U.S. Department of Labor

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

BRB No. 17-0473 BLA

EARL D. FLEENOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 06/06/2018
	)	_____
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in a Modification of a Subsequent Claim of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Earl D. Fleenor, Rogersville, Tennessee.

Paul E. Frampton and Fazal A. Shere (Bowles Rice, LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits in a Modification of a Subsequent Claim (2014-BLA-05418) of Administrative Law Judge Morris D. Davis. The administrative law judge considered claimant's request for modification of his denied subsequent claim[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge noted employer's stipulation to fourteen years of coal mine employment and that the record, including claimant's hearing testimony, supported a finding of less than fifteen years of coal mine employment. He therefore determined that clamant could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act.[3] The administrative law judge

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, represented claimant at the hearing on his subsequent claim. She has requested, on behalf of claimant, that the Board review the administrative law judge's decision, but notes that she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed his first claim on August 23, 1994. Director's Exhibit 1. Administrative Law Judge Christine McKenna denied benefits because the evidence was insufficient to establish pneumoconiosis or total disability. *Id.* The Board affirmed the denial of benefits on October 23, 1997. *Fleenor v. Westmoreland Coal Co.*, BRB No. 97-0388 BLA (Oct. 23, 1997) (unpub.). Claimant filed a subsequent claim on February 25, 2008. Director's Exhibit 3. Administrative Law Judge Daniel F. Solomon denied benefits, finding that claimant established total disability and a change in an applicable condition of entitlement under 20 C.F.R. §725.309, but did not establish the existence of pneumoconiosis. Director's Exhibit 47. The Board affirmed the denial of benefits based on Judge Solomon's finding that claimant did not establish the existence of pneumoconiosis and, therefore, did not reach employer's argument on cross-appeal that Judge Solomon erred in finding total respiratory disability established. *Fleenor v. Westmoreland Coal Co.*, BRB Nos. 12-0121 BLA and 12-0121 BLA-A (Oct. 18, 2012) (unpub.); Director's Exhibit 56. Claimant requested modification on July 25, 2013. Director's Exhibit 57. The district director issued a proposed Decision and Order denying modification and benefits on the grounds that claimant did not establish pneumoconiosis or total disability. Director's Exhibit 68. At claimant's request, the claim was referred to Office of Administrative Law Judges for a hearing, which was held on July 23, 2016. Director's Exhibits 69, 70, 72.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground

further found that the new evidence, when considered in conjunction with the previously submitted evidence, was insufficient to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

I. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

At the hearing, employer stipulated that claimant had fourteen years of coal mine employment, and claimant testified that he worked as an underground coal miner for fourteen years and eight months. Hearing Transcript at 6, 19-20, 23, 25. Relying on employer's stipulation and claimant's testimony, the administrative law judge credited claimant with "over [fourteen]," but less than fifteen years of coal mine employment. Decision and Order at 4 n.17, 11. In light of employer's stipulation, which is supported by substantial evidence in the form of claimant's employment records and testimony, we affirm the administrative law judge's finding of less than fifteen years of qualifying coal mine employment. *See 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). Accordingly, we further affirm his determination that claimant could not invoke the Section 411(c)(4) presumption. 30 U.S.C.

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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 are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] Because claimant's last coal mine employment was in Virginia, the Board 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 5; Hearing Transcript at 24.

§921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698-99 (4th Cir. 2015).

II. Establishing Entitlement Without the Section 411(c)(4) Presumption

To establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption, claimant must establish that: he has pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, considered in conjunction with the evidence submitted with the request for modification, establishes a change in conditions or a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. 20 C.F.R. §725.310; *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Because claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis, the administrative law judge considered whether claimant demonstrated a change in condition or a mistake in a determination of fact with respect to that element of entitlement. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge first addressed the three analog x-rays[5] submitted with claimant's subsequent claim and determined that the x-rays, dated April 3, 2008 and July 30, 2008, are negative for

[5] From claimant's subsequent claim, the record contains eleven readings of x-rays dated April 3, 2008, July 30, 2008 and February 17, 2010. Dr. Alexander, dually qualified as a B reader and Board-certified radiologist, interpreted the April 3, 2008 x-ray as positive for pneumoconiosis, while Drs. Meyer, Miller and Wiot, also dually-qualified, interpreted the same x-ray as negative for the disease. Director's Exhibits 14, 16, 33. In addition, Dr. Forehand, a B reader, interpreted the April 3, 2008 x-ray as negative for pneumoconiosis. Director's Exhibit 12. With respect to the July 30, 2008 x-ray, Dr. Alexander read it as positive, while Drs. Meyer, Miller and Wiot read it as negative. Director's Exhibits 13, 14; Claimant's Exhibit 6; Employer's Exhibit 3. Dr. Miller interpreted the February 17, 2010 x-ray as positive, while Dr. Wiot interpreted the x-ray as negative. Director's Exhibit 13; Employer's Exhibit 11.

clinical pneumoconiosis,[6] based on the preponderance of negative readings by physicians dually qualified as Board-certified radiologists and B readers. Decision and Order at 10. The administrative law judge found that the film dated February 17, 2010, is in equipoise because it received conflicting readings by dually-qualified radiologists. *Id*. at 10-11. Turning to the two x-rays submitted in conjunction with the request for modification, the administrative law judge determined that the February 26, 2013 analog x-ray is in equipoise on the same basis.[7] *Id*. at 11. He further found that the November 6, 2015 digital x-ray is negative, as the sole interpretation, rendered by a dually-qualified radiologist, is negative.[8] *Id*. The administrative law judge therefore determined that the x-ray evidence submitted on modification is insufficient to establish the existence of pneumoconiosis. *Id*.

Upon weighing the evidence of record as a whole, the administrative law judge concluded that it was negative for pneumoconiosis. Decision and Order at 11. We affirm the administrative law judge's finding that pursuant to 20 C.F.R. §718.202(a)(1), as it is rational and supported by substantial evidence, based on his permissible finding that each x-ray was either negative or in equipoise. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

We further affirm the administrative law judge's determination that the existence of pneumoconiosis could not be established under 20 C.F.R. §718.202(a)(2), (a)(3), as he

[6] "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).

[7] The record contains three readings of x-rays submitted with the request for modification. They are dated February 26, 2013 and November 6, 2015. Dr. Alexander read the February 26, 2013 analog x-ray as positive, while Dr. Meyer read the same x-ray as negative. Director's Exhibits 57, 67. Dr. Seaman, a dually-qualified radiologist, interpreted the November 6, 2015 digital x-ray as negative. Employer's Exhibit 1.

[8] The administrative law judge properly weighed the reading of the November 6, 2015 digital x-ray at 20 C.F.R. §718.202(a), as it was done after May 19, 2014, the effective date of the quality standards applicable to digital x-rays. *See* Black Lung Benefits Act (BLBA) Bulletin 14-11 (Sept. 29, 2014).

properly found that there is no biopsy evidence and the presumption set forth at 20 C.F.R. §718.304 is also not applicable.[9] Decision and Order at 11.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge weighed together the medical opinions submitted with claimant's subsequent claim and the medical opinions submitted with claimant's request for modification. Drs. Smiddy and Forehand diagnosed pneumoconiosis, while Drs. Hippensteel, Spagnolo, Zaldivar and Rosenberg ruled out the presence of the disease.[10] The administrative law judge permissibly discredited Dr. Smiddy's diagnosis of clinical pneumoconiosis because the physician relied on a positive reading of the February 10, 2010 x-ray, which conflicts with the administrative law judge's weighing of that x-ray, and his determination that the x-ray evidence as a whole is negative for clinical pneumoconiosis. *See Island Creek v. Compton*, 211 F.3d 203, 209, 22 BLR 2-162, 2-171 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423, 1-426 (1983); Decision and Order at 16-17; Claimant's Exhibit 33. The administrative law judge also rationally determined that Dr. Smiddy's opinion is entitled to little weight on the issue of legal pneumoconiosis[11] because he did not discuss other conditions suffered by claimant that could have caused his chronic obstructive pulmonary impairment.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order at 17; Claimant's Exhibit 33. Similarly, the administrative law judge permissibly found that Dr. Forehand's diagnosis of legal pneumoconiosis is not adequately reasoned, in light of the doctor's failure to address claimant's other respiratory and pulmonary conditions. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 14; Director's Exhibit 12. Based on the administrative law judge's permissible discrediting of the only medical opinions

[9] The administrative law judge correctly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, as there is no evidence that claimant has complicated pneumoconiosis. Decision and Order at 11.

[10] The opinions of Drs. Smiddy, Forehand, Hippensteel and Spagnolo were submitted by the parties in conjunction with claimant's subsequent claim. Employer submitted the opinions of Drs. Zaldivar and Rosenberg on modification.

[11] 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).

[12] The record reflects diagnoses of obstructive sleep apnea, heart disease and susceptibility to recurrent respiratory infections due to an immune suppressing drug prescribed to treat claimant's rheumatoid arthritis. Claimant's Exhibits 4, 6, 7; Employer's Exhibits 9 at 30, 12 at 19, 28.

diagnosing clinical and/or legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not prove the existence of pneumoconiosis by the medical opinion evidence.

Upon considering the "other evidence" relevant to the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge reasonably determined that the uncontradicted negative readings of the August 29 and October 10, 2008 digital x-rays, obtained by dually-qualified radiologists, do not support a finding of pneumoconiosis.[13] Decision and Order at 12; Director's Exhibit 36. The administrative law judge also permissibly found that claimant's medical treatment records are insufficient to establish pneumoconiosis because they do not contain diagnoses of either form of the disease.[14] Decision and Order at 12-13; Claimant's Exhibits 4, 6, 7. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Because we have affirmed the administrative law judge's no pneumoconiosis findings under 20 C.F.R. §718.202(a)(1)-(4), we further affirm his determination that, when weighed together, the relevant evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as it is rational and supported by substantial evidence. *See Compton*, 211 F.3d at 209, 22 BLR at 2-171; Decision and Order at 20. We further affirm the denial of claimant's request for modification. In determining that the evidence submitted with the subsequent claim, and on modification, did not establish pneumoconiosis, the administrative law judge effectively found that claimant did not demonstrate either a change in conditions on the applicable condition of entitlement or a mistake in a determination of fact in the prior denial. 20 C.F.R. §725.310; *see Jessee*, 5 F.3d at 724-5, 18 BLR at 2-28.

[13] The administrative law judge correctly determined that he could not consider the readings of the previously submitted digital x-rays at 20 C.F.R. §718.202(a)(1), as they were performed prior to May 19, 2014, the effective date of the quality standards applicable to digital x-rays. *See* BLBA Bulletin 14-11.

[14] Claimant's records from the Center for Sleep Disorders contain diagnoses of obstructive apnea, hypertension, coronary artery disease, sinus bradycardia and chronic obstructive pulmonary disease. Claimant's Exhibit 4. A cardiopulmonary stress test performed on October 13, 2013, showed coronary artery disease. Claimant's Exhibit 6. Dr. Hamati, a cardiologist, stated that claimant's shortness of breath, wheezing and fatigue are not related to cardiac disease, but did not identify their cause. Claimant's Exhibit 7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Modification of a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge