U.S. Department of Labor

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

BRB No. 15-0516 BLA

JERRY WAYNE MURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPOLO FUELS, INCORPORATED	)	DATE ISSUED: 10/21/2016
	)	
and	)	
	)	
SECURITY INSURANCE OF HARTFORD, C/O HARTFORD CAPITAL	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia/Tennessee for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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 appeals the Decision and Order Award of Benefits (2013-BLA-06134) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on October 9, 2012,[1] 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 eleven years of coal mine employment[2] and considered his entitlement under the regulations at 20 C.F.R. Part 718. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge also found that claimant established the existence of clinical and legal pneumoconiosis[3] arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed his initial claim for benefits on March 1, 2010, which was denied by the district director on December 10, 2010, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action before filing the current claim.

[2] Because claimant established less than fifteen years of coal mine employment, he is not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 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 tissue to that deposition caused by coal 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). 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).

On appeal, employer argues that the administrative law judge erred in weighing the x-ray evidence and that the medical opinions relied upon by the administrative law judge to establish the elements of legal pneumoconiosis and disability causation are not reasoned. Employer also contends that the administrative law judge failed to explain his credibility findings in accordance with the Administrative Procedure Act (the APA).[4] Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge's finding that claimant has clinical pneumoconiosis is supported by substantial evidence.[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 into the Act 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 his 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);

[4] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), requires that 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." 5 U.S.C. §557(c)(3)(A).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eleven years of coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The record reflects that claimant's coal mine employment was in Tennessee and Kentucky. Director's Exhibit 4. 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).

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. The Existence of Pneumoconiosis

A. The X-ray and Medical Opinion Evidence Establishing Clinical Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six interpretations of four x-rays, dated October 23, 2012, May 15, 2013, August 15, 2013, and April 14, 2014. Decision and Order at 4-5; Director's Exhibits 12, 15-16; Claimant's Exhibit 1; Employer's Exhibits 1-2. The administrative law judge found that the October 23, 2012 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Ahmed, a dually qualified Board-certified radiologist and B reader, and as negative for both simple and complicated pneumoconiosis by Dr. Scott, also a dually qualified radiologist.[7] Decision and Order at 13; Director's Exhibits 12, 15. The administrative law judge found that the May 15, 2013 and August 15, 2013 x-rays[8] were each read by Dr. Scott as negative for pneumoconiosis. Decision and Order at 13; Director's Exhibit 16; Employer's Exhibit 1. The administrative law judge further found that April 14, 2014 x-ray was read by Dr. Ahmed as showing simple and complicated pneumoconiosis, Category A, while Dr. Adcock, also a dually qualified radiologist, read it as showing simple but not complicated pneumoconiosis. Decision and Order at 13; Claimant's Exhibit 1; Employer's Exhibit 2.

[7] On the ILO classification form, Dr. Scott inserted a question mark over a box he check-marked as showing tuberculosis on the x-ray. Under "OD [other diseases]" - Dr. Scott wrote "[p]robable interstitial fibrosis in mid and lower lungs. Advise CT scan to further evaluate." Director's Exhibit 15. He also noted "[f]ocal fibrosis/infiltrate . . . right upper lung - probably due to [tuberculosis], probably healed. Small scar left upper lung. Possible few calcified granulomata left lower lung. Possible bullae right apex." *Id*.

[8] On the ILO classification form he completed for the May 15, 2013 x-ray, Dr. Scott wrote, "scarring or small infiltrates upper lungs - possible [tuberculosis], pneumonia, scarring from prior infection. Cannot [rule out] 1.5 centimeter nodule [right upper lung.' Director's Exhibit 16. On the ILO classification form he prepared for the August 15, 2013 x-ray, Dr. Scott inserted a question mark over a box he check-marked as showing tuberculosis on the x-ray. Under "OD [other diseases]" he wrote, "Peripheral minimal infiltrates or fibrosis upper lungs. This could be [tuberculosis] or sarcoid. The distribution of changes is not compatible with silicosis/CWP [coal workers' pneumoconiosis]. . . ." Employer's Exhibit 1.

After observing that Drs. Ahmed, Adcock and Scott "possess the same qualifications," the administrative law judge determined that the October 23, 2012 x-ray was "in equipoise as Drs. Ahmed and Scott had conflicting readings." Decision and Order at 13. The administrative law judge next found "Dr. Scott's opinion that [c]laimant's calcified granulomata were probably due to histoplasmosis or tuberculosis [is] equivocal and unsupported by the record, which does not contain evidence of either of these diagnoses."[9] *Id.* Relying on the two positive readings of the most recent x-ray, which were uncontradicted, the administrative law judge concluded that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1).[10]

Employer argues that the administrative law judge erred in discrediting Dr. Scott's negative x-ray readings as equivocal. We disagree. The credibility of the evidence is within the sound discretion of the administrative law judge, and the Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). To the extent that Dr. Scott used question marks on the ILO form and other qualifying language, we see no error in the administrative law judge's finding that Dr. Scott's negative interpretations were equivocal as to what he saw on the x-rays. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

Moreover, the administrative law judge acted within his discretion in giving Dr. Scott's negative readings less weight on the grounds that there is no evidence in the record that claimant suffers from the alternative etiologies proposed for the radiological abnormalities Dr. Scott observed.[11] *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287,

[9] Employer contends that the administrative law judge erred in finding that there is no evidence in the record of alternate diseases to corroborate Dr. Scott's negative x-ray readings and points to Dr. Dahhan's notation that claimant has a history of rheumatoid arthritis, which can result in radiographic abnormalities. Employer's Brief in Support of Petition for Review at 9. Employer's assertion of error is without merit because Dr. Scott did not identify rheumatoid arthritis as one of the possible etiologies for claimant's x-ray findings. Director's Exhibit 16.

[10] The administrative law judge did not make any findings as to whether the evidence was sufficient to establish that claimant has complicated pneumoconiosis.

[11] The administrative law judge also indicated that he gave less weight to Dr. Scott's interpretation of an August 13, 2010 CT scan as showing radiological findings

24 BLR 2-269, 2-286-87 (4th Cir. 2010). Thus, because all of the other x-ray readings are positive for simple clinical pneumoconiosis, we affirm his finding that "the x-ray evidence favors [claimant's] position under 20 C.F.R. §718.202(a)(1)." Decision and Order at 13; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

Pursuant to 20 C.F.R. §718.202(a)(4),[12] the administrative law judge credited Dr. Burrell's diagnosis of clinical pneumoconiosis as being supported by the more credible positive x-ray evidence, which he considered to be dispositive for the disease, and he rejected the contrary opinions of Drs. Rosenberg and Dahhan. Decision and Order at 13, 17. Because employer does not identify any specific error with the administrative law judge's weighing of the medical opinions, we affirm his finding that claimant established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 17. We further affirm, as unchallenged, the administrative law judge's finding that claimant established that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.201. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

B. The Medical Opinion Evidence Regarding Legal Pneumoconiosis

In weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge found that claimant established the existence of legal pneumoconiosis based on the opinions of Drs. Burrell and Fernandes.[13] The administrative law judge stated:

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that "are probably due to healed histoplasmosis." Decision and Order at 13, *quoting* Employer's Exhibit 3.

[12] The administrative law judge did not render findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

[13] The administrative law judge also determined that Drs. Rosenberg and Dahhan expressed views that were contrary to the preamble or the regulations and, therefore, their opinions were not credible on the issue of legal pneumoconiosis. Decision and Order at 16-17. Because employer does not challenge the administrative law judge's credibility findings with regard to the opinions of Drs. Rosenberg and Dahhan they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> I find the opinions of Drs. Burrell and Fernandes that the miner suffers from clinical coal workers' pneumoconiosis and that coal mine dust contributed to his respiratory affliction, establish the existence of clinical pneumoconiosis. These physicians possess excellent credentials, as noted above, they reviewed and integrated a plethora of evidence, they had the opportunity to examine and test the miner, and their documentation and reasoning support their conclusions far better than those physicians finding otherwise.
>
> Considering the evidence as a whole, I find the preponderant x-ray evidence and the more persuasive Claimant medical opinions agree on a diagnosis of pneumoconiosis. I find that the Claimant has established both clinical and legal pneumoconiosis.

Decision and Order at 17.

Employer asserts that the administrative law judge mischaracterized the opinions of Drs. Burrell and Fernandes as "integrat[ing] a plethora of evidence" when each physician relied "entirely upon the evidence obtained during their respective examinations of [claimant]." Employer's Brief in Support of Petition for Review at 10 quoting Decision and Order at 17. Employer also contends that the administrative law judge failed to address specific arguments it raised in its post-hearing brief pertaining to the physicians' credibility and claimant's smoking history. Employer maintains that the opinions of Drs. Burrell and Fernandes are not sufficiently reasoned to satisfy claimant's burden of proof and that the administrative law judge's cursory findings do not satisfy the APA. Employer's assertions of error have merit.

We agree with employer that the administrative law judge erred in stating that Dr. Fernandes "reviewed a plethora of evidence" in preparing his opinion. Employer's Brief in Support of Petition for Review at 14, *quoting* Decision and Order at 17. Dr. Fernandes' opinion is contained on a "chart note" from an office visit. Claimant's Exhibit 2. There are notations of physical findings from his examination of claimant and a heading of "Pneumoconiosis (505)," wherein he stated only that "[patient] is disabled from performing his last coal mining job based on [Department of Labor] standards for [pulmonary function studies]." *Id.* Because Dr. Fernandes does not indicate what objective tests underlie his diagnosis, the administrative law judge has not adequately explained his basis for finding Dr. Fernandes' opinion sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 17.

We also agree that the administrative law judge's summary finding that Dr. Burrell's opinion is reasoned and documented does not satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165; *Fields*, 10 BLR at 1-20-21. Further, the administrative law judge did not properly address whether Dr. Burrell had an accurate understanding of claimant's smoking history, and what affect, if any, it may have had on his opinion that claimant's COPD constitutes legal pneumoconiosis.[14] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Dr. Burrell wrote in his report that claimant began smoking at "approximately 17 years old," that he smoked one pack a day, and stopped at "30-something" years old. Director's Exhibit 12. Claimant testified that he "started smoking as a teenager and smoked until 1985." Hearing Transcript at 11, 15. The administrative law judge did not make a specific finding as to the length of claimant's smoking history and did not address employer's assertion that Dr. Burrell's report underestimated the length of claimant's smoking history, which is between "21 and 31-1/2 pack years." Employer's Post-Hearing Brief at 6.

Based on these errors we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Wojtowicz*, 12 BLR 1-at 1-165. The administrative law judge on remand should address the conflicts in the record regarding the length of claimant's smoking history, render a determination as to how long claimant smoked, and consider the credibility of the medical opinions in relation to their knowledge of claimant's work and smoking histories. *See Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998).

II. Disability Causation

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge noted that claimant was required to establish that his pneumoconiosis was a substantially

[14] Dr. Burrell examined claimant on behalf of the Department of Labor on October 23, 2012. Dr. Burrell diagnosed chronic obstructive pulmonary disease (COPD), which he attributed to claimant's "[ten] year exposure to hazardous environmental dust in the coal mining industry and [thirteen] years tobacco abuse." Director's Exhibit 12. In a supplemental letter, Dr. Burrell stated that "claimant's diagnosis of COPD with bullous emphysema was significantly contributed to or substantially aggravated by his exposure to hazardous occupational dust in his coal mine employment." Director's Exhibit 13.

contributing cause of his respiratory or pulmonary disability. Decision and Order at 21. The administrative law judge then stated:

> I have the discretion to accord less weight to the opinions of examining physicians to the extent that they did not diagnose clinical coal workers' pneumoconiosis, contrary to the determination that the existence of clinical was established.
>
> Employer's experts failed to diagnose coal workers' pneumoconiosis and their medical opinions failed to account for [c]laimant's exposure to coal mine dust. Therefore, their opinions are … accorded less weight. The well-reasoned and well[-]documented opinions of Drs. Burrell and Fernandes attribute [c]laimant's totally disabling respiratory impairment to his coal mine dust exposure and smoking history. Therefore I find [claimant] has stablished the existence of a total respiratory or pulmonary disability due to coal workers' pneumoconiosis.

Id. (citations omitted).

We agree with employer that the administrative law judge's conclusory statement that the opinions of Drs. Burrell and Fernandes are well-reasoned and well-documented does not satisfy the APA. *See Wojtowicz*, 12 BLR 1-at 1-165. The administrative law judge is required to discuss "the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Rowe*, 710 F.2d at 255, 5 BLR at 2-103: *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

Furthermore, because we have vacated the finding of legal pneumoconiosis, which affected the administrative law judge's weighing of the evidence on the issue of disability causation, we must also vacate his conclusion that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).[15] *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we vacate the award of benefits and remand the case for further consideration.

[15] We affirm, as unchallenged, the administrative law judge's finding that that the opinions of Drs. Dahhan and Rosenberg are not credible on the issue of disability causation. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21.

III. Remand Instructions

Because the administrative law judge did not consider whether the evidence is sufficient to establish that claimant has complicated pneumoconiosis, we first instruct the administrative law judge on remand to determine whether claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. If claimant is unable to invoke the irrebuttable presumption, the administrative law judge must reconsider whether claimant has established the existence of legal pneumoconiosis. The administrative law judge should render a specific finding as to the length of claimant's smoking history and resolve any conflicts in the evidence on this issue. The administrative law judge must reweigh the medical opinions of Drs. Fernandez and Burrell and explain the bases for his findings that their opinions are well-reasoned and well-documented to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In so doing, the administrative law judge should consider whether the physicians took into consideration other possible etiologies for claimant's respiratory condition.[16] *See Rowe*, 710 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-151. Thereafter, the administrative law judge must consider whether claimant satisfied his burden of proving that his total respiratory disability is due to either clinical or legal pneumoconiosis under 20 C.F.R. §718.204(c). In rendering his credibility findings on remand, the administrative law judge must explain the bases for all of his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz*, 12 BLR 1-at 1-165.

[16] Employer maintains that "neither physician addressed whether [claimant's] rheumatoid arthritis or diagnosis of Barrett's mucosa (a precursor to esophageal cancer)" would have any effect on their conclusions as to whether claimant's breathing impairment was related to coal mine dust exposure." Employer's Brief in Support of Petition for Review at 10; Employer's Post Hearing Brief at 16

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge