U.S. Department of Labor

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

BRB No. 16-0583 BLA

NELL PENDLEY YARBROUGH (Widow of WALTER THOMAS YARBROUGH)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 05/17/2017
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 of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ann R. Littell Mills, Springfield, Missouri, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2011-BLA-5836) of Administrative Law Judge Richard M. Clark (the administrative law judge) on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on August 20, 2010.

Based on his determination that the miner worked eleven years and eight months in coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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,

[1] Claimant is the widow of the miner, who died on May 29, 2005. Director's Exhibit 14. The miner's claim, filed on March 31, 1992, was finally denied by the district director on September 24, 1992. Director's Exhibit 1.

[2] Relevant to this claim, Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] "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). "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).

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 (1965).

In a survivor's claim, where no statutory presumption applies, claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Failure to establish any one of the requisite elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Legal Pneumoconiosis

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish that the miner suffered from legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4).[6]

The administrative law judge considered the medical opinions of Drs. Salzman, Lea, Ghio and Basheda in determining whether claimant established the existence of legal pneumoconiosis. Decision and Order at 7-21, 22-26; Claimant's Exhibits 1, 3, 4, 5; Employer's Exhibits 1, 3, 6, 7, 8, 9. Dr. Salzman diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to cigarette smoking and coal dust exposure. Claimant's Exhibits 1, 3; Employer's Exhibit 7. Dr. Lea diagnosed COPD due to cigarette smoking and coal dust exposure. Claimant's Exhibits 4, 5; Employer's Exhibit 8. Dr. Ghio also diagnosed COPD, but determined that it was due solely to cigarette smoking. Employer's Exhibits 1, 6. Dr. Basheda diagnosed COPD with a strong asthmatic component due to cigarette smoking. Employer's Exhibits 3, 9.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] None of the medical opinions of record diagnosed clinical pneumoconiosis. Claimant's Exhibits 1, 3, 4, 5; Employer's Exhibits 1, 3, 6, 7, 8, 9.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Decision and Order at 21; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge acknowledged that "it is clear" from the miner's medical records and the opinions of all of the physicians that the miner suffered from severe COPD. Decision and Order at 22. After reviewing the medical opinion evidence, however, the administrative law judge discounted all of the physicians' opinions, in part, because he found them to be inadequately explained and not well-reasoned regarding the etiology of the miner's COPD. *Id*. at 22-26. Thus, the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that the opinions of Drs. Salzman and Lea are sufficient to establish that the miner's COPD "arose at least in part" out of coal dust exposure, arguing that the physicians exercised sound medical judgment in conjunction with the miner's medical and work histories and rendered reasoned diagnoses of legal pneumoconiosis.[7] Claimant's Brief at 5-7. With respect to Dr. Salzman's opinion, claimant maintains that the physician based his opinion that coal dust was a significant contributing factor to the miner's COPD on "the [medical] literature, . . . the fact [that the miner] had really no evidence of obstructive lung disease after twenty years of smoking, before he worked in the coal mines . . . [and] on the evidence that [the miner] quit smoking for thirteen years prior to dying of COPD . . .". Claimant's Brief at 8. Thus, claimant asserts that the administrative law judge should have credited the opinion.

Contrary to claimant's assertion, the administrative law judge considered Dr. Salzman's conclusion that the miner's coal dust exposure was "more likely than not" a significant contributing factor to his COPD and emphysema, and acknowledged that it was in accordance with medical literature that supports the position that coal dust and cigarette smoking are additive as potential factors in the development of COPD and emphysema.[8] Decision and Order at 24; Claimant's Exhibits 1, 3 at 28, 37-38. However,

[7] To the extent claimant is arguing that legal pneumoconiosis can be established by any standard other than "any chronic pulmonary disease or respiratory or pulmonary impairment *significantly related to, or substantially aggravated by*, dust exposure in coal mine employment," that argument is rejected. 20 C.F.R. §718.201(b)(emphasis added).

[8] When asked why he believed that the miner's chronic obstructive pulmonary disease (COPD) had to be related in significant part to his coal dust exposure, Dr. Salzman explained:

> I think it was related to both cigarette smoking and coal dust exposure. He had smoked for twenty years and had no evidence of COPD. He then was exposed to coal dust and then later developed a severe COPD. I believe

despite finding that the medical literature upon which Dr. Salzman relied was consistent with the medical studies found credible by the Department of Labor as set forth in the preamble to the 2001 regulations, the administrative law judge was not persuaded that simply because coal dust can cause COPD in miners, it necessarily did so in this case. The administrative law judge found that Dr. Salzman's opinion was neither based on, nor supported by, any objective evidence specific to the miner, and that the doctor failed to convincingly explain how he determined, in light of the miner's fifty pack-year history of smoking, that coal dust exposure was a significant contributing factor in the miner's obstruction. Thus, the administrative law judge permissibly concluded that Dr. Salzman's opinion was inadequately reasoned and documented, and merited little weight. Decision and Order at 24-25; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

With respect to Dr. Lea's opinion that the miner's COPD was due to both cigarette smoking and coal dust exposure, claimant asserts that the opinion should have been credited because Dr. Lea, as the miner's long-time family physician, was familiar with the miner's medical and work histories. Claimant's Brief at 7, 8.

In discounting Dr. Lea's opinion,[9] the administrative law judge noted that the doctor treated the miner frequently and regularly for almost seven years, and testified that he based his opinion on the miner's work history and multiple examinations that confirmed that the miner had severe COPD. Decision and Order at 25-26. The administrative law judge determined, however, that following the miner's initial visit in 1998 when Dr. Lea diagnosed COPD "probably secondary to a combination of occupational exposures and cigarette smoking," Dr. Lea's records do not indicate or suggest that the miner's COPD was related to his coal dust exposure, Decision and Order at 25; Claimant's Exhibits 4, 6. The administrative law judge further determined that Dr.

> that the two were additive, and the literature that I presented supports my opinion.

Claimant's Exhibit 3 at 43-44.

[9] Dr. Lea provided a medical report dated March 3, 2011, in which he stated that he was familiar with the medical and work history of the miner, who was his patient from 1998 to 2005. Dr. Lea opined that the miner suffered from COPD, which "was significantly related to, or substantially aggravated by, dust exposure in coal mine employment" and that "the objective medical evidence found in his office records supported this opinion." Claimant's Exhibit 4.

Lea did not have any special training in pulmonary diseases, and relied exclusively on the miner's years of coal dust exposure, without discussing any of the miner's symptoms, physical examination findings or objective test results. Decision and Order at 25-26; Claimant's Exhibit 5, 6; Employer's Exhibit 8. Thus, the administrative law judge permissibly concluded that despite his status as the miner's treating physician, Dr. Lea's opinion was inadequately reasoned and documented, and merited little weight.[10] *See* 20 C.F.R. §718.104(d)(5); *Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 26.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The determination of whether a medical opinion is documented and reasoned is for the administrative law judge, and we may not reweigh the evidence or substitute our judgment. *Moseley v. Peabody Coal Co*., 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Salzman and Lea are insufficiently reasoned to support a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields*, 10 BLR at 1-22.

Finally, weighing all of the evidence together, 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); Decision and Order at 26.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's determination that an award of benefits in this survivor's claim is precluded. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[10] The relationship between a miner and his treating physician may constitute substantial evidence in support of the adjudicator's decision to give that physician's opinion controlling weight, *provided* that the weight given to the opinion shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole. 20 C.F.R. §718.104(d)(5)(emphasis added).

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