U.S. Department of Labor

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

BRB No. 18-0293 BLA

DENNIS H. FELTNER Claimant-Petitioner v. SHAMROCK COAL COMPANY, INCORPORATED, c/o SUNCOKE ENERGY and SUN COAL COMPANY c/o HEALTHSMART CCS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/22/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, PSC), Asher, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05641) of Administrative Law Judge John P. Sellers, III, rendered pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on July 13, 2015.[1]

Based on claimant's representation he engaged in underground coal mine employment between 1981 and 1992, and the evidence of record, the administrative law judge credited claimant with at least ten, but fewer than fifteen, years of underground coal mine employment. He therefore found claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found claimant established he has a totally disabling respiratory or pulmonary impairment, demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. He also determined claimant failed to establish the existence of pneumoconiosis, however, and denied benefits.[3]

[1] This is claimant's fourth claim. His most recent prior claim was finally denied for failure to establish the existence of pneumoconiosis and total respiratory or pulmonary disability. Decision and Order at 2; *Feltner v. Shamrock Coal Co*., BRB No. 06-0341 BLA (Nov. 28, 2006) (unpub.). 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 his most recent claim was denied for failure to establish pneumoconiosis and total disability, claimant had to demonstrate at least one of these elements of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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); 20 C.F.R. §718.305(b).

[3] The administrative law judge further found claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(3)

On appeal, claimant asserts the administrative law judge erred in finding he did not establish his total disability is due to pneumoconiosis. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

In a living miner's claim where no statutory presumptions are invoked, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Existence of Pneumoconiosis

X-Ray Evidence

We reject claimant's argument that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of clinical pneumoconiosis.[6] Pursuant

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because there is no evidence that he suffers from complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 12.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had at least ten, but fewer than fifteen, years of coal mine employment and thus did not invoke the Section 411(c)(4) presumption, and further failed to establish the existence of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 12, 14.

[5] 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 Exhibits 5, 7.

[6] "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 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of four x-rays dated April 14, 2015, August 26, 2015, January 14, 2016, and November 9, 2016.[7]

As the negative readings of the August 26, 2015, January 14, 2016, and November 9, 2016 x-rays are uncontradicted, the administrative law judge determined they are negative for clinical pneumoconiosis. Decision and Order at 15-16. Contrary to claimant's arguments, in resolving the conflicting readings of the April 14, 2015 x-ray, the administrative law judge permissibly found the sole positive interpretation by Dr. Baker, a B reader, outweighed by the negative interpretation of Dr. Meyer, a dually-qualified B reader and Board-certified radiologist. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 15-16. Having determined that none of the x-rays of record are positive for clinical pneumoconiosis, the administrative law judge reasonably found "the x-ray evidence, overall, does not establish that the Claimant has clinical pneumoconiosis." *See Staton*, 65 F.3d at 59; Decision and Order at 16. We affirm this finding as supported by substantial evidence. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

Medical Opinions

Pursuant to 20 C.F.R. §718.202(a)(4),[8] the administrative law judge weighed the medical opinions of Drs. Ajjarapu, Chaney, Castle and Rosenberg. Decision and Order at

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tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] An x-ray dated June 7, 2017 appears in claimant's treatment records, and was interpreted by Dr. Polsani as showing "minimal left base infiltrates concerning for pneumonitis." Claimant's Exhibit 2 at 37. We affirm, as unchallenged by claimant on appeal, the administrative law judge's finding that Dr. Polsani's reading was not positive for clinical pneumoconiosis, as pneumonitis is not included in the regulatory definition of the disease. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16, *citing* 20 C.F.R. §718.201(a)(1).

[8] Claimant is unable to establish pneumoconiosis at 20 C.F.R. §718.202(a)(2), as there is no biopsy evidence of pneumoconiosis in the record. We have affirmed, as unchallenged by claimant on appeal, the administrative law judge's finding claimant

16-18; Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 3, 5, 6. Only Drs. Ajjarapu and Chaney diagnosed legal pneumoconiosis. Finding their opinions not credible, the administrative law judge concluded they did not establish either clinical or legal pneumoconiosis. Decision and Order at 16, 18. Weighing the evidence as a whole, he determined claimant failed to prove that he has pneumoconiosis under 20 C.F.R. §718.202(a). *Id*.

We reject claimant's assertions that the administrative law judge erred in discrediting the opinions of Drs. Ajjarapu and Chaney. Dr. Ajjarapu examined claimant at the request of the Department of Labor on August 26, 2015. Director's Exhibit 11. She stated claimant does not have clinical pneumoconiosis, but diagnosed legal pneumoconiosis in the form of chronic bronchitis caused by coal dust exposure and tobacco smoking.[9] *Id*. Contrary to claimant's contention, the administrative law judge permissibly discredited Dr. Ajjarapu's opinion because she relied on histories of coal mine employment and cigarette smoking of approximately thirty-one and thirteen years, respectively, significantly different than the administrative law judge's findings of ten and twenty years, respectively.[10] *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); Decision and Order at 17-18. We therefore affirm the administrative law judge's conclusion that Dr. Ajjarapu's opinion does not support a finding of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Dr. Chaney submitted a report dated July 17, 2017, which consisted of his responses to questions posed on a form submitted to him by claimant's counsel. Claimant's Exhibit 1. He checked "yes" when asked whether claimant has "coal workers' pneumoconiosis" and indicated his diagnosis was based on claimant's "history, physical examination, chest x-ray [and] spirometry," but did not cite to any specific test results. *Id*. The administrative law judge permissibly found that to the extent Dr. Chaney intended to diagnose clinical pneumoconiosis, his opinion was entitled to little weight because, "Dr. Chaney did not perform or reference any x-rays o[r] other objective testing in his medical report," and the

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cannot invoke the relevant presumptions referenced in 20 C.F.R. §718.202(a)(3). *See Skrack*, 6 BLR at 1-711.

[9] To establish legal pneumoconiosis, claimant must demonstrate that he has 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(b).

[10] We have affirmed, as unchallenged by claimant on appeal, the administrative law judge's finding of at least ten years of coal mine employment. We also affirm his finding of a twenty pack-year smoking history, as unchallenged by claimant on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 3-4.

only x-ray contained in the treatment records did not reflect pneumoconiosis. Decision and Order at 16; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). He also reasonably found to the extent Dr. Chaney diagnosed legal pneumoconiosis, his opinion was conclusory and not adequately reasoned and documented, as he "failed to set forth the clinical findings, observations, facts, and other data upon which he based his diagnosis." *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 18.

Finally, contrary to claimant's contention, the administrative law judge acknowledged Dr. Chaney's status as claimant's treating physician pursuant to 20 C.F.R. §718.104(d), and considered whether his opinion was therefore entitled to controlling weight.[11] Decision and Order at 4, 8, 16, 18. In light of his permissible determination that Dr. Chaney failed to substantiate a diagnosis of either clinical or legal pneumoconiosis, however, he properly declined to give controlling weight to his opinion. 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) ("[T]he opinions of treating physicians get the deference they deserve based on their power to persuade."); Decision and Order at 16, 18. Thus, we affirm the administrative law judge's finding Dr. Chaney's opinion did not establish clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), we further affirm his determination that the evidence of record, considered as a whole, is insufficient to proving that claimant has pneumoconiosis under 20 C.F.R. §718.202(a). Decision and

[11] The regulation at 20 C.F.R. §718.104(d) provides, "the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." The relevant factors to be addressed are the nature and duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, the weight accorded "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).

Order at 16, 18. Because claimant failed to establish pneumoconiosis, a requisite element of entitlement, we must affirm the denial of benefits.[12] *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[12] We therefore decline to address claimant's argument the administrative law judge did not properly weigh the evidence relevant to total disability causation at 20 C.F.R §718.204(c) as error, if any, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Claimant's Brief at 7-10.