U.S. Department of Labor

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

BRB No. 16-0264 BLA

JESSE NEWSOME	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAGING BULL COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELER'S BOND & FINANCIAL PRODUCTS	)	DATE ISSUED: 03/07/2017
	)	
Employer/Carrier-Respondents	)	
	)	
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 of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Jesse Newsome, Teaberry, Kentucky.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (12-BLA-5548) of Administrative Law Judge Lee J. Romero, Jr., rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). After crediting claimant with "at least" eleven years of underground coal mine employment,[2] pursuant to the parties' stipulation, the administrative law judge found that claimant did not establish enough coal mine employment to benefit from the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4),[3] 30 U.S.C. §921(c)(4) (2012). Therefore, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989).

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[1] Claimant's first claim, filed on April 11, 2002, was denied by the district director on September 19, 2003, because claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 1 at 7, 102. Claimant filed his second and current claim on May 13, 2011. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 9. 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, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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), as implemented by 20 C.F.R. §718.305.

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. 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).

Length of Coal Mine Employment

The administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment, and thus could not benefit from the Section 411(c)(4) presumption. Decision and Order at 5-6, 21. Substantial evidence supports this finding. The record reflects that claimant has alleged, at most, twelve to thirteen years of coal mine employment.[4] Director's Exhibits 1 at 102; 3 at 1. Because the record contains no evidence that could establish any more than thirteen years of coal mine employment, we affirm the administrative law judge's finding that claimant did not establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *See Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003).

Entitlement Under 20 C.F.R. Part 718

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).

[4] In his Description of Coal Mine Work Form CM-913, claimant stated that he worked in the coal mines from 1985 to 1997. Director's Exhibits 1 at 93; 6 at 1. The record also contains claimant's paystubs from 1985-97, as well as Social Security Administration earnings records, which reflect that claimant worked for BJL Coal Company in 1985 and 1986, for JOP Coal Company from 1986-90, and for employer from 1990-97. Director's Exhibits 7, 9. In answers to interrogatories, claimant stated that he worked in underground coal mines for twelve or thirteen years, and when he was deposed, he testified that he worked in coal mine employment from 1985-97. Director's Exhibits 21 at 4; 22A at 10-12. At the hearing, employer stipulated to eleven years of coal mine employment, and claimant, who was then represented by counsel, accepted the stipulation. Hearing Transcript at 8.

Where 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 "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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1 at 7. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of pneumoconiosis or total disability. 20 C.F.R. §725.309(c)(3), (4).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight readings of five new x-rays. Decision and Order at 9-10, 23-24. Dr. Vuskovich, a B reader, interpreted a January 17, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Wheeler, who is dually-qualified as a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Both Dr. Wheeler, and Dr. Forehand, a B reader, interpreted the June 23, 2011 x-ray as negative for pneumoconiosis.[5] Director's Exhibits 17, 19. Dr. Jarboe, a B reader, interpreted the November 3, 2011 x-ray as negative for pneumoconiosis, Employer's Exhibit 1, and Dr. Poulos, a Board-certified radiologist and B reader, interpreted the May 15, 2012 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. Finally, Dr. Crum, a Board-certified radiologist and B reader, interpreted the June 8, 2015 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, while Dr. Kendall, who is also a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 13.

The administrative law judge began his analysis of the x-ray evidence by explaining that he would "favor an interpretation by a dually-qualified reader over a conflicting interpretation by a B-reader who is not a radiologist."[6] Decision and Order at

[5] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the June 23, 2011 x-ray to assess its film for quality only. Director's Exhibit 17.

[6] The administrative law judge also considered a request by the Director, Office of Workers' Compensation Programs (the Director), to take official notice of reports regarding the credibility of Dr. Wheeler's x-ray readings, and considered employer's objection that those reports were not appropriate matters for official notice. The administrative law judge declined to take official notice of the reports. Decision and Order at 23. The decision to reopen the record or take official notice of a matter are procedural issues committed to the administrative law judge's discretion. *See Troup v.*

23. The administrative law judge found that because Dr. Wheeler was "a more highly-qualified reader" than Dr. Vuskovich, and read the January 17, 2011 x-ray as negative for pneumoconiosis, that x-ray was negative. *Id*. at 24. Further, because the June 23, 2011, November 3, 2011, and May 15, 2012 x-rays received only negative readings by qualified readers, the administrative law judge found that all three x-rays were negative for pneumoconiosis. *Id*. Additionally, because the June 8, 2015 x-ray was read as both positive and negative for pneumoconiosis by dually-qualified readers, the administrative law judge found that x-ray to be "in equipoise on the issue of pneumoconiosis." *Id*. Finding that four x-rays were negative and one was in equipoise, the administrative law judge determined that "the x-ray evidence on the whole is negative for a finding of clinical pneumoconiosis . . . ." *Id.*

The administrative law judge based his finding on a proper qualitative analysis of the new x-ray evidence, taking into account the readers' radiological qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-86 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Substantial evidence supports the administrative law judge's finding that the weight of the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7] That finding is therefore affirmed.

Reading Anthracite Coal Co., 22 BLR 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Detecting no abuse of discretion by the administrative law judge, we affirm his denial of the request to take official notice of the reports regarding the credibility of Dr. Wheeler's x-ray readings. *See Troup*, 22 BLR at 1-21.

[7] We note that even without Dr. Wheeler's negative readings of the January 17, 2011 and June 23, 2011 x-rays, substantial evidence supports the administrative law judge's finding that claimant did not carry his burden to establish the existence of pneumoconiosis. The June 23, 2011 x-ray would still be negative, based on Dr. Forehand's uncontradicted negative reading. Director's Exhibit 17. While the January 17, 2011 x-ray would arguably have been found positive without Dr. Wheeler's reading to contradict Dr. Vuskovich's positive reading, the administrative law judge would then have weighed one positive x-ray from a B reader against two negative x-rays from B readers, another negative x-ray from a dually-qualified reader, and an x-ray that received conflicting readings from dually-qualified readers. Further, as was noted above, the administrative law judge stated that he chose to accord greater weight to the readings by dually-qualified readers. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-86 (6th Cir. 1993).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that there was no autopsy or biopsy evidence, and thus we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 25. None of the presumptions listed at 20 C.F.R. §718.202(a)(3) is applicable in this living miner's claim, in which the record contains no evidence of complicated pneumoconiosis and claimant did not establish at least fifteen years of qualifying coal mine employment.

Pursuant to 20 C.F.R. §718.107, the administrative law judge considered a May 1, 2008 CT scan requested by Dr. Potter and contained in claimant's treatment records, and accurately found that it "did not provide an opinion as to the existence of pneumoconiosis."[8] *Id.*; Director's Exhibit 18 at 2. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the other medical evidence of record.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Forehand, Potter, Jarboe, and Rosenberg. Decision and Order at 25-27. Dr. Forehand, who is Board-certified in Allergy and Immunology and Board-eligible in Pediatric Pulmonary Medicine, examined claimant on behalf of the Department of Labor, and initially opined that claimant does not have clinical pneumoconiosis,[9] but has legal pneumoconiosis,[10] in the form of a "mixed obstructive-restrictive ventilatory pattern" due to both smoking and coal mine dust exposure. Director's Exhibit 17 at 25. Later, however, Dr. Forehand was deposed and reviewed the results of the examination that Dr. Jarboe conducted five months after Dr. Forehand's examination. Employer's Exhibit 4 at 8-9. Based on the normal pulmonary function study and blood gas study results obtained by Dr. Jarboe, Dr. Forehand opined that there

[8] The record reflects that the physician who interpreted the CT scan, Dr. Skeens, noted the presence of "three pulmonary nodules . . . all of which likely represent noncalcified granulomas." Director's Exhibit 18 at 2.

[9] "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).

[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).

was no evidence of an impairment, and thus no evidence that claimant has legal pneumoconiosis. Employer's Exhibit 4 at 10.

