U.S. Department of Labor

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

BRB No. 17-0329 BLA

OSCAR JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA CREWS COAL COMPANY	)	DATE ISSUED: 03/26/2018
	)	
and	)	
	)	
ALPHA NATURAL RESOURCES	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05062) of Administrative Law Judge Adele Higgins Odegard, rendered on a miner's subsequent claim filed on October 28, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant had 14.08 years of underground coal mine employment and, therefore, he was not able to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that claimant established that he is totally disabled due to legal pneumoconiosis, however, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established legal pneumoconiosis and total disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3]

[1] This is claimant's fourth claim for benefits. His most recent prior claim, filed on April 3, 2001, was denied by the district director on November 27, 2001, because claimant failed to respond to the order to show cause why his claim should not be dismissed by reason of abandonment. Director's Exhibit 3. Claimant did not take any further action until he filed the current subsequent claim. Director's Exhibit 5.

[2] 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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, as claimant's prior claim was denied for abandonment, the administrative law judge concluded that claimant satisfied the requirements of 20 C.F.R. §725.309 because employer stipulated that claimant is totally disabled from a pulmonary or respiratory impairment. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 5.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 362 (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. *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).

I. Legal Pneumoconiosis

To establish that he suffers from legal pneumoconiosis, claimant must prove that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). In considering whether claimant met his burden, the administrative law judge weighed the opinions of Drs. Rasmussen and Green, who diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, against Dr. Zaldivar's contrary opinion. 20 C.F.R. §718.202(a)(4); Decision and Order at 20-23; Director's Exhibit 13; Claimant's Exhibit 4; Employer's Exhibit 1. She noted that the physicians are equally-qualified and that they "based their opinions on the understanding that claimant had a significant smoking history" that contributed to his respiratory impairment. Decision and Order at 20-21. She gave the greatest weight to Dr. Rasmussen's opinion, however, as "consistent with the Department of Labor's expressed position" in the preamble to the 2001 regulations that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that the effects of both exposures are additive. *Id*. at 23, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

[4] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, we 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).

By contrast, the administrative law judge gave little weight to the opinion of Dr. Green because he relied on a twenty-four year coal mine employment history, which is "far in excess" of the 14.08 years she found. Decision and Order at 23. She gave little weight to Dr. Zaldivar's opinion because he did not adequately explain why coal dust could not also have contributed to claimant's respiratory impairment, given the totally disabling impairment remaining after the administration of bronchodilators. *Id*. at 22-23. Based on these findings, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis.[5] *Id*.

Employer argues that the administrative law judge erred in giving the most weight to Dr. Rasmussen's opinion when Dr. Rasmussen did not describe the extent to which claimant's coal dust exposure contributed to his respiratory impairment and did not adequately explain his finding of interstitial fibrosis.[6] We reject employer's contentions, as the administrative law judge's decision to give Dr. Rasmussen's opinion the greatest weight is rational and supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

Contrary to employer's contention, Dr. Rasmussen was not required to apportion the relative contributions of smoking and coal dust exposure to claimant's obstructive impairment in order for the administrative law judge to find his opinion credible. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Moreover, independent of Dr. Rasmussen's diagnosis of interstitial fibrosis, the administrative law judge permissibly credited Dr. Rasmussen's diagnosis of COPD/emphysema due to coal dust and cigarette smoking because it is consistent with the Department of Labor's recognition in the preamble that coal dust-induced emphysema and cigarette smoke-induced emphysema occur through similar mechanisms. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir.

[5] The administrative law judge concluded that claimant's treatment records are not entitled to probative weight regarding the existence of the disease because they do not include any discussion of the underlying causes of claimant's various ailments. Decision and Order at 26.

[6] Employer also asserts that Dr. Green's opinion is insufficient to establish legal pneumoconiosis. However, because employer acknowledges that the administrative law judge did not credit Dr. Green's opinion, we need not address employer's contention. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

2012); Decision and Order at 23, *citing* 65 Fed. Reg. 79,939-43 (Dec. 20, 2000). As the administrative law judge provided a valid rationale for crediting Dr. Rasmussen's opinion, we need not address employer's remaining allegations of error.[7] *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We therefore affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a).

II. Total Disability Causation

To establish that total respiratory or pulmonary disability is due to pneumoconiosis, claimant is required to prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The administrative law judge gave little weight to the opinion of Dr. Green based on her discrediting of his opinion on the existence of legal pneumoconiosis. Decision and Order at 27. In contrast, the administrative law judge gave "full probative weight" to Dr. Rasmussen's opinion that claimant is totally disabled due to legal pneumoconiosis, because she determined that it is well documented, well reasoned and supported by the evidence.[8] *Id*.

[7] Because employer does not specifically challenge the administrative law judge's discrediting of Dr. Zaldivar's opinion that claimant does not have legal pneumoconiosis, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

[8] The administrative law judge discredited Dr. Zaldivar's opinion that claimant's totally disabling respiratory impairment is not due to legal pneumoconiosis because, contrary to her finding, Dr. Zaldivar did not diagnose legal pneumoconiosis. Decision and Order at 27. Because employer does not identify any error in the administrative law judge's discrediting of Dr. Zaldivar's opinion on total disability causation, we affirm this finding. *See Skrack*, 6 BLR at 1-711; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015) (having found pneumoconiosis, an administrative law judge cannot credit an opinion on the issue of disability causation that does not diagnose pneumoconiosis unless he or she identifies specific and persuasive reasons for crediting the opinion and, even then, the opinion can only carry little weight.).

Employer asserts that Dr. Rasmussen merely stated that coal mine dust is a "moderate" contributing cause of claimant's respiratory impairment and did not explain if he viewed coal mine dust as a substantial or significant contributing factor. Employer's Brief at 13, *quoting* Director's Exhibit 13. In addition, employer objects to the administrative law judge's reliance on Dr. Rasmussen's statement that claimant's legal pneumoconiosis contributed to a significant degree to his "disabling lung disease[,]" asserting that this is not the correct standard. *Id*. Employer states that, contrary to the administrative law judge's finding, claimant is required to establish that "pneumoconiosis is a significant contributing factor to the impairment, not the disease." Employer's Brief at 13.

As an initial matter, we note that several of employer's allegations of error mistakenly frame the total disability causation issue in terms of whether *coal dust exposure* is a substantially contributing cause of claimant's totally disabling obstructive impairment. By determining that claimant established the existence of legal pneumoconiosis, the administrative law judge resolved the question of whether coal dust exposure contributed to a significant or substantial degree to claimant's respiratory or pulmonary impairment. 20 C.F.R. §718.201(a)(2), (b); *see Compton*, 211 F.3d at 207-208, 22 BLR at 2-168. Thus, in addressing total disability causation, the administrative law judge properly focused on whether claimant established that *pneumoconiosis* is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); Decision and Order at 26-27.

When weighing Dr. Rasmussen's opinion, the administrative law judge credited the physician's statement that "a diagnosis of legal pneumoconiosis . . . is established and contributes to a significant degree to [claimant's] disabling lung disease." Decision and Order at 27, *quoting* Director's Exhibit 13. The administrative law judge was not required to distinguish between "disease" and "impairment" when Dr. Rasmussen used these terms interchangeably, thereby indicating that they are identical for purposes of assessing the extent to which legal pneumoconiosis contributed to claimant's total respiratory or pulmonary disability. *Id.*; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847, 25 BLR 2-799, 2-816-18 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and contributed to the miner's disabling impairment could be considered in satisfying the substantially contributing cause standard). Therefore, we affirm the administrative law judge's determination that claimant established that his totally disabling respiratory impairment is due to legal pneumoconiosis under 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge