U.S. Department of Labor

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

BRB Nos. 18-0325 BLA
and 18-0325 BLA-A

LAWRENCE GAUZE, JR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION, n/k/a EXCEL MINING	)	
	)	
and	)	
	)	DATE ISSUED: 06/28/2019
MAPCO, INCORPORATED c/o ALLIANCE RESOURCE PARTNERS L.P.	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05601) of Administrative Law Judge Peter B. Silvain, Jr. on a claim filed 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 May 11, 2015.

Based on his determination that claimant has 13.16 years of coal mine employment, the administrative law judge found claimant did not 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).[1] As there is no evidence of complicated pneumoconiosis, he also found claimant did not invoke the irrebuttable presumption of total disability due to 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 to benefits without the presumptions, the administrative law judge found that he established the existence of clinical and legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. He further found that legal pneumoconiosis is a substantially contributing cause of claimant's total disability and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant has clinical and legal pneumoconiosis and his total disability is due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. He also filed a cross-appeal asserting the administrative law judge erred in weighing the x-ray evidence relevant to clinical pneumoconiosis, should the Board vacate the award of benefits and remand this case.[2] Employer responds, urging the Board to reject claimant's

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be 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); *see* 20 C.F.R. §718.305.

[2] The administrative law judge found the x-ray evidence as a whole positive for simple pneumoconiosis based on the preponderantly positive readings of the most recent x-ray of record, dated December 11, 2015. Decision and Order at 29. Claimant argues that if this claim is remanded, the administrative law judge should reconsider his finding that the August 27, 2015 x-ray is in equipoise. Claimant's Cross Petition for Review at 15-16.

argument. The Director, Office of Workers' Compensation Programs, did not file a response brief in either appeal.[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.[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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish four elements: 1) disease, i.e., he has pneumoconiosis; 2) disease causation, i.e., it arose out of dust exposure from coal mine employment; 3) disability, i.e., he has a totally disabling respiratory impairment; and 4) disability causation, i.e., pneumoconiosis is a substantially contributing cause of his disability. 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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, a claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Employer contends the administrative law judge erred in finding the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree.

The administrative law judge considered the opinions of Drs. Rosenberg, Broudy, Sikder, and Sood. Decision and Order at 18-26, 30-36; Director's Exhibits 14, 24; Claimant's Exhibit 3; Employer's Exhibit 1, 3, 4, 5. Drs. Rosenberg and Broudy opined that claimant does not have legal pneumoconiosis, but has disabling chronic obstructive pulmonary disease (COPD) solely due to cigarette smoking. Director's Exhibit 24;

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 13.16 years of coal mine employment and a totally disabling respiratory or pulmonary impairment 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 9-13, 37-39.

[4] 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 4.

Employer's Exhibits 1, 3, 5. Dr. Sikder initially diagnosed legal pneumoconiosis, but revised her opinion to conclude that the contribution by coal mine dust was "minor," perhaps 30% or less. Director's Exhibit 14; Employer's Exhibit 4 at 8-9, 17-18. Conversely, Dr. Sood definitively diagnosed legal pneumoconiosis, in the form of COPD due to both tobacco exposure and coal mine dust exposure. Claimant's Exhibit 3 at 9.

The administrative law judge credited Dr. Sood's opinion as well reasoned and well documented, and discredited the opinions of Drs. Rosenberg, Broudy, and Sikder, as not well reasoned, to conclude that the medical opinion evidence establishes the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 32-36. Employer's challenges to those determinations are without merit.

Initially, we reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Broudy. Employer's Brief at 10 (unpaginated). He accurately noted that in concluding claimant's disabling impairment is unrelated to coal dust exposure, Dr. Rosenberg relied, in part, on the view that claimant's reduced FEV1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 32-33; Employer's Exhibit 3. In accordance with the opinion of the United States Court of Appeals for the Sixth Circuit in *Sterling*, he permissibly discounted Dr. Rosenberg's opinion as inconsistent with the Department of Labor's (DOL) recognition that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. *See* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order 32-34.

In addition, noting that studies found credible by the DOL recognize that the risks associated with smoking and coal mine dust exposure are additive, the administrative law judge permissibly found that neither Dr. Rosenberg nor Dr. Broudy adequately explained why coal dust exposure did not contribute, along with cigarette smoking, to claimant's obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007) (administrative law judge permissibly rejected medical opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 33-34, *referencing* 65 Fed. Reg. at 79,940; *see also* 20 C.F.R. §§718.201(b); 718.203(b). We therefore affirm the administrative law judge's determination to give little probative weight to the opinions of Drs. Rosenberg and Broudy. Decision and Order at 33-34.

We also reject employer's contention that the administrative law judge erred in discrediting Dr. Sikder's opinion. Employer's Brief at 9-10. Dr. Sikder initially diagnosed legal pneumoconiosis, but after reviewing additional evidence, concluded that coal dust was only a "minor" contributor to claimant's respiratory impairment. Director's Exhibit

14 at 6; Employer's Exhibit 4 at 8, 10, 15-16. As the administrative law judge observed, to the extent Dr. Sikder ultimately concluded that claimant's impairment is not significantly related to, or substantially aggravated by dust exposure, she based her revised conclusion, in part, on her view that claimant's reduced FEV1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 35; Employer's Exhibit 4 at 11-12. Thus, the administrative law judge permissibly discredited her opinion as inconsistent with the DOL's conclusion that a reduced FEV1/FVC ratio may support a finding of a coal dust-related impairment.[5] *See Sterling*, 762 F.3d at 491, 25 BLR at 2-645; Decision and Order at 35.

Employer next asserts that the administrative law judge erred in relying on the opinion of Dr. Sood to establish legal pneumoconiosis. Employer contends Dr. Sood's opinion is entitled to diminished weight because he did not examine claimant and failed to differentiate between claimant's coal dust exposure "as a truck driver as opposed to an actual coal miner." Employer's Brief at 10. Employer's contentions lack merit.

There is no requirement that a non-examining physician's opinion be given less weight than an examining physician's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Collins v. J&L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999). Rather, the determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder to decide. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). In crediting Dr. Sood's opinion that both smoking and coal dust exposure substantially contributed to claimant's COPD, the administrative law judge acknowledged that Dr. Sood did not examine claimant, but based his opinion on a review of the medical record, including the opinions of Drs. Rosenberg, Broudy, and Sikder, and the valid objective testing. Decision and Order at 24-25, 35-36; Claimant's Exhibit 3. He also noted Dr. Sood considered that claimant had a 45-47 pack year smoking history and worked thirteen years in coal mine employment, both underground and more recently as a coal truck driver, and found these histories "substantially accurate."[6] Decision and Order at 24. Further, the

[5] Because the administrative law judge provided a valid reason for discrediting Dr. Sikder's opinion, his error, if any, in additionally discrediting her opinion as equivocal would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 35; Employer's Brief at 9-10.

[6] As the administrative law judge noted, claimant specifically testified that as a coal truck driver he was exposed to dust "every day it wasn't raining." Decision and Order at 6-7, 10; Hearing Tr. at 33-37; Director's Exhibits 4; 30 at 40.

administrative law judge found his opinion consistent with the scientific premises accepted by the DOL regarding the effects of cigarette smoking and coal mine dust in the development of obstructive lung disease. *See* 65 Fed. Reg. at 79,940-43; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 35-36.

The administrative law judge's decision reflects that he considered Dr. Sood's reasoning in light of the objective evidence of record, and explained why he credited his conclusion that claimant's COPD is due, in significant part, to coal mine dust exposure. As substantial evidence supports the administrative law judge's credibility determination, we affirm his finding that Dr. Sood's opinion is "well-documented and well-reasoned" and sufficient to support a finding of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 35-36; Claimant's Exhibit 3.

Because the administrative law judge permissibly rejected the opinions of Drs. Broudy, Rosenberg, and Sikder, and credited the opinion of Dr. Sood, we affirm his finding that claimant established the existence of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002).

Disability Causation

To establish that he is totally disabled due to pneumoconiosis, claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The administrative law judge found the opinion of Dr. Sood meets this standard, as Dr. Sood opined that legal pneumoconiosis contributes "substantially" to claimant's total disability. Decision and Order at 46-48; Claimant's Exhibit 3. Contrary to employer's contention, the administrative law judge rationally found that the same reasons undercutting the opinions of Drs. Rosenberg, Broudy, and Sikder on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment is not caused by the disease. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (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); *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); Decision and Order at 40.

Employer raises no separate causation argument not previously addressed with regard to the administrative law judge's finding of legal pneumoconiosis. Consequently,

we affirm his finding 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.[7]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[7] Employer also contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer's Brief at 6-9. In light of our affirmance of the administrative law judge's findings of legal pneumoconiosis, and total disability due to legal pneumoconiosis, error, if any, in his findings regarding clinical pneumoconiosis are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Further, in light of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *Id.*