U.S. Department of Labor

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

BRB No. 17-0452 BLA

MATTHEW W. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN MINING COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 06/15/2018
	)	
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, 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 (16-BLA-5617) of Administrative Law Judge Drew A. Swank 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 January 15, 2014.

After crediting claimant with 13.52 years of coal mine employment,[1] the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that he was entitled to the presumption that it arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).[2] He further found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also argues that the administrative law judge erred in finding the evidence established that claimant's total disability was due to pneumoconiosis pursuant

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

[2] 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 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. 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.

to 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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).

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).

Clinical Pneumoconiosis

In addressing whether the evidence established the existence of clinical pneumoconiosis,[4] the administrative law judge considered nine interpretations of four x-rays taken on February 17, 2014, March 18, 2015, June 7, 2016 and October 18, 2016.[5] The administrative law judge noted that five of the nine x-ray interpretations were interpreted as positive for pneumoconiosis.[6] Decision and Order at 8; Director's Exhibits

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings of 13.52 years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] As was summarized by the administrative law judge, all the doctors who provided interpretations for the four x-rays at issue in this appeal are dually-qualified as Board-certified radiologists and B readers.

[6] The earliest x-ray taken on February 17, 2014 was interpreted three times, twice as positive for pneumoconiosis and once as negative for the disease. Director's Exhibits 10, 32; Claimant's Exhibit 6. The subsequent three x-rays were each read once as positive

10, 32, 39; Claimant's Exhibits 3, 4, 6; Employer's Exhibits 1, 15, 17. The administrative law judge also considered two negative interpretations of CT scans taken on May 8, 2014 and June 24, 2016.[7] Decision and Order at 8; Employer's Exhibits 2, 8.

In finding that this evidence established the existence of clinical pneumoconiosis, the administrative law judge stated:

> Based on the totality of the evidence, including the qualifications of the readers, CT scan readings as "other medical evidence," and the fact that a majority of the [x]-ray readings were positive for coal workers' pneumoconiosis, the undersigned finds that [c]laimant has proven by a preponderance of the evidence that he has simple, clinical coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Decision and Order at 9.

We agree with employer that the administrative law judge did not properly analyze the x-ray evidence regarding clinical pneumoconiosis. Employer's Brief at 8-9. At Section 718.202(a)(1), the administrative law judge summarized nine interpretations of four x-rays (five positive and four negative readings), summarized the readers' radiological qualifications, and found that the "totality of the evidence" established clinical pneumoconiosis because a "majority of the [x]-ray readings were positive . . . ." Decision and Order at 9. The administrative law judge erred in relying on a mere count of the positive readings without explaining how he considered the individual x-rays. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992) (holding that it is error for an administrative law judge to rely on a head count of the physicians providing assessments, rather than on a qualitative analysis of their interpretations); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 25 BLR 2-779 (4th Cir. 2016) (holding that an administrative law judge may not base a decision on numerical superiority of the same items of evidence).

Moreover, we agree with employer that the administrative law judge erred in not considering all of the relevant evidence regarding the existence of clinical pneumoconiosis. Employer's Brief at 6-8. The United States Court of Appeals for the Fourth Circuit has held that an administrative law judge must weigh all of the relevant evidence together

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for pneumoconiosis and once as negative for the disease. Director's Exhibit 39; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 15, 17.

[7] Each of the negative CT scan interpretations was rendered by a physician dually-qualified as a Board-certified radiologist and B reader. Employer's Exhibits 2, 8.

before making a determination regarding the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In addition to the x-ray and CT scan evidence considered by the administrative law judge,[8] the record in this case contains claimant's treatment records, including interpretations of additional x-rays and CT scans, as well as medical opinions by Drs. Johnson, Green, Zaldivar and Basheda. Because the administrative law judge did not consider all of the relevant evidence, we must vacate his finding that claimant established the existence of clinical pneumoconiosis. *See Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74; *Williams*, 114 F.3d at 25, 21 BLR at 2-111.

Because the administrative law judge must reevaluate whether the evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9]

Finally, we note that the administrative law judge has not addressed whether the medical opinion evidence establishes the existence of legal pneumoconiosis.[10] Ordinarily, an administrative law judge's finding that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a) would obviate the need for him to render a

[8] We agree with employer that the administrative law judge erred in not addressing the weight that he accorded to the negative interpretations of the May 8, 2014 and June 24, 2016 CT scans. Employer's Brief at 8.

[9] In addressing whether the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge questioned Dr. Green's opinion because he could not apportion the contributions that cigarette smoking and coal mine dust exposure made to claimant's chronic obstructive pulmonary disease (COPD). Decision and Order at 15. However, physicians are not required to apportion a miner's lung impairment between cigarette smoking and coal mine dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107(6th Cir. 2000). A claimant need only establish that his lung disease is significantly related to, or substantially aggravated by, his coal mine dust exposure. 20 C.F.R. §718.201(b).

[10] "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).

separate finding regarding whether the evidence establishes the existence of legal pneumoconiosis. *See Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). However, in this case, there is evidence supportive of a finding of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal mine dust exposure. Consequently, on remand, should the administrative law judge find that the evidence does not establish clinical pneumoconiosis, he must address whether the medical opinion evidence establishes the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, if so, whether the evidence establishes that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[11]

[11] We agree with employer that the administrative law judge, on remand, must not use the preamble as a legal rule or presumption that all obstructive lung disease or asthma is legal pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); Decision and Order at 15; Employer's Brief at 13. To establish that diseases, such as COPD or asthma, constitute legal pneumoconiosis, claimant must affirmatively establish, through medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), that those chronic lung diseases arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

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