the elevated cotinine, nicotine, and carboxyhemoglobin levels that he found in 2015 indicated that claimant was "using tobacco of some nature." Employer's Exhibit 3 at 11. The administrative law judge acknowledged that Dr. Rosenberg "may be correct" that claimant was exposed to more cigarette smoke than he admitted. Decision and Order at 26.

claimant's smoking history. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, on remand, the administrative law judge must make a specific finding as to the length of claimant's smoking history, and reconsider the credibility of the relevant medical opinion evidence in light of that finding. In light of the above-referenced error, we vacate the administrative law judge's finding that the medical evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.

In light of our decision to vacate 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 the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue, if necessary, 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 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