U.S. Department of Labor

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

BRB No. 17-0235 BLA

DAVID LEE MAYNARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GRACE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/19/2018
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05142) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim filed on December 27, 2012,[1] 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 found that claimant established no more than 13.98 years of coal mine employment and, thus, was not eligible for the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), because there is no evidence of complicated pneumoconiosis.

Considering claimant's entitlement under 20 C.F.R. Part 718 without the benefit of either statutory presumption, the administrative law judge found that claimant established the existence of legal pneumoconiosis[3] and a change in the applicable condition of

[1] Claimant filed three prior claims, each of which was denied. The third claim, filed on July 15, 2003, was denied by the administrative law judge on January 30, 2007, based on her finding that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant did not take any further action until filing the subsequent claim at issue in this appeal.

[2] 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 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.

[3] The regulations provide separate definitions for clinical pneumoconiosis and legal pneumoconiosis. 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). "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). The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis. Decision and Order at 27, 31.

entitlement pursuant to 20 C.F.R. §725.309(c).[4] The administrative law judge further found that claimant established total disability due to pneumoconiosis and awarded benefits accordingly.

Employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Employer further alleges that the administrative law judge erred in relying on the preamble to the 2001 regulations in assessing the credibility of the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to employer's appeal, unless requested to do so by the Board. Employer has filed a reply brief, reiterating its contentions.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this claim in which the Section 411(c)(3) and Section 411(c)(4) statutory presumptions were not invoked, claimant must affirmatively establish the existence of

[4] 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 "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). Because claimant's prior claim was denied for failure to establish the existence of pneumoconiosis, claimant had to submit new evidence establishing that element in order to obtain a review of his current claim on the merits. 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant established 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); Decision and Order at 33.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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. 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. *See 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).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted opinions of Drs. Forehand, Trice, Vernon, Jarboe and Rosenberg. Decision and Order at 28-31; Director's Exhibits 16 (at 20), 17 (at 2); Claimant's Exhibits 2, 3; Employer's Exhibits 5, 7, 9. She observed that Drs. Forehand, Trice and Vernon diagnosed legal pneumoconiosis, while Drs. Jarboe and Rosenberg determined that claimant does not have any coal dust-induced lung disease. Decision and Order at 28. The administrative law judge gave "greatest probative weight" to the opinions of Drs. Forehand, Trice and Vernon, stating:

> All possess excellent credentials in the field of pulmonary disease. All had the opportunity to examine the Claimant. I find their reasoning and explanation in support of their conclusions more complete and thorough than was provided by the physicians who concluded that the Claimant does not have pneumoconiosis. Drs. Forehand, Trice, and Vernon better explained how all of the evidence they developed and reviewed supported their conclusions. I find their opinions to be in better accord with the evidence underlying their opinions, the overall weight of the medical evidence of record, and the premises underlying the regulations.

Id. at 31.

The administrative law judge noted that Dr. Jarboe "diagnosed severe asthma and opined that [claimant's] eight pack-year smoking history contributed to his airway obstruction." Decision and Order at 30. But she further determined that he "failed to offer any creditable explanation how he was able to exclude coal dust as a contributing factor" and found that his opinion is "contrary to the premises underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms and that coal dust exposure and cigarette smoking have additive effects." *Id*. In addition, the administrative law judge determined that Dr. Jarboe relied on claimant's positive response to bronchodilator medication to rule out coal dust exposure as a causal factor, without "adequately address[ing] the irreversible component of the obstruction." *Id*. The administrative law judge thus concluded that Dr. Jarboe's opinion "is not well-reasoned" and is entitled to "little weight." *Id*. at 31.

Similarly, the administrative law judge gave Dr. Rosenberg's opinion "no weight" because Dr. Rosenberg did not account for claimant's residual impairment and she could not discern the basis for his determination that claimant does not have legal pneumoconiosis, as the report of his examination of claimant is not in the record. Decision and Order at 31. Based on her weighing of the newly submitted medical opinion evidence, the administrative law judge found that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id*.

Employer maintains that the administrative law judge mischaracterized Dr. Jarboe's opinion and therefore erred in finding that it was entitled to little weight. Employer further alleges that the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis made by Drs. Forehand, Trice and Vernon, without considering whether they adequately addressed asthma and obesity as causal factors in claimant's obstructive impairment.[7] Employer's allegations of error have merit, in part.

As employer maintains, the administrative law judge did not accurately characterize Dr. Jarboe's opinion when resolving the conflicts among the physicians of record as to the cause of claimant's obstructive impairment. Director's Exhibit 17; Employer's Exhibit 7. The administrative law judge correctly indicated in her summary of the evidence that Dr. Jarboe attributed claimant's severe obstructive impairment to asthma and obesity, and that he disagreed with Dr. Forehand's opinion that smoking contributed to claimant's obstructive lung disease. Decision and Order at 19-20; Director's Exhibit 7; Employer's Exhibit 7 at 9-11, 17-19, 21. In her analysis of the newly submitted medical opinions relevant to legal pneumoconiosis, however, she incorrectly stated that Dr. Jarboe indicated that smoking was a causal factor in claimant's totally disabling pulmonary impairment.[8]

[7] Employer also contends that the administrative law judge erred in determining that Dr. Rosenberg's opinion was outweighed by the opinions of Drs. Forehand, Trice and Vernon. However, employer does not allege error in the administrative law judge's findings that Dr. Rosenberg's opinion is "incomplete" because the report of his examination of claimant on May 14, 2014, "is absent from the record and his supplemental reports provide little to no diagnoses of the [c]laimant's obstructive lung disease." Decision and Order at 31. We therefore affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Rosenberg's opinion is entitled to "no weight" on the issue of legal pneumoconiosis. *Id*.; *see Skrack*, 6 BLR at 1-711.

[8] In his July 6, 2013 report, Dr. Jarboe opined that claimant's permanently disabling pulmonary impairment was caused by a combination of morbid obesity and bronchial asthma unrelated to coal dust exposure. Director's Exhibit 17. Dr. Jarboe stated:

Decision and Order at 30. This led the administrative law judge to err in discrediting Dr. Jarboe's opinion on the grounds that it is contrary to the Department of Labor's recognition in the preamble to the 2001 regulations that coal dust exposure and smoking cause damage to the lungs by similar mechanisms and have additive effects. *Id*.; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000). Employer is also correct in alleging that the administrative law judge further erred in determining that Dr. Jarboe did not account for the totally disabling obstructive impairment shown on claimant's pulmonary function studies after the administration of bronchodilators. Dr. Jarboe stated at his deposition that morbid obesity and bronchial asthma with airway remodeling are the sources of claimant's fixed airway obstruction. Employer's Exhibit 7 at 24-25, 28-30, 34-35. The administrative law judge also did not assess whether Dr. Jarboe's identification of asthma and obesity, rather than coal dust exposure or smoking, as the causes of claimant's pulmonary condition, is

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> [Claimant] has reversible airways disease (asthma). … Although one of the original terms used to describe the pneumoconiosis of coal miner's was coal miner's asthma, there is no evidence that coal mine dust is capable of inducing reversible airflow obstruction. … [Claimant] does have persistent airflow obstruction, even after the administration of bronchodilators. Asthma can be a significant risk factor for chronic obstructive pulmonary disease [(COPD)] …. Asthma in itself can serve as a significant risk factor for the development of fixed airflow obstruction. This is especially true when asthma is not aggressively treated. The records do not indicate that [claimant] has received aggressive treatment for his asthma …
>
> Another finding not seen in coal dust-induced lung disease is the presence of a markedly elevated residual volume … indicative of hyperinflation and air trapping caused by bronchial asthma and not the inhalation of coal mine dust, which causes no or only very mild increases in residual volume.
>
> [Claimant] is morbidly obese … causing a significant reduction of both FVC and FEV1.

Id. Dr. Jarboe noted that claimant was sixty-seven inches tall, weighed 296 pounds and had a BMI of 46.4. *Id.* In his November 12, 2012 deposition, Dr. Jarboe reiterated his opinion and further explained that when combined with obesity, seasonal allergies were another strong risk factor for the development of asthma. Employer's Exhibit 7 at 9-11, 17-19, 21. He also stated that claimant's smoking history of eight pack-years contributed, at most, "a tiny bit" to claimant's airway obstruction. *Id*. at 22-23.

reasoned and documented, such that she would be required to resolve the conflict between Dr. Jarboe's opinion and the opinions of Drs. Forehand, Trice and Vernon.

In light of these errors, the administrative law judge's findings do not accord with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Accordingly, we vacate the administrative law judge's determination that Dr. Jarboe's opinion is not well-reasoned. *See Wojtowicz*, 12 BLR at 1-165.

Employer is also correct in arguing that the administrative law judge did not provide valid rationales for according greater weight to the newly submitted opinions of Drs. Forehand, Trice and Vernon.[10] In support of her finding, the administrative law judge cited their examinations of claimant, their qualifications, and the fact that, in her view, their opinions were better-documented and more thorough than the opinion of Dr. Jarboe. Decision and Order at 31. Nevertheless, the administrative law judge did not explain how these factors actually distinguished the opinions of Drs. Forehand, Trice and Vernon from the opinion of Dr. Jarboe. As employer points out, Dr. Jarboe also examined claimant and possesses "excellent credentials" as a Board-certified pulmonologist. Decision and Order

[9] The Administrative Procedure Act (APA), 5 U.S.C. §§500-599, as incorporated into the Act by 30 U.S.C. §932(a), 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 on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] However, we reject employer's allegation that the administrative law judge should have given less weight to the opinions of Drs. Trice and Vernon because each relied on a discredited x-ray. Even assuming that the x-rays are relevant to the diagnosis of legal pneumoconiosis, employer is incorrect in stating that the administrative law judge discredited them. Rather, she determined that they are inconclusive because two equally-qualified physicians provided conflicting readings of each x-ray. Decision and Order at 27; Claimant's Exhibits 2, 3; Employer's Exhibits 3, 4. We also reject employer's argument that the administrative law judge erred in crediting Dr. Trice's opinion when he relied on a "deflated smoking habit." Employer's Brief in Support of Petition for Review at 15. Employer identifies no specific error in the administrative law judge's discretionary finding that the difference between the six pack-year smoking history Dr. Trice reported and the twelve pack-year history she found "is not so great as to decrease the reliability of his opinion." Decision and Order at 29; *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010). We therefore affirm the administrative law judge's finding.

at 31; Director's Exhibit 17 at 2. Similarly, the administrative law judge did not identify the basis for her conclusion that the opinions of Drs. Forehand, Trice and Vernon are more thorough than Dr. Jarboe's opinion. In contrast to the other physicians, Dr. Jarboe reviewed the report of Dr. Forehand's examination of claimant, in addition to performing his own examination, and discussed cigarette smoking, coal dust exposure, obesity and asthma as possible causes of claimant's disabling obstructive impairment.[11] Director's Exhibit 17 at 2.

In light of these omissions, we vacate the administrative law judge's finding that the opinions of Drs. Forehand, Trice and Vernon are entitled to greater weight than Dr. Jarboe's opinion on the issue of the existence of legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165. We also vacate the administrative law judge's findings that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a) and a change in the applicable condition of entitlement at 20 C.F.R. §725.309. We further vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis, as the administrative law judge relied on her erroneous weighing of the evidence relevant to legal pneumoconiosis to discredit Dr. Jarboe's opinion and accord greatest weight to the opinions of Drs. Forehand, Trice and Vernon under 20 C.F.R. §718.204(c). Decision and Order at 33-34.

On remand, the administrative law judge must initially reconsider the newly submitted medical opinions of Drs. Jarboe, Forehand, Trice and Vernon on the existence of legal pneumoconiosis. Following her reconsideration of this evidence at 20 C.F.R. 718.202(a)(4), the administrative law judge must weigh all of the newly submitted evidence together to determine whether claimant has established the existence of legal pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a).[12] *See Arch on the Green v. Groves*, 761 F.3d 594, 598, 25 BLR 2-615, 624 (6th Cir. 2014); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-217-18

[11] Dr. Trice also referred to claimant's obesity when making his diagnoses, noting that claimant's blood gas study showed moderate hypoxemia that "could be due to a combination of factors, including obstructive sleep apnea, under[-]diagnosed COPD, coal worker's pneumoconiosis, and obesity." Claimant's Exhibit 2.

[12] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant can satisfy his or her burden of proof on the existence of legal pneumoconiosis by proving that his or her respiratory or pulmonary impairment is due, at least in part, to coal dust exposure. *Arch on the Green v. Groves*, 761 F.3d 594, 598, 25 BLR 2-615, 2-624 (6th Cir. 2014), *citing Southard v. Director, OWCP*, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984).

(6th Cir. 2012). If the administrative law judge finds that claimant has not established the existence of legal pneumoconiosis, and she does not alter her finding that claimant failed to prove that he has clinical pneumoconiosis, an award of benefits is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

If the administrative law judge finds that claimant has established the existence of legal pneumoconiosis based on the newly submitted evidence, she may reinstate her finding that claimant established a change in the applicable condition of entitlement at 20 C.F.R. §725.309. She is then required to reconsider whether the evidence of record as a whole, including the evidence from the claimant's previous claims, is sufficient to establish the existence of legal pneumoconiosis, and the other elements of entitlement. 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). She must then reconsider whether claimant has proven that claimant's pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c), based on a weighing of all of the evidence of record.[13] *See Groves*, 761 F.3d at 600-01, 25 BLR at 2-626-27, *citing Island Creek Coal Co. v. Calloway*, 460 Fed. App'x. 504, 512-13 (6th Cir. 2012).

When reconsidering the medical opinion evidence on remand, the administrative law judge must address the credentials of the physicians,[14] the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The administrative law judge

[13] Under the regulations, pneumoconiosis is a "substantially contributing cause" of total disability if it "has a material adverse effect on the miner's respiratory or pulmonary condition" or "materially worsens a totally disabling respiratory or pulmonary impairment" caused by a disease or exposure unrelated to coal mine employment. 20 CFR 718.204. As employer points out, this standard differs from that pertinent to legal pneumoconiosis. *See Groves*, 761 F.3d at 598, 25 BLR at 2-624; slip op. at 8 n.12.

[14] On the curriculum vitae Dr. Vernon attached to the report of his March 11, 2014 examination of claimant, he indicated that he was Board-certified in pulmonology in "1992 and 2002, good through 2012." Claimant's Exhibit 3. At his September 4, 2014 deposition, Dr. Vernon stated, "I'm a board certified pulmonologist . . . my last board certification was in 2012 for pulmonary disease." Employer's Exhibit 9 at 11-12. To the extent that there is a conflict in the evidence as to whether Dr. Vernon was a Board-certified pulmonologist when he prepared the report of his March 11, 2014 examination of claimant, the administrative law judge must resolve that conflict.

may also consider, where relevant, the preamble to the 2001 regulations in resolving questions of scientific fact.[15] *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). Finally, the administrative law judge must place the burden of proof on claimant as to the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and set forth each of her findings of fact and conclusions of law, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[15] Contrary to employer's contention, the administrative law judge's identification of the preamble as a source of credible medical research findings that she could rely on to resolve conflicts in the medical opinion evidence, absent admission into the record of subsequent contrary credible medical research findings, is in accordance with applicable law. The Sixth Circuit has held that an administrative law judge may evaluate expert opinions in conjunction with the preamble. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). However, as our decision to vacate the administrative law judge's discrediting of Dr. Jarboe's opinion indicates, we agree with employer that the administrative law judge's specific application of the preamble to Dr. Jarboe's opinion contained errors. *See* discussion *supra*.

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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge