U.S. Department of Labor

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

BRB No. 15-0435 BLA

BENNY BRODIS GARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BELL COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/30/2016
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05245) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 claim filed on November 18, 2011.

After crediting claimant with more than ten, but less than fifteen, years of coal mine employment,[1] the administrative law judge found that the x-ray evidence did not establish the existence of clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1). However, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer specifically contends that the administrative law judge failed to properly address the length of claimant's coal mine employment, and thereby failed to consider whether the physicians who diagnosed legal pneumoconiosis based their opinions on inflated coal mine employment histories. Employer also

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory 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 consideration under Section 411(c)(4). Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

[2] 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).

[3] "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).

contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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.[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).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Burrell, Fernandes, Dahhan, and Jarboe. Dr. Burrell diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 14. Dr. Fernandes also diagnosed legal pneumoconiosis, in the form of COPD/emphysema due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 3. Drs. Dahhan and Jarboe, however, opined that claimant does not suffer from legal pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 2, 4. Although Drs. Dahhan and Jarboe agreed that claimant suffers from a disabling obstructive pulmonary impairment, they attributed the impairment solely to cigarette smoking. *Id.*

[4] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

In weighing the conflicting evidence, the administrative law judge found that the opinions of Drs. Burrell and Fernandes that claimant has legal pneumoconiosis in the form of COPD/emphysema due to coal mine dust exposure and cigarette smoking were "reasoned." Decision and Order at 10. Conversely, the administrative law judge found that the opinions of Drs. Dahhan and Jarboe that claimant does not suffer from legal pneumoconiosis were not reasoned because neither physician adequately explained why claimant's coal mine dust exposure did not contribute, along with his cigarette smoking, to his disabling obstructive pulmonary impairment. *Id.* at 9-10. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe. We disagree. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Jarboe that claimant's obstructive pulmonary impairment is due solely to smoking because neither physician adequately explained how he eliminated claimant's coal mine dust exposure as a source of his obstructive impairment.[5] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 9-10, *citing* 65 Fed. Reg. 79,941 (Dec. 20, 2000). The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Dahhan and Jarboe.[6] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We agree, however, with employer that the administrative law judge erred in his consideration of the opinions of Drs. Burrell and Fernandes. As employer accurately notes, the administrative law judge failed to address the bases for their respective opinions that claimant's (COPD)/emphysema is attributable in part to his coal dust

[5] The administrative law judge found that neither Dr. Dahhan nor Dr. Jarboe accounted for claimant's coal mine dust exposure in addressing the cause of his obstructive pulmonary impairment. Decision and Order at 9-10.

[6] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Dahhan and Jarboe, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

exposure.[7] Consequently, the administrative law judge's analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also contends that the administrative law judge failed to consider all of the relevant evidence when he credited the opinions of Drs. Burrell and Fernandes to find that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer argues that the administrative law judge did not consider evidence which, if credited, would reflect that claimant's coal mine dust exposure was less extensive than the administrative law judge found it to be. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health.[8] *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

The miner bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act nor the regulations provide specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. *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).

In determining the length of claimant's coal mine employment, the administrative law judge noted that, although claimant testified that he worked in the mines for about fourteen years from July of 1969 to 1982, Hearing Transcript at 13, claimant's Social Security earnings statement documented only seven years and eleven months of coal

[7] The administrative law judge merely noted that the "main reason why Drs. Burrell and Fernandez [sic] diagnosed legal pneumoconiosis is due to the exposure." Decision and Order at 8.

[8] Although Dr. Fernandes relied upon a coal mine dust exposure history of seven years and eleven months, Claimant's Exhibit 3, Dr. Burrell relied upon a coal mine dust exposure history of fourteen years. Director's Exhibit 14.

mine employment. Decision and Order at 3-4; Director's Exhibit 10. After noting that evidence regarding the length of claimant's coal mine employment should not "be limited to the documentary evidence," the administrative law judge stated:

> I had an opportunity to review the record and observe the [c]laimant. I also questioned him. There is no basis to reject his testimony. I accept the [c]laimant's testimony that he worked "in and out" of "dog holes" or "dog mines." [Hearing Transcript at] 13. I also accept that at one mining job, he was an "intern" and received minimum wage.
>
> Therefore, I find that the [c]laimant is credible, and I accept that the [c]laimant worked in excess of ten years in mining but did not work [fifteen] years.

Decision and Order at 4.

Although the administrative law judge determined that claimant's testimony established that he worked more than the seven years and eleven months evidenced by his Social Security earnings statement, he did not explain how he calculated the length of claimant's additional coal mine employment. The administrative law judge also failed to consider discrepancies in claimant's reported coal mine employment.[9] We, therefore, agree with employer that the administrative law judge's analysis does not comply with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165 (1989). Therefore, we must vacate the administrative law judge's finding regarding the length of claimant's coal mine employment, and remand the case for him to reconsider the length of the miner's coal mine employment, and to fully explain his weighing of the evidence in making his findings.

In light of the foregoing, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge to reconsider the medical opinion evidence. Specifically, on remand, the

[9] In submitting his claim, claimant initially indicated that he worked for employer, Bell County Coal Corporation (Bell County), from 1980 to 1982. Director's Exhibit 3. However, claimant subsequently indicated that he worked for Bell County from 1978 to 1980. Director's Exhibit 4. Moreover, as employer notes, claimant provided earlier deposition testimony in 1979 that he worked for Bell County from August 22, 1978 to October 16, 1979. Director's Exhibit 23 (March 6, 1979 Deposition Transcript at 13, November 16, 1979 Deposition Transcript at 9). Employer also notes that claimant's Social Security earnings statement reveals no coal mine employment in 1974, as well as non-coal mine employment during the period from 1969 to 1982. Director's Exhibit 10.

administrative law judge should consider all of the relevant evidence and determine the extent of claimant's coal mine dust exposure history, then reassess the medical opinion evidence in light of his determination, if it has changed. Further, when considering whether the opinions of Drs. Burrell and Fernandes establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he should then weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012);

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 is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue, if necessary, on remand.

Employer finally argues that the administrative law judge erred in finding that the evidence established that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b). We disagree. The administrative law judge accurately found that the opinions of all of the physicians, including employer's physicians (Drs. Dahhan and Jarboe), support a finding that claimant suffers from a totally disabling pulmonary impairment.[10] Decision and Order at 5-6. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b).

[10] Dr. Burrell opined that the severity of claimant's chronic pulmonary disease would "prevent his performance of his last coal mine job." Director's Exhibit 14. Dr. Fernandes opined that claimant's pulmonary impairment renders him totally disabled from performing his last coal mine job. Claimant's Exhibit 3. Dr. Dahhan opined that claimant does not retain the respiratory capacity to return to his previous coal mining job. Director's Exhibit 15. Dr. Jarboe opined that claimant is totally disabled from a pulmonary standpoint. Employer's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, 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