U.S. Department of Labor

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

BRB No. 17-0114 BLA

DALLAS LEE DILLON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATTLE RIDGE COMPANIES	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	DATE ISSUED: 11/17/2017
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. 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 Awarding Benefits (14-BLA-05643) of Administrative Law Judge Larry A. Temin rendered on a claim filed on April 4, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 11.89 years of coal mine employment,[1] and found that employer is the responsible operator. The administrative law judge further found that the evidence established the existence of legal pneumoconiosis,[2] in the form of chronic obstructive lung disease and arterial hypoxemia due to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that the evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges its designation as the responsible operator. Employer also contends that the administrative law judge erred in finding that the evidence established that claimant has legal pneumoconiosis and that his total disability is due to pneumoconiosis. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer is the responsible operator.[3]

[1] Based on claimant's testimony at the hearing, the administrative law judge found that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 39-40. Accordingly, the Board 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).

[2] "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). This definition encompasses any 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has 11.89 years of coal mine employment, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack*

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).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[4] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The regulations provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the operator that most recently employed the miner is financially incapable of assuming liability for the payment of benefits, the district director must submit a statement to that effect, and such statement is prima facie evidence "that the most recent employer is not financially capable of assuming its liability for a claim." *Id*.

In determining that employer is the responsible operator, the administrative law judge considered that claimant worked for employer from 1990-1995, and subsequently worked for E & D Mountain View Construction, Incorporated (E & D Mountain View) from 1995-2001. Decision and Order at 7. The administrative law judge further noted, however, that the record contained a statement from the district director pursuant to 20

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v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-7, 14, 20-22.

[4] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

C.F.R. §725.495(d) that E & D Mountain View was not insured or self-insured on the last day of claimant's employment with it. Based on that statement, the district director identified employer as the next operator that most recently employed claimant for not less than one year that was capable of paying benefits. Decision and Order at 8; Director's Exhibits 22, 35. Because employer did not establish that it was financially incapable of paying benefits or that the more recent operator was financially capable of paying benefits, the administrative law judge found that was employer is the responsible operator. Decision and Order at 8.

Employer argues that the administrative law judge failed to consider its argument that the district director did not properly investigate whether E & D Mountain View had insurance coverage for its operations in Kentucky, where the district director found that claimant last worked in coal mine employment.[5] Employer's Brief at 4-5.

The Director responds that, contrary to employer's argument, the district director investigated the financial capability of E & D Mountain View, concluded that it did not have the financial capability to pay benefits, and issued the required statement to that effect pursuant to 20 C.F.R. §725.495(d). Director's Brief at 3. Therefore, the Director contends, the burden shifted to employer to prove that E & D Mountain View had the financial capability of paying benefits pursuant to 20 C.F.R. §725.495(c)(2).

We agree with the Director. The record reflects that the district director adequately investigated whether E & D Mountain View was financially capable of paying benefits. The district director issued a Notice of Claim on April 16, 2013, to E & D Mountain View as a potentially liable operator. Director's Exhibit 17 at 2. Thereafter, E & D Mountain View's insurance carrier, the West Virginia Coal Workers' Pneumoconiosis Fund (the Fund), moved to be dismissed from the claim because its

[5] As the Director, Office of Workers' Compensation Programs (the Director), notes, the district director's determination that claimant last worked in Kentucky is contrary to the administrative law judge's finding that claimant last worked in West Virginia. Director's Brief at 2 n.2. The record reflects that although claimant stated in his answers to interrogatories before the district director that he last worked in Kentucky, he later testified at the hearing before the administrative law judge that he last worked in coal mining in West Virginia. Director's Exhibit 28 at 5; Hearing Transcript at 39-40. On appeal, employer does not argue that claimant's last coal mine employment was in West Virginia. Instead, employer argues that the district director made no "effort to determine whether E & D [Mountain View] had other coverage for its operations in Kentucky" before designating employer as the responsible operator. Employer's Brief at 5. Therefore, the Board will not further address the issue of where claimant's last coal mine employment with E & D Mountain View took place. *See Skrack*, 6 BLR at 1-711.

coverage of E & D Mountain View was limited to West Virginia, and did not cover claims filed in Kentucky, where claimant informed the district director he last worked. *See* Director's Exhibit 28 at 2-5.

By letter dated September 26, 2013, the district director granted the motion, and dismissed the Fund as a putative responsible insurance carrier. Director's Exhibit 30 at 1. The district director attached to the letter a statement reporting that a search of the Department of Labor's records of insurance and self-insurance information submitted pursuant to 20 C.F.R. Part 726 revealed that E & D Mountain View was neither insured, nor approved to self-insure, on the date of claimant's last employment with it on January 25, 2001. *Id*. at 2; *see* 20 C.F.R. §725.495(d). Thereafter, the district director issued a proposed Decision and Order identifying employer as the responsible operator liable for the payment of benefits. The district director explained that E & D Mountain View was dismissed because it had no policy of insurance at the time of claimant's last work for it in the state of Kentucky and was not self-insured. Director's Exhibit 35 at 4, 14.

Based on the documentation in the record, the administrative law judge correctly found that the district director submitted the statement required by 20 C.F.R. §725.495(d). Because employer was designated as the responsible operator, the administrative law judge accurately noted that it was employer's burden to demonstrate that the more recent employer, E & D Mountain View, was financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.492(c)(2); Decision and Order at 8. As the administrative law judge found, employer submitted no evidence to support its burden on that issue. Because the administrative law judge's finding that employer is the responsible operator is supported by substantial evidence and in accordance with law, it is affirmed. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23, 25 BLR 2-521, 2-546-48 (6th Cir. 2014).

Entitlement Under 20 C.F.R. Part 718

Legal Pneumoconiosis

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" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This

definition encompasses any 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).

Employer argues 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 opinions of Drs. Forehand, Jarboe, and Rosenberg. Dr. Forehand diagnosed claimant with legal pneumoconiosis, in the form of chronic obstructive lung disease and exercise-induced arterial hypoxemia due to coal mine dust exposure. Director's Exhibit 10 at 37-39; Employer's Exhibit 6 at 6, 7. Dr. Jarboe opined that claimant does not have legal pneumoconiosis, but has bronchial asthma unrelated to coal mine dust exposure. Employer's Exhibit 5 at 6, 7. Dr. Rosenberg opined that there was no basis to diagnose claimant with legal pneumoconiosis, because claimant's blood gas study results were variable and improved over time. Employer's Exhibit 2 at 10.

In evaluating the conflicting medical opinion evidence, the administrative law judge credited the opinion of Dr. Forehand, finding it to be well-documented and reasoned. In contrast, the administrative law judge discounted the contrary opinions of Drs. Jarboe and Rosenberg, because he found that they did not provide sufficient reasoning as to why claimant's impairment was not contributed to by his coal mine dust exposure. Decision and Order at 18-20.

Employer initially argues that the administrative law judge applied an improper legal standard in determining whether claimant established the existence of legal pneumoconiosis. Employer's Brief at 3-4. This argument lacks merit. Before discussing the medical opinion evidence, the administrative law judge correctly set forth the definition of legal pneumoconiosis. Decision and Order at 15, *quoting* 20 C.F.R. §718.201(a)(2), (b). The administrative law judge reiterated the definition of legal pneumoconiosis before he weighed the medical opinion evidence on that issue. Decision and Order at 17-18. In considering the medical opinions of Drs. Forehand, Jarboe, and Rosenberg, the administrative law judge properly considered whether the evidence established that claimant has a chronic lung disease or pulmonary or respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Id*. at 17-20. Thus, the administrative law judge assessed the medical opinion evidence regarding the existence of legal pneumoconiosis under the proper legal standard.[6] 20 C.F.R. 718.201(a)(2), (b); Decision and Order at 17-20.

[6] That the administrative law judge applied the proper standard is evidenced by his conclusion that "Dr. Forehand's opinion that coal dust exposure substantially contributed to the [c]laimant's chronic lung disease and gas exchange impairment is sufficient to

Employer next argues that the administrative law judge erred in crediting Dr. Forehand's opinion, contending that substantial evidence does not support the administrative law judge's finding that the opinion was well-reasoned. *Id*. at 2-3. We disagree. As stated above, Dr. Forehand diagnosed claimant with legal pneumoconiosis, in the form of chronic obstructive lung disease and exercise-induced arterial hypoxemia due to coal mine dust exposure. Director's Exhibit 10 at 37-39; Employer's Exhibit 6 at 6, 7. The administrative law judge acted within his authority in finding that Dr. Forehand's opinion was well-reasoned, because it was supported by claimant's coal mine employment and smoking histories, symptoms, physical examination, and objective testing, and because Dr. Forehand adequately explained that claimant's exercise-induced arterial hypoxemia was due to coal mine dust exposure *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 307, 23 BLR 2-261, 2-287 (6th Cir. 2005); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 18-19; Director's Exhibit 10 at 37-39; Employer's Exhibit 6 at 6-7. The administrative law judge found that although Dr. Forehand acknowledged that other factors could cause exercise-induced hypoxemia, he credibly explained that he found no evidence of other causes to explain claimant's respiratory impairment in this case. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 18-19; Director's Exhibit 10 at 36-39; Employer's Exhibit 6 at 10-11. As substantial evidence supports the administrative law judge's finding that Dr. Forehand's opinion was well-reasoned, we reject employer's allegation of error.

Employer argues further that the administrative law judge erred in discounting the opinions of Drs. Jarboe and Rosenberg because, employer contends, the administrative law judge ignored their reasoning for why claimant's "hypoxemia was not due to dust-related disease." Employer's Brief at 4. This argument lacks merit. The administrative law judge specifically noted Dr. Rosenberg's reasoning that "with [claimant's] chest X-ray being 0/0, there is no indication that any fall in PO2 noted previously relates to past coal mine dust exposure." Employer's Exhibit 1 at 5; Decision and Order at 19. The administrative law judge permissibly discredited this aspect of Dr. Rosenberg's opinion, because a positive x-ray is not required to establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); *see Helen Mining Co. v. Director*,

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meet the causation requirement in the regulations to make a diagnosis of legal pneumoconiosis." Decision and Order at 18. Further, consistent with the applicable legal standard, the administrative law judge found that Drs. Jarboe and Rosenberg did not adequately explain why they concluded that claimant's coal mine dust exposure did not contribute to the impairment. *See* Decision and Order at 19-20.

OWCP [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 19. Additionally, the administrative law judge acted within his authority in finding that Dr. Rosenberg did not adequately explain his opinion that claimant's variable blood gas study results were due to an elevated diaphragm, because Dr. Rosenberg did not specifically explain how an elevated diaphragm would affect blood oxygenation levels. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Employer's Exhibits 1 at 3, 2 at 10.

Additionally, the administrative law judge reasonably discounted Dr. Jarboe's opinion that claimant has bronchial asthma unrelated to coal mine dust exposure, because the physician stated that asthma is a condition of the general public, without providing reasoning for why he concluded that coal mine dust exposure did not contribute to claimant's disease in this specific case. *See* 20 C.F.R. §718.201(b)(2); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19-20; Employer's Exhibit 5 at 7. Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Total Disability Due to Pneumoconiosis

To establish that claimant is totally disabled due to pneumoconiosis, he must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.[7] 20 C.F.R. §718.204(c)(1). The administrative law judge found that Dr. Forehand's opinion met that standard, as Dr. Forehand opined that claimant's chronic coal mine dust-induced lung disease was "the sole factor substantially contributing to [claimant's] respiratory impairment" and that claimant is totally disabled "due solely to [his] exercise hypoxemia." Decision and Order at 23; Director's Exhibit 10 at 38-39. The administrative law judge found that Drs. Jarboe and Rosenberg did not offer an opinion on disability causation, because they did not find that claimant was totally disabled, and he noted that he had already discounted their opinions at total disability. Decision and Order at 23.

Employer's only argument is that the administrative law judge applied an improper legal standard at disability causation, Employer's Brief at 4, which we reject.

[7] Pneumoconiosis is a "substantially contributing cause" of 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).

We affirm the administrative law judge's finding that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).[8] Decision and Order at 23; Director's Exhibit 10 at 38-39; Employer's Exhibit 6 at 11-12.

[8] We additionally note that, because Drs. Jarboe and Rosenberg did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that legal pneumoconiosis was established, the administrative law judge could accord their opinions, at most, little weight at disability causation. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013); *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 other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

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