Dr. Potter, who is claimant's treating physician and who lacks credentials in pulmonary medicine, noted claimant's complaints of shortness of breath and productive cough, and noted that the May 1, 2008 CT scan revealed "lung nodules." Director's Exhibit 18 at 1. Dr. Potter diagnosed claimant with "coal workers' pneumoconiosis." *Id*.

Dr. Jarboe, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant and reported that claimant's x-ray is negative for pneumoconiosis, and his pulmonary function studies and blood gas studies are normal, reflecting no impairment. Dr. Jarboe concluded that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibits 1 at 5-7; 3 at 6; 5 at 12, 14, 20.

Dr. Rosenberg, who is also Board-certified in Internal Medicine and Pulmonary Disease, examined claimant and noted that claimant's x-ray is negative for pneumoconiosis, his blood gas study is normal, and his pulmonary function study is "normal," thus reflecting "no obstruction or restriction . . . ."[11] Employer's Exhibit 8 at 6. Dr. Rosenberg concluded that claimant has neither clinical nor legal pneumoconiosis. *Id*.

With respect to clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reasonably discounted Dr. Potter's opinion that claimant has coal workers' pneumoconiosis, because it was based on the May 1, 2008 CT scan reading that did not mention pneumoconiosis. *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 26; Director's Exhibit 18 at 1-2. Further, the administrative law judge rationally found that the opinions of Drs. Forehand, Jarboe, and Rosenberg that claimant does not have clinical pneumoconiosis were consistent with the administrative law judge's finding that the weight of the new x-ray evidence did not establish the existence of clinical pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); Decision and Order at 26, 27.

With regard to legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally credited the opinions of Drs. Forehand, Jarboe and Rosenberg that claimant has no impairment that could constitute legal pneumoconiosis because he found that their opinions were supported by the results of claimant's normal

[11] Dr. Rosenberg noted that the pulmonary function study he administered to claimant on May 5, 2012 showed "at worse [sic] a mild degree of obstruction" in its prebronchodilator values, but noted further that "these were not performed with complete efforts," and that claimant's "postbronchodilator results were normal." Employer's Exhibit 8 at 6.

blood gas studies and pulmonary function studies.[12] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 26-27. Moreover, the administrative law judge rationally discounted Dr. Potter's opinion on the issue of legal pneumoconiosis, because he found that Dr. Potter did not consider claimant's smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Decision and Order at 26; Director's Exhibit 18 at 1. The administrative law judge therefore permissibly found that the "medical opinion evidence on the whole . . . tends to be negative as to the existence of pneumoconiosis." Decision and Order at 27; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Substantial evidence supports the administrative law judge's finding that the medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge's finding is therefore affirmed.

Based on the weight of the new x-ray and medical opinion evidence, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis 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). Consequently, we affirm the administrative law judge's denial of benefits, as claimant failed to establish both a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and an essential element of entitlement under 20 C.F.R. Part 718.[13] *See Anderson*, 12 BLR at 1-112.

[12] The administrative law judge found that there was conflicting, equally probative evidence as to whether the June 23, 2011 pulmonary function study that was initially conducted by Dr. Forehand was valid. Decision and Order at 26-27; Director's Exhibits 17 at 10; 19. The administrative law judge correctly noted that the next two pulmonary function studies, conducted by Drs. Jarboe and Rosenberg on November 3, 2011 and May 15, 2012, respectively, were valid and interpreted as normal. Further, the administrative law judge accurately found that the most recent pulmonary function study, conducted by Dr. Potter on June 8, 2015, was invalidated by a more highly-qualified physician. Decision and Order at 27; Employer's Exhibit 9. The administrative law judge rationally found that, of the valid pulmonary function studies, "the two most recent of the three show virtually normal results." Decision and Order at 27; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014).

[13] In his decision, the administrative law judge stated incorrectly that the issue of total disability had been withdrawn. Decision and Order at 4; Hearing Transcript at 8.

Thus, the administrative law judge did not address whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) by establishing that he now has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Any error in this regard was harmless, as the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis, and the prior claim evidence did not establish the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 1 at 7, 10, 12.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge