U.S. Department of Labor

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

BRB No. 17-0380 BLA

TERRY L. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PA PA COAL MINING COMPANY	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 05/10/2018
	)	
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 of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Isidro Mariscal (Kate S. O'Scannlain, Solicitor of Labor, Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-06130) of Administrative Law Judge Steven D. Bell, awarding benefits on a subsequent claim[1] filed on April 26, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After accepting the parties' stipulation that claimant had twelve years of coal mine employment,[2] the administrative law judge first found that claimant could not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Next, considering whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that new evidence established the existence of clinical and legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a), and that claimant therefore

[1] This is claimant's fourth claim for benefits. His first two claims were finally denied by the district director for failure to establish any element of entitlement. Director's Exhibits 1-2. His most recent claim, filed on January 22, 2001, was denied by the district director as abandoned on April 1, 2002, and thus is treated as a finding that claimant did not establish any element of entitlement. *See* 20 C.F.R. §725.409(c); Director's Exhibit 3.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 1 at 110-111. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] "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 to that

established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge also found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that his disabling impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant has legal pneumoconiosis, and in finding that claimant is totally disabled due to pneumoconiosis.[5] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits. Employer has filed a reply brief reiterating its contentions.[6]

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deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that it arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant has 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 17-18, 23-25. Consequently, we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309(c). Decision and Order at 22.

[6] More than six months after filing its initial brief, and four months after the briefing schedule closed, employer moved to hold this case in abeyance pending the Supreme Court's decision in *Lucia v. SEC*, No. 17-130 (argued Apr. 23, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2. Employer's Motion at 2-4. Because the Supreme Court is expected to address in *Lucia* whether U.S. Securities and Exchange Commission administrative law judges are "Officers of the United States," and whether the manner of their appointment violates the Appointments Clause, employer requests that we hold this case in abeyance until the Court issues its decision. *Id.* The Director, Office of Workers' Compensation Programs, argues that employer waived this argument by not raising it in its opening brief. We agree. Generally, we do not consider issues that a petitioner raises only after it has filed its brief identifying the issues on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). While we retain the discretion in exceptional cases to consider

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. 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).

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).

Legal Pneumoconiosis

To establish that he has legal pneumoconiosis, claimant was required to prove that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by," coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b). Employer argues that the administrative law judge erred in weighing the medical opinions of Drs. Habre and Jarboe to find that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Dr. Habre diagnosed claimant with respiratory failure due to chronic bronchitis, caused by both smoking and coal mine employment: "This is the basic diagnosis of COPD [chronic obstructive pulmonary disease] or tobacco-induced lung disease and legal pneumoconiosis/chronic bronchitis due to his work history and underground mining." Director's Exhibit 14 at 45. Dr. Jarboe determined that claimant has a restrictive ventilatory impairment and diagnosed bronchial asthma, respiratory failure, "[c]hronic ingestion of narcotic medication," and possible chronic bronchitis, but concluded that claimant does not have legal pneumoconiosis. Director's Exhibit 15 at 8-9.

The administrative law judge found Dr. Habre's opinion to be documented and reasoned, determining that it was consistent with the regulations and sufficient to establish legal pneumoconiosis. Decision and Order at 20. In contrast, he found that Dr. Jarboe's opinion was unreasoned and undocumented, and entitled to less weight, because Dr. Jarboe

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nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer waived the Appointments Clause issue, we deny the motion to hold this case in abeyance.

did not adequately explain why twelve years of coal mine dust exposure did not contribute to claimant's restrictive disease. Decision and Order at 21-22.

Employer contends that the administrative law judge gave no valid reasons for discrediting Dr. Jarboe's opinion. Employer's Brief at 12-13. We disagree. Dr. Jarboe concluded that claimant's restrictive ventilatory defect was caused primarily by bronchial asthma, a reversible airway disease. Director's Exhibit 15 at 9, 12. Based on his view that coal mine dust causes fixed impairments, not reversible disease, Dr. Jarboe opined that coal mine dust does not cause bronchial asthma. *Id*. at 9. Dr. Jarboe also concluded that claimant may have chronic bronchitis, based on Dr. Habre's report, but that it does not represent legal pneumoconiosis because chronic bronchitis "does not appear to play a direct role" in the development of COPD in miners, and "will generally resolve after withdrawal from [coal] dust exposure." *Id*. at 11.

The administrative law judge permissibly discounted Dr. Jarboe's views "that asthma is not caused by coal mine dust inhalation, and that chronic bronchitis does not contribute to COPD" for being contrary to the Department of Labor's position that COPD encompasses chronic bronchitis, emphysema and asthma, and can be caused by coal mine dust exposure. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 210-11 (6th Cir. 2012); Decision and Order at 21; Director's Exhibit 15. Moreover, although Dr. Jarboe cited claimant's "marked response" to bronchodilators in concluding that claimant's asthma is reversible, the administrative law judge noted that claimant's impairment was only partially reversible and reasonably discredited Dr. Jarboe's opinion for not addressing the irreversible component of his impairment. *See Crocket Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 22; Director's Exhibit 15 at 8-9. We therefore affirm the administrative law judge's determination that Dr. Jarboe's opinion was entitled to less weight.

Employer also argues that the administrative law judge applied the wrong legal standard in evaluating Dr. Jarboe's opinion. Employer's Brief at 14-15. Specifically, employer contends that the administrative law judge erred by requiring Dr. Jarboe to explain "why 12 years of coal dust exposure was not a factor in Claimant's restrictive disease," instead of considering whether claimant's impairment was "significantly related to, or substantially aggravated by," coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Employer's Brief at 14-15 (quoting Decision and Order at 22) (emphasis in employer's brief). This argument lacks merit, because any mistake by the administrative law judge in stating the standard for legal pneumoconiosis with regard to Dr. Jarboe's opinion was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). The administrative law judge did not reject Dr. Jarboe's opinion for failing to eliminate any connection between claimant's coal mine dust exposure

and impairment.[7] Instead, as explained above, he permissibly discredited Dr. Jarboe's opinion for being inadequately reasoned.

Next, employer argues that the administrative law judge should have credited Dr. Jarboe's opinion that claimant's gas-exchange impairment arose from the use of narcotic medication, but erroneously "substituted his own expertise," even though no evidence in the record contradicts Dr. Jarboe's view that narcotics can cause hypoxemia. Employer's Brief at 12-14; Director's Exhibit 15 at 10-13. We disagree. The administrative law judge did not substitute his own opinion for Dr. Jarboe's. Instead, the administrative law judge noted Dr. Jarboe's opinion that narcotic medication caused claimant's gas-exchange impairment, but permissibly discounted his opinion for not explaining why twelve years of coal mine dust exposure could not have also contributed to claimant's impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 21.

Finally, employer argues that the administrative law judge did not adequately explain his determination that Dr. Habre's opinion was entitled to greater weight than Dr. Jarboe's opinion. Employer's Brief at 16-17. Employer contends that the administrative law judge gave greater weight to Dr. Habre's opinion because of his "excellent credentials" and because he "had the opportunity to examine Claimant, and review other medical evidence in the record." *Id*. at 16 (quoting Decision and Order at 22). Employer argues that those were not valid bases for crediting Dr. Habre's opinion, because the administrative law judge failed to explain any distinction between Dr. Habre's credentials and Dr. Jarboe's, and because Dr. Jarboe also examined claimant and reviewed the evidence in the record. *Id*. at 16-17.

This argument lacks merit. It is clear from the Decision and Order that the administrative law judge did not give greater weight to Dr. Habre's opinion because of his credentials and the fact that he personally examined claimant. The administrative law judge found that both physicians were well-qualified to offer opinions as to the existence of legal pneumoconiosis, and recognized that both physicians personally examined claimant. Decision and Order at 19-20. The administrative law judge explained that he found Dr. Habre's reasoning and explanation "more complete and thorough" than Dr. Jarboe's, and that he found Dr. Habre's opinion "to be in better accord" with the evidence

[7] The administrative law judge correctly placed the burden of establishing the existence of legal pneumoconiosis on claimant, and gave probative weight to Dr. Habre's opinion. Decision and Order at 19, 22.

and the premises underlying the regulations.[8] *Id.* at 22. Consequently, we affirm the administrative law judge's determination that Dr. Habre's opinion that claimant has legal pneumoconiosis is reasoned and documented, and affirm the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability Causation

To establish that he is totally disabled due to pneumoconiosis, claimant had 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 total disability 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); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-153 (6th Cir. 2012). Employer contends that the administrative law judge's "errors in considering the legal pneumoconiosis issues were repeated" when he found that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and that he did not offer a valid reason to discount Dr. Jarboe's opinion. Employer's Brief at 19-20. We disagree.

First, having rejected employer's arguments that the administrative law judge erred in finding that claimant has legal pneumoconiosis, we necessarily reject the argument that the administrative law judge repeated his errors in finding that claimant's pneumoconiosis is a substantially contributing cause of his disabling impairment. Second, the administrative law judge credited Dr. Habre's opinion that claimant's clinical and legal pneumoconiosis played a "substantial role" in his respiratory impairment and, contrary to employer's contention, reasonably discounted Dr. Jarboe's opposing opinion because of Dr. Jarboe's "disagreement with my finding [that] Claimant has legal pneumoconiosis."[9] *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on*

[8] To the extent employer argues that Dr. Jarboe's opinion is "more complete and thorough" than Dr. Habre's, and that Dr. Habre's "simplified opinion" did not refute Dr. Jarboe's opinion about the effects of narcotic medications on claimant, employer is asking us to reweigh the evidence, which we may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 14, 17-18.

[9] Moreover, Dr. Jarboe did not diagnose clinical pneumoconiosis and opined that claimant was not permanently disabled, contrary to the administrative law judge's determinations. Director's Exhibit 15.

other grounds, Skukan v. Consolidated Coal Co., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 26-27. Therefore, we affirm the administrative law judge's finding that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c), and affirm the award of benefits.

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