U.S. Department of Labor

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

BRB No. 16-0126 BLA

PAUL CHILDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CRANK COAL AND ENERGY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 11/22/2016
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-05673) of Administrative Law Judge Lystra A. Harris rendered 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 subsequent claim filed on July 7, 2009.[1]

The administrative law judge credited claimant with eight years of coal mine employment, found that claimant has a smoking history of about eighteen pack-years, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[2] Decision and Order at 5. The administrative law judge further found, based on employer's concession, that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Consequently, the administrative law judge considered claimant's 2009 claim on the merits. According greater weight to the most recent evidence, the administrative law judge found that the evidence, as a whole, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence established that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

[1] This is claimant's fifth claim. Director's Exhibit 6. Claimant's most recent prior claim, filed on April 14, 1998, was finally denied by the district director on January 5, 2000, because claimant did not establish any of the elements of entitlement. Director's Exhibit 4 at 46. Claimant took no further action on his 1998 claim. Although claimant filed a claim on May 5, 2003, it was subsequently withdrawn by claimant and, therefore, is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] The administrative law judge determined that the amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, because claimant did not establish at least fifteen years of coal mine employment. Decision and Order at 20; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[3] Where 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).

On appeal, employer asserts that the administrative law judge erred in her analysis of the medical opinion evidence in determining that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also contends that the administrative law judge erred in her determination of the commencement date for benefits. Claimant has not responded to employer's appeal.[4] The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[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 & 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).

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[4] Sharon McDevitt, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, was claimant's lay representative while the case was pending before the Office of Administrative Law Judges, but is not currently representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established eight years of coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[6] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Employer asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Alam, Baker, Jarboe, and Rosenberg, together with claimant's medical treatment records.[7] Decision and Order at 12-20. Dr. Alam diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), chronic bronchitis, and resting hypoxemia, all due to coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Claimant's Exhibit 6. Dr. Baker also diagnosed legal pneumoconiosis, in the form of COPD, chronic bronchitis, and resting hypoxemia, due to a combination of coal mine dust exposure and cigarette smoking. Director's Exhibits 22, 25. Conversely, Drs. Jarboe and Rosenberg opined that claimant does not suffer from legal pneumoconiosis, but suffers from a disabling obstructive pulmonary impairment attributable to cigarette smoking, asthma, and obesity. Director's Exhibit 27; Employer's Exhibits 3-6, 9-14. The administrative law judge accorded greater weight to the opinion of Dr. Baker, than to the opinions of Drs. Jarboe and Rosenberg,[8] to conclude that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 22.

Employer contends that the administrative law judge erred in relying on Dr. Baker's opinion to support a finding of legal pneumoconiosis. In his initial report, Dr. Baker considered an employment history of ten years of underground coal mine employment, and stated that claimant suffers from chronic bronchitis, a moderate obstructive defect, and mild resting hypoxemia, which "can all be caused by coal dust exposure." Director's Exhibit 22. Dr. Baker further explained that claimant "has a 12 to 13-pack year history of smoking and this would not be considered extremely strong epidemiological exposure to tobacco smoke. On this basis, I feel his condition has been significantly contributed to and aggravated by dust exposure in his coal mine employment." Director's Exhibit 22.

[7] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's prior claims. However, the administrative law judge reasonably relied upon the more recent medical opinions, which she found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); Decision and Order at 6.

[8] The administrative law judge also accorded less weight to Dr. Alam's diagnosis of legal pneumoconiosis because Dr. Alam based his conclusion, in part, on the incorrect premise that claimant has "no history of any tobacco abuse." Decision and Order at 20; Claimant's Exhibit 6.

In a supplemental report, prepared at the district director's request, Dr. Baker stated that his opinion would not change if claimant had only eight years of coal mine dust exposure, instead of ten. Director's Exhibit 25. Specifically, Dr. Baker explained that while a "normally susceptible" individual would require about ten years of coal mine employment to develop pneumoconiosis, someone with "undue susceptibility" may develop pneumoconiosis with a shorter period of time. *Id.* Dr. Baker further explained that "[i]f [claimant's] smoking history is accurate," there was evidence to suggest now that both cigarette smoking and coal dust exposure may damage the lungs in an "additive or synergistic fashion."[9] *Id.* Dr. Baker added that "it is generally accepted that at least a [fifteen] pack year history of smoking is necessary to be associated with any pulmonary problems." Director's Exhibit 25. Dr. Baker concluded that it remained his opinion that claimant's COPD, chronic bronchitis, and mild resting hypoxemia are all due to a combination of his coal mine dust exposure and cigarette smoking "in a nearly equal fashion." *Id.*

Employer asserts that the administrative law judge failed to adequately consider that Dr. Baker's opinion, that claimant's obstructive impairment is due, in part, to his eight years of coal mine dust exposure, is based on nothing more than Dr. Baker's unsupported assertion that a susceptible miner could develop pneumoconiosis with fewer than ten years of coal mine dust exposure. Employer's Brief at 22. Employer argues that because Dr. Baker did not address whether claimant is someone with undue susceptibility, or explain his conclusion with reference to the specifics of claimant's case, his opinion is too speculative and general to constitute a well-reasoned diagnosis of legal pneumoconiosis. Employer's Brief at 20-23. Employer's arguments have merit.

In finding legal pneumoconiosis established, the administrative law judge noted that, in opining that claimant's obstructive impairment is due to a combination of coal mine dust exposure and smoking, Dr. Baker relied on a smoking history of only twelve and one-half pack years, which was less than her own finding that claimant has an eighteen pack-year smoking history. Decision and Order at 21. The administrative law judge found, however, that because "Dr. Baker . . . acknowledged that [c]laimant could have had enough cigarette smoking history or enough coal dust exposure to develop lung disease if he were a susceptible host," Dr. Baker's reliance on an underestimated smoking history did not undermine the credibility of his opinion. Decision and Order at 21. Noting that "all three doctors agreed that eight years of coal dust exposure could be

[9] Thus, Dr. Baker explained, if claimant "did have [eight] years of coal dust exposure and [twelve and one-half] pack[-]years of smoking, this would be equivalent to either a [twenty] year history of coal mine employment or [twenty] year history of smoking." Director's Exhibit 25.

sufficient to cause an obstructive impairment in a susceptible host" and that the physicians also agree that "both coal dust exposure and cigarette smoking could cause obstructive airways disease," the administrative law judge found that "[c]laimant has carried his burden of proof" to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 21.

We agree with employer that the administrative law judge failed to adequately explain her determination that the medical opinion evidence is sufficient to support claimant's burden to establish that he has legal pneumoconiosis. The determination of whether a medical opinion is reasoned and documented, and sufficient to carry claimant's burden of proof requires the fact finder to examine the validity of the physician's reasoning in light of the studies conducted and the objective indications upon which the medical conclusion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case lies, has held that "it is critical to the appellate process that the [administrative law judge] clearly set forth the rationale for his [or her] findings of facts and conclusions of law." *Director, OWCP v. Congleton*, 743 F.2d 428, 429, 7 BLR 2-12, 2-15 (6th Cir. 1984), *referencing* the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (requiring every adjudicatory decision include 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."); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the administrative law judge explained why Dr. Baker's reliance on an underestimated smoking history did not undermine his opinion, she did not explain why Dr. Baker's opinion was sufficient to support claimant's burden to establish the existence of legal pneumoconiosis. Because the administrative law judge did not adequately explain her determination to credit the opinion of Dr. Baker, the only credible physician to diagnose legal pneumoconiosis,[10] we must vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must reconsider Dr. Baker's opinion and explain her findings.[11]

[10] The administrative law judge permissibly discredited the opinion of Dr. Alam, claimant's treating physician, because he misstated claimant's smoking history. Decision and Order at 20.

[11] There is also merit to employer's assertion that the administrative law judge did not adequately consider the extent to which Dr. Baker's reliance on an inaccurate smoking history impacted his opinion. Employer's Brief at 22. Because Dr. Baker stated that claimant could have had enough coal mine dust or cigarette smoke exposure to

On remand the administrative law judge should also reconsider the opinions of Drs. Rosenberg[12] and Jarboe,[13] that claimant does not have legal pneumoconiosis. The administrative law judge noted that Dr. Rosenberg agreed that eight years of coal mine dust exposure could cause an obstructive impairment in a susceptible host. Decision and Order at 21. The administrative law judge also noted that Dr. Rosenberg attributed claimant's impairment entirely to cigarette smoking, based, in part, on the fact that claimant's smoking history is longer than his coal mine employment history, and studies suggest that cigarette smoking damages the lungs more intensively and at a faster rate than coal dust exposure. Decision and Order at 21, *referencing* Employer's Exhibit 5 at 21-22. The administrative law judge discounted Dr. Rosenberg's opinion, finding that "even assuming that Dr. Rosenberg's conclusions are correct . . . this does not exclude the possibility that the Claimant was a susceptible host." Decision and Order at 21. As employer correctly asserts, however, employer does not have the burden to exclude coal mine dust exposure as a factor in claimant's impairment. Employer's Brief at 26. Rather, claimant has the burden to establish that he suffers from a chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. 718.201(b).

The administrative law judge also gave diminished weight to Dr. Jarboe's opinion, that claimant's does not have legal pneumoconiosis, because Dr. Jarboe failed to explain

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develop lung disease, the administrative law judge found that Dr. Baker's "slight underestimate" of claimant's smoking history did not undermine his opinion. In so finding, however, the administrative law judge failed to acknowledge that Dr. Baker specifically premised his opinion on claimant's smoking history being "accurate." Director's Exhibit 25.

[12] In a report dated July 12, 2010, Dr. Rosenberg diagnosed chronic obstructive pulmonary disease secondary to cigarette smoking. Employer's Exhibits 3. Dr. Rosenberg reiterated his original opinion in his supplemental reports dated April 2, 2012, May 11, 2012, and October 24, 2013, and during his depositions on April 6, 2012 and on December 18, 2013. Employer's Exhibits 4, 5, 10, 12, 14.

[13] In a report dated March 6, 2010, Dr. Jarboe opined that claimant's "disabling impairment has been caused by a combination of bronchial asthma and cigarette smoking." Director's Exhibit 27. Dr. Jarboe reiterated his original opinion in his supplemental reports dated June 4, 2012 and November 14, 2013, and during his depositions on June 21, 2012 and on December 5, 2013. Employer's Exhibits 6, 9, 11, 13.

why claimant's asthma was not substantially aggravated by his coal dust exposure, and because claimant's treatment records "make no reference to asthma as a diagnosis."[14] Decision and Order at 21-22. As employer correctly asserts, however, while the most recent treatment records from Dr. Alam do not specifically reference asthma, the record reflects that Drs. Ahmed and Dahhan diagnosed claimant with asthma in 1999 and 2000, respectively, and Dr. Dahhan noted that claimant had a history of hospitalizations for asthma. Director's Exhibit 4 at 36-37, 160.

On remand, when considering the physicians' opinions relevant to the existence of legal pneumoconiosis, the administrative law judge should address the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, she should then weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis is established 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).

In light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate her finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct her to reconsider this issue, if necessary, on remand.

Lastly, we address employer's challenge to the administrative law judge's determination of the date for the commencement of benefits. Employer asserts that the administrative law judge erred in stating that benefits for a claimant who has established entitlement "commence with the month of onset of total disability." Employer's Brief at 27, *citing* Decision and Order at 28. Employer further asserts that, in awarding benefits as of July 2009, the month in which the current claim was filed, the administrative law judge failed to consider that claimant's objective testing did not reliably reflect total disability until July 2010. Employer's Brief at 27.

Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to

[14] The administrative law judge acknowledged claimant's testimony that he saw Dr. Alam for asthma treatment, and that he had been treated for asthma for about ten years, but found the treatment records to be more credible than claimant's testimony as to the nature of his medical condition. Decision and Order at 27.

pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Because we have vacated the award of benefits, we also vacate the benefits commencement date finding. On remand, if the administrative law judge again awards benefits, she should reconsider that issue and explain her findings.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge