U.S. Department of Labor

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

BRB No. 16-0490 BLA

WAYNE A. CLAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMCO, INCORPORATED/AK STEEL CORPORATION	)	DATE ISSUED: 06/21/2017
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06166) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent miner's claim filed on December 21, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant established 12.23 years of coal mine employment and, therefore, was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Considering the merits of the claim, the administrative law judge determined that although claimant did not establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), she established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). On this basis, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[3] The administrative law

[1] The miner filed four previous claims for benefits. Director's Exhibits 1-4. The first three claims were denied by the district director because the miner did not establish any element of entitlement. Director's Exhibits 1-3. The most recent prior claim, filed on July 16, 2009, was denied by the district director due to abandonment. Director's Exhibit 4. The miner did not take any further action until he filed the current claim. The miner died while the case was before the administrative law judge. For the purposes of our decision, claimant is the widow of the miner and she is pursuing the miner's claim on behalf of his estate.

[2] The administrative law judge properly determined that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b), because he has less than the required fifteen years of coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine.

[3] When 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 at least "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because the miner's prior claim was denied by reason of abandonment, the miner is considered to have failed to establish any element of entitlement. The administrative law judge concluded that the requirements of 20 C.F.R. §725.309 were satisfied, as the evidence submitted with the subsequent claim was sufficient to establish that the miner had legal

judge also determined that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c), and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.[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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act 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);

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pneumoconiosis. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 7, 30.

[4] Employer preserves for any future proceedings a challenge to the administrative law judge's finding that the x-ray evidence is in equipoise. Employer alleges that the negative x-ray readings of Drs. Seaman, Tarver, and Meyer are entitled to greater weight under 20 C.F.R. §718.202(a)(1) based on their professorships in radiology and their status as "prolific authors and/or lecturers on roentgenographic issues." Employer's Brief at 10 n.5. Because employer is merely preserving the issue, we decline to address its argument.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Because the record reflects that the miner's last coal mine employment was in West Virginia, we will apply the law 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 7.

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

Drs. Splan, Habre and Wooten diagnosed legal pneumoconiosis.[7] Dr. Splan examined the miner on February 25, 2012, and recorded a coal mine employment history of thirteen years on Department of Labor Form CM-988 and in a separate, typewritten report. Director's Exhibit 14. In both documents, Dr. Splan diagnosed chronic bronchitis, chronic obstructive pulmonary disease (COPD), and cor pulmonale, and indicated that the miner was totally disabled due to his COPD. *Id*. Dr. Splan stated in the typewritten report, "statutory diagnosis of pneumoconiosis is present based upon confirmed work time, exposure to coal dust, symptoms and findings on physical examination, spirometry and arterial blood[-]gas reports."[8] *Id*. On Form CM-988, Dr. Splan indicated that the miner's cardiopulmonary conditions were due to the "inhalation of coal dust [and] tobacco smoke." *Id*.

The administrative law judge determined that Dr. Splan's opinion is well-documented because his diagnoses are supported by an accurate employment history, medical records, a physical examination, and objective medical tests. Decision and Order at 26. The administrative law judge further found that Dr. Splan's opinion is well-reasoned "because he considered the risk factors for [the miner's] pulmonary impairment, finding that both cigarette smoke exposure and coal mine dust contributed to [the miner's] obstructive impairment." *Id*. Accordingly, the administrative law judge determined that Dr. Splan's opinion "merits probative weight." *Id*.

Dr. Habre examined the miner on April 11, 2013, and reported a diagnosis of chronic bronchitis caused by cigarette smoking and coal dust exposure. Claimant's Exhibit 2. Dr. Habre stated:

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[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] Dr. Splan reported that the miner's pulmonary function study showed severe obstructive airways disease with hyperinflation and air-trapping, marked bronchospasm, and moderate emphysema. Director's Exhibit 14. He indicated that the results of the miner's blood gas study was consistent with moderate hypoxemia and that the miner was not exercised because the resting study produced qualifying values. *Id*.

> [The miner] did have a history of smoking from 1964 until 2006. He did have pulmonary malignancy and he underwent surgery as well as chemoradiation in 2012. Of note, also he did have substantial exposure to coal mine dust with [a twenty-one] year history of mining work, especially as a continuous miner operator. All these are factors to smoking and inhalation of coal mine dust due to the presence of airway remodeling as well as the presence of bronchoconstriction and airway inflammation. It can continue to progress even after the cessation of exposure and despite lack of cumulative and continuous work . . . . Coal mine dust, similar to smoking, will lead to the presence of respiratory symptoms, notably cough, wheezing, and shortness of breath, which leads to [the] diagnosis of legal pneumoconiosis/chronic bronchitis, an entity arising from coal mine dust, which can affect both [the] pulmonary function study as well as gas transfer and arterial pO2.

Id.

The administrative law judge found that Dr. Habre's opinion "merits less weight" because he relied on a coal mine employment history of twenty-one years, rather than the 12.23 years the administrative law judge found, and "did not explain why he concluded that coal mine dust played a significant role in causing [the miner's] lung disease."[9] Decision and Order at 27.

Dr. Wooten examined the miner on July 27, 2013 and recorded a history of coal mine employment of twenty years. Claimant's Exhibit 4. She diagnosed severe COPD and moderate hypoxemia, and attributed these conditions to coal dust exposure and smoking. *Id*. Dr. Wooten stated: "[The miner] has worked in the coal mines for approximately [twenty] years with significant exposure to coal dust as a miner operator, a roof bolter, rock duster and shuttle car driver. He also smoked for approximately [forty-three] pack[-]years. It is impossible to determine the contribution of either exposure to his current findings, but the chest x-ray findings are consistent with exposure to coal dust, not cigarette smoking." *Id*.

The administrative law judge gave Dr. Wooten's opinion "less weight because she considered an inflated coal mine employment history which is eight years longer than the coal mine employment history supported by the record." Decision and Order at 27.

[9] When weighing the medical opinions, the administrative law judge initially noted that the physicians' opinions "merit equal weight based on their professional credentials; they are all Board-certified in pulmonary disease." Decision and Order at 24.

However, the administrative law judge further found that Dr. Wooten's diagnosis of COPD due to smoking and coal dust exposure "is well[-]documented and well-reasoned because she based her opinion on [the miner's] medical history, symptoms, and medical tests and explained the factors which could have contributed to [the miner's] impairment." *Id*. The administrative law judge concluded that Dr. Wooten's opinion on legal pneumoconiosis was entitled to "moderate probative weight." *Id*. In light of her crediting of the opinions of Drs. Splan and Wooten, and her discrediting of the contrary opinions of employer's experts, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 29.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Splan and Wooten are well-reasoned, arguing that neither physician adequately explained how the factors they considered supported a diagnosis of legal pneumoconiosis. Employer maintains that the administrative law judge properly rejected Dr. Habre's opinion diagnosing legal pneumoconiosis because the physician did not identify the basis for his opinion and should have rendered the same finding with respect to the opinions of Drs. Splan and Wooten.

We agree with employer that the administrative law judge has not adequately explained why she found the opinion of Dr. Splan well-reasoned, and that her finding with respect to Dr. Splan's opinion is inconsistent with her determination that Dr. Habre's explanation was inadequate. The fact that an opinion is supported by a miner's employment and smoking histories, and the results of certain medical tests, does not, by itself, establish that it is reasoned. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). To make that determination, the administrative law judge must assess the validity of the physician's reasoning in light of his or her explanation, the underlying documentation, and the sophistication and bases of the diagnoses he or she rendered. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In the present case, the administrative law judge did not assess, as she had with respect to Dr. Habre's opinion, whether Dr. Splan explained how the miner's work and smoking histories, and the results of the objective clinical studies, supported his conclusion that the miner's COPD was significantly related to, or substantially aggravated by, smoking *and* coal dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 14. The administrative law judge therefore did not comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we vacate the administrative law judge's decision to credit Dr. Splan's opinion on the issue of the existence of legal pneumoconiosis.

Regarding the opinion of Dr. Wooten, the administrative law judge permissibly found that she provided an explanation of her diagnosis of legal pneumoconiosis. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-648 (4th Cir. 1999); Decision and Order at 27. However, the administrative law judge did not consider that Dr. Wooten explicitly relied on a positive x-ray reading for simple pneumoconiosis to identify coal dust exposure as a causal factor in the miner's severe COPD and moderate hypoxemia when, in contrast, the administrative law judge found that the x-ray obtained during Dr. Wooten's examination of the miner is in equipoise. Decision and Order at 10; Claimant's Exhibit 4; Employer's Exhibit 12. Because the administrative law judge did not consider all relevant evidence in determining whether Dr. Wooten's opinion is reasoned, she again did not comply with the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate her crediting of Dr. Wooten's diagnosis of legal pneumoconiosis.

Because we have vacated the administrative law judge's weighing of the opinions of Drs. Splan and Wooten, we also vacate the administrative law judge's determination that these opinions are sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[10] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). This case is remanded to the administrative law judge for reconsideration of whether claimant has established the existence of legal pneumoconiosis by a preponderance of the medical opinion evidence. In reconsidering the medical opinions of Drs. Splan and Wooten on remand, the administrative law judge is instructed to assess the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge must also explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

In the interest of judicial economy, we will now consider employer's arguments regarding the administrative law judge's weighing of the opinions of Drs. Zaldivar and Basheda that the miner did not have legal pneumoconiosis. Employer contends that the

[10] The administrative law judge relied on her finding that claimant established the existence of legal pneumoconiosis to determine that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Decision and Order at 30. We need not vacate the administrative law judge's determination because total disability was also an element adjudicated against the miner in his prior claim and we have affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled under 20 C.F.R. §718.204(b)(2). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

administrative law judge erred in discrediting their opinions on the ground that they did not sufficiently explain why coal mine-dust could not also have contributed to the miner's respiratory impairment. Employer asserts that the administrative law judge also erred in finding that their opinions were based upon generalities and not focused on the specifics of this case. Further, employer argues that the administrative law judge misapplied the preamble to the 2001 regulatory revisions to the opinions of Drs. Zaldivar and Basheda. Employer's allegations of error lack merit. Considering that the Department of Labor, in the preamble to its final rulemaking, found credible scientific studies showing that the risks of smoking and coal mine-dust exposure are additive, the administrative law judge permissibly determined that Drs. Zaldivar and Basheda did not adequately explain why the miner's significant history of coal mine-dust exposure was not a significant contributing cause of his COPD, along with cigarette smoking, although they ruled out coal dust as contributing to the miner's impairment.[11] *See* 65 Fed. Reg. at 79,920, 79,941 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); Decision and Order at 28; Employer's Exhibits 10, 11.

Therefore, we affirm the administrative law judge's decision to discredit the opinions of Drs. Zaldivar and Basheda on the issue of the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[12]

[11] Dr. Zaldivar concluded that the miner did not have legal pneumoconiosis, but rather had "asthma, emphysema, and cancer of the lung no different from that of any person who never worked in the coal mines and was exposed to biomass and cigarette smoke all of his life as he had." Employer's Exhibit 5. Dr. Basheda found that coal mine-dust was not a causal factor in the miner's "progressive tobacco-induced [chronic obstructive pulmonary disease (COPD)]," because cigarette smoking was statistically a more likely source of obstructive lung disease; the combination of severe obstruction, hyperinflation, and a diffusion impairment is "typically seen in tobacco-induced COPD;" and the miner's impairment was partially reversed by bronchodilators, while respiratory medications "would have no positive effect in coal dust-induced obstructive lung disease due to the absence of bronchoconstriction." Employer's Exhibit 6.

[12] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Zaldivar and Basheda, we need not address employer's arguments concerning the administrative law judge's additional reasons for according diminished weight to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

II. Total Disability Causation – 20 C.F.R. §718.204(c)

Employer raises the same allegations of error regarding the administrative law judge's determination that the miner was disabled due to pneumoconiosis as it raised on the issue of the existence of legal pneumoconiosis. We affirm the administrative law judge's finding that the opinions of Drs. Zaldivar and Basheda are entitled to little weight on the issue of total disability causation under 20 C.F.R. §718.204(c), because they were not adequately reasoned as to the source of the miner's totally disabling respiratory or pulmonary impairment. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 42. However, because the administrative law judge relied on her crediting of the opinions of Drs. Splan and Wooten under 20 C.F.R. §718.202(a)(4) to find that claimant established total disability causation under 20 C.F.R. §718.204(c), we must vacate this finding. If the administrative law judge again determines that claimant has established that the miner suffered from legal pneumoconiosis, the administrative law judge must reconsider her finding on the issue of total disability causation, in light of her reconsideration of the medical opinions under 20 C.F.R. §718.202(a)(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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge