U.S. Department of Labor

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

BRB No. 18-0252 BLA

EDGAR OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOHNSON FLOYD COAL COMPANY LLC	)	DATE ISSUED: 07/19/2019
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 and the Decision and Order on Reconsideration of Monica Markley, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (2011-BLA-06157) of Administrative Law Judge Monica Markley, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on April 12, 2010.[1]

Based on her determination that claimant had 9.05 years of coal mine employment, the administrative law judge found claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She also found no evidence of complicated pneumoconiosis, precluding invocation of the irrebuttable presumption of total disability due to

[1] The administrative law judge issued her Decision and Order Awarding Benefits on October, 25, 2017. Employer filed a Notice of Appeal with the Board on November 21, 2017, which the Board acknowledged and assigned BRB No. 18-0075 BLA. On February 20, 2018, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to dismiss the appeal as premature due to her prior filing on November 15, 2017 of a Motion for Reconsideration with the administrative law judge, arguing that the administrative law judge erred in finding that claimant had three dependents. On February 28, 2018 the Board granted the Director's motion and dismissed employer's appeal as premature. The administrative law judge filed a Decision and Order on Reconsideration on February 2, 2018 granting the Director's motion and revising her Decision and Order Awarding Benefits to reflect that claimant has one dependent for purposes of augmentation of benefits. Employer subsequently filed a Notice of Appeal with the Board on March 2, 2018, and the case was assigned BRB No. 18-0252 BLA.

[2] Under Section 4111(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. 921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant established entitlement without the presumptions, the administrative law judge found that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), (c).[3] Accordingly, she awarded benefits.

On appeal, employer contends the administrative law judge erred in evaluating claimant's smoking history and finding the medical opinion evidence establishes legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Rosenberg that claimant does not have legal pneumoconiosis.[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).

Smoking History

The administrative law judge reviewed claimant's hearing testimony and the smoking histories in both the treatment records and the medical reports.[6] Decision and Order at 12-13. She determined:

[3] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-12, 43-46.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

[6] The administrative law judge noted claimant's treatment records from Dr. Sikder, Dr. Rice, and the University of Kentucky pulmonary clinic reflect smoking histories ranging from one to two packs per day for twenty-eight to thirty years. Decision and Order at 12; Claimant's Exhibit 8; Employer's Exhibit 15. The physicians who examined

> [T]he preponderance of the evidence indicates that [c]laimant first smoked in 1975, and based on an average of the various accounts as to when [c]laimant stopped smoking, I find that [c]laimant stopped smoking in 2000. I therefore find that [c]laimant smoked from 1975 to 2000. The evidence indicates that [c]laimant smoked approximately four cigarettes per day (one-fifth of a pack of cigarettes) during this 25-year period. Thus, I find the evidence establishes that [c]laimant has a 5 pack[-]year smoking history.

Id. at 13.

Employer initially contends the administrative law judge should have given determinative weight to the longer smoking histories reported by Drs. Sikder and Rice, claimant's treating physicians, based on their superior knowledge of claimant. Employer further argues substantial evidence does not support the administrative law judge's finding claimant has a smoking history of five pack-years, as his treatment records and the medical opinions of Drs. Rosenberg and Baker, "indicate more than twenty-five years of smoking history." Employer's Brief at 7-8. Employer maintains the administrative law judge's error affected her weighing of the medical opinions. Employer's arguments lack merit.

The length and extent of claimant's smoking history is a factual determination for the administrative law judge. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Contrary to employer's argument, the administrative law judge was not required to give determinative weight to the smoking histories reported by Drs. Sikder and Rice. The regulation at 20

---

claimant in conjunction with his claim recorded lower histories: Dr. Rasmussen indicated claimant smoked one-half pack of cigarettes per day from 1978 to 1998; Dr. Baker reported claimant smoked less than one-quarter of a pack per day from age twenty to age fifty; Dr. Chavda indicated claimant smoked one-quarter pack per day for twenty-five years, quitting in 2000; Dr. Rosenberg noted claimant started smoking about three cigarettes per day in his twenties and quit in 2003; and Dr. Jarboe recorded claimant smoked three to four cigarettes a day from his mid-twenties until 2000, except for the last year when he smoked up to half a pack a day. Director's Exhibit 13; Claimant's Exhibits 4, 7; Employer's Exhibits 6, 8. At the hearing, claimant testified he smoked three to four cigarettes per day beginning in his mid-twenties and ending in 2002 or 2003, when he was forty-nine or fifty years old. Hearing Transcript at 25. He stated he could not explain why his treatment records reflected heavier smoking because, "I told them two to four cigarettes, the same thing," and added it was possible Dr. Sikder misunderstood him. *Id.* at 34-35.

C.F.R. §718.104(d) provides for according determinative weight to a treating physician's opinion only as it relates to the elements of entitlement, not to ancillary questions of fact.

Furthermore, although Drs. Rosenberg and Baker reported claimant smoked for approximately twenty-five years in total, they recorded only about three to four cigarettes and five cigarettes a day, respectively, or 4.5 pack-years and less than 7.5 pack-years. Their histories are similar to those recorded by Drs. Chavda, Jarboe, and Rasmussen that claimant smoked three to four, four to five, and about ten cigarettes a day. Director's Exhibit 13; Claimant's Exhibits 4, 7; Employer's Exhibits 6, 8. Taking into consideration the complete range of reported smoking histories and claimant's testimony, the administrative law judge permissibly determined the preponderance of the evidence established claimant smoked approximately four cigarettes a day from 1975 to 2000, for a smoking history of five pack-years. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 12-13. As it is supported by substantial evidence, we affirm this finding. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 13.

Entitlement to Benefits

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 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 element 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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

Employer contends the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] In order to establish legal pneumoconiosis, claimant must prove that he has "a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis through any of the available methods at 20 C.F.R. §§718.107, 718.202(a)(1)-(4). Decision and Order at 35-37.

Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to both cigarette smoking and coal mine dust exposure. Director's Exhibits 13, 16, 17; Claimant's Exhibit 3. Dr. Baker similarly diagnosed legal pneumoconiosis, in the form of COPD and chronic bronchitis due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 7. Conversely, Drs. Jarboe and Rosenberg opined claimant does not have legal pneumoconiosis, as his severe obstructive lung disease is due solely to cigarette smoking. Employer's Exhibits 6, 8. The administrative law judge credited the opinions of Drs. Rasmussen and Baker as well-reasoned and well-documented, and discredited the opinions of Drs. Jarboe and Rosenberg as inconsistent with the preamble to the regulations.[8] Decision and Order at 38-43. She therefore found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's challenges to these determinations lack merit. Employer's Brief at 11-14.

We reject employer's contention that Dr. Baker did not state with certainty that claimant's COPD was due to coal dust exposure, as Dr. Baker set forth a definitive conclusion on the etiology of claimant's COPD at three places in his medical report. Employer's Brief at 11. He initially opined claimant's "condition has been significantly contributed to and substantially aggravated by his coal mine employment." Claimant's Exhibit 7. He further stated claimant's COPD and hypoxemia have "been substantially contributed to by his coal dust exposure as well as his cigarette smoking history." *Id*. Finally, he stated "the combination of cigarette smoke and coal dust has . . . contributed to [claimant's] lung disease." *Id*. Dr. Baker's specific opinion that coal dust exposure "significantly contributed" to claimant's impairment meets the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

We also reject employer's contention that Drs. Rasmussen and Baker relied on inflated coal mine employment histories.[9] While both physicians initially recorded

[8] The administrative law judge also considered Dr. Chavda's opinion that claimant has legal pneumoconiosis, but found it not well-reasoned or documented. Decision and Order at 41-42; Claimant's Exhibit 4A.

[9] Having affirmed the determination of a five pack-year smoking history, we reject employer's additional allegation that the administrative law judge erred in crediting Dr. Rasmussen's opinion when the physician's assumption of a ten pack-year history understated claimant's use of cigarettes. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

claimant worked as a surface miner for twenty-five years, they subsequently provided supplemental opinions acknowledging an employment history of only nine years, consistent with the administrative law judge's finding, and reiterated their diagnoses of legal pneumoconiosis. Decision and Order at 12; Director's Exhibit 13; Claimant's Exhibit 7.

Finally, employer is incorrect in alleging the administrative law judge was required to discredit the opinions of Drs. Rasmussen and Baker because they failed to definitively diagnose the condition they believed made claimant genetically predisposed to the harmful effects of coal dust inhalation.[10] Employer's Brief at 11-12. Both physicians observed it was unusual to see such severe obstructive lung disease in a person of claimant's age. Director's Exhibit 13; Claimant's Exhibit 7. They further opined that he likely has Alpha-1 antitrypsin deficiency or another genetic condition predisposing him to obstructive airways disease when exposed to lung irritants. *Id*. Neither Dr. Rasmussen nor Dr. Baker

[10] After addressing and rejecting the possibility that asthma made claimant prone to developing severe obstructive lung disease, Dr. Rasmussen stated, "[a]nother condition, which is the only identified hereditary factor with such susceptibility[,] is Alpha-1 antitrypsin deficiency." Director's Exhibit 13 at 51. He further indicated published studies show non-smokers with the deficiency typically do not develop significant disease before age fifty, but smoking and occupational coal dust exposure "hasten the development of emphysema." *Id*. Dr. Rasmussen concluded, "[w]hatever [claimant's] underlying increased susceptibility might be[,] both smoking and mine dust have contributed significantly to his disabling lung disease." *Id*. Dr. Baker stated:

> As he has a severe degree of obstructive airway disease at a young age, it is felt he probably has an Alpha-1 antitrypsin deficiency or some other genetic predisposition to obstructive airway disease. Any and all exposures would be considered toxic to him. The medical literature also suggests that when both exposures are present, the effects may be either synergistic or additive. On this basis, his condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment and represents legal pneumoconiosis.

Claimant's Exhibit 7.

indicated, however, that their diagnoses of legal pneumoconiosis were contingent on the existence of the predisposing condition.[11] *Id.*

Because we have rejected employer's allegations of error, we affirm the administrative law judge's crediting of the opinions of Drs. Rasmussen and Baker. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 40, 42.

We also reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Jarboe that claimant does not have legal pneumoconiosis. The administrative law judge accurately noted that in concluding claimant's disabling impairment is unrelated to coal dust exposure, Drs. Rosenberg and Jarboe relied, in part, on their view that claimant's reduced FEV_1/FVC ratio is inconsistent with obstruction due to coal dust exposure.[12] Decision and Order at 40-42; Employer's Exhibits 1, 3, 6, 8. In accordance with the law of the United States Court of Appeals for the Sixth Circuit, the administrative law judge permissibly discounted their opinions as contrary to the Department of Labor's (DOL) recognition that obstructive impairments significantly related to, or substantially aggravated by, coal dust exposure may be associated with decrements in the FEV_1 and the FEV_1/FVC ratio. *See* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (crediting studies showing that coal miners have an increased risk of developing COPD, which "may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC."); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (holding the administrative law judge appropriately declined to credit Dr. Rosenberg's medical opinion because it was inconsistent with the position DOL adopted in the preamble that coal dust exposure can cause COPD, with associated decrements in FEV_1/FVC); Decision and Order 41-42.

[11] Both physicians opined that claimant's severe lung impairment at a young age demonstrated that he is an unusually susceptible individual, more likely to respond to coal dust exposure. Director's Exhibit 13 at 51; Claimant's Exhibit 7.

[12] We find no merit to employer's assertion that Dr. Jarboe did not mention the FEV_1/FVC ratio, but focused his opinion on the preservation of the FVC value. Employer's Brief at 9. Dr. Jarboe specifically stated, "[a] disproportionate reduction of FEV_1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation," and "the inhalation of coal mine dust tends to produce a more parallel reduction of FVC and FEV_1." Employer's Exhibit 6.

Similarly in accord with Sixth Circuit precedent, the administrative law judge further permissibly found Dr. Jarboe's exclusion of legal pneumoconiosis, based on the absence of radiographically-apparent coal dust in claimant's lungs, to be inconsistent with the regulations. 20 C.F.R. §§718.201(a)(2); 718.202(a)(4), (b); 65 Fed. Reg. at 79,971 (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (holding the administrative law judge permissibly discounted Dr. Jarboe's opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays); Decision and Order at 41.

Having rejected employer's contentions, we affirm the administrative law judge's determination to give "less probative weight" to the opinions of Drs. Rosenberg and Jarboe. Decision and Order at 41-42. Accordingly, we further affirm her finding claimant established the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); Decision and Order at 41-42.

Total Disability Due to Pneumoconiosis

To establish disability causation, claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.[13] 20 C.F.R. §718.204(c)(1). The administrative law judge rationally found that the opinions of Drs. Baker and Rasmussen satisfied that standard, as both physicians opined that legal pneumoconiosis contributes "substantially" to claimant's total disability. Decision and Order at 46-48; Director's Exhibits 13, 16, 17; Claimant's Exhibits 3, 7. She permissibly discounted the opinions of Drs. Rosenberg and Jarboe because they did not diagnose claimant with legal pneumoconiosis, contrary to her finding.[14] *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated 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); Decision and Order at

[13] Pneumoconiosis is a "substantially contributing cause" of total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

[14] Drs. Rosenberg and Jarboe offered no explanation for their conclusions on the issue of disability causation, aside from their determinations that claimant does not have legal pneumoconiosis. Employer's Exhibits 6, 8.

48-50; Employer's Exhibits 6, 8. Consequently, we affirm the administrative law judge's determination that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c), and the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge