U.S. Department of Labor

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

BRB No. 16-0052 BLA

DENVER MADDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOPHER MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 10/27/2016
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5649) of Administrative Law Judge Peter B. Silvain, Jr. (the administrative

law judge), rendered on a subsequent claim[1] filed pursuant to the 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 10.55 years of coal mine employment and adjudicated this claim, filed on September 23, 2009, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[2] The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3] thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] Considering the

[1] Claimant's initial claim for benefits, filed on May 23, 1986, was denied by Administrative Law Judge Richard D. Mills on March 10, 1989, because claimant failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1-596. The Board affirmed the denial of benefits. *Madden v. Gopher Mining Co*., BRB No. 89-1101 BLA (Dec. 14, 1990)(unpub.); Director's Exhibit 1-588.

Claimant's second claim for benefits, filed on February 2, 1993, was denied by Administrative Law Judge Daniel J. Roketenetz on January 15, 1998, because claimant failed to establish total respiratory disability or a change in an applicable condition of entitlement. Director's Exhibit 1-502. The Board affirmed the denial of benefits, and denied claimant's motion for reconsideration. *Madden v. Gopher Mining Co*., 21 BLR 1-122, 1-124-25 (1999), *recon. denied* (Aug. 19, 1999)(Order)(unpub.); Director's Exhibits 1-487, 1-484.

Claimant's third claim for benefits, filed on August 19, 2003, was denied by Administrative Law Judge Pamela Lakes Wood on October 2, 2006, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1-146. The Board affirmed the denial of benefits, and denied claimant's motion for reconsideration. *Madden v. Gopher Mining Co*., BRB No. 07-0155 BLA (Aug. 29, 2007)(unpub.), *recon. denied* (Nov. 30, 2007)(Order)(unpub.); Director's Exhibits 1-70; 1-59.

[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] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] 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.

entire record, the administrative law judge found that the new evidence outweighed the earlier evidence and established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence in finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response. Employer has filed a reply brief in support of its position.[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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§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).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), and that claimant is unable to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he established less than fifteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Hearing Transcript at 36.

Employer challenges the administrative law judge's reliance on the opinions of Drs. Baker and Ranavaya over the contrary opinion of Dr. Jarboe to find the existence of legal pneumoconiosis and disability causation established at 20 C.F.R. §§718.202(a) and 718.204(c). Employer contends that the opinions of Drs. Baker and Ranavaya are not well reasoned and are insufficient to support a finding of legal pneumoconiosis, arguing that the doctors provided no basis for their opinions other than reliance on an inflated length of coal dust exposure and a positive chest x-ray. Employer further maintains that Dr. Baker's opinion is speculative, as he based his diagnosis of pneumoconiosis on the possibility that some of claimant's condition could be due to his coal dust exposure. Employer also asserts that the administrative law judge discounted Dr. Jarboe's opinion for improper reasons. Employer's Brief at 6-17. Some of employer's arguments have merit.

In evaluating the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Baker, Ranavaya, Jarboe, Repsher, and Dahhan. Decision and Order at 13-19. After finding that clinical pneumoconiosis[7] was not established,[8] the administrative law judge determined that the well-reasoned opinions of Drs. Baker and Ranavaya, who diagnosed legal pneumoconiosis, outweighed the opinions of Drs. Jarboe, Repsher, and Dahhan, who found no pneumoconiosis.[9] Decision and Order at 21-25. Specifically, the administrative law judge credited the opinions of Drs. Baker and Ranavaya that claimant's disabling chronic obstructive pulmonary disease (COPD) is caused by smoking and coal dust exposure,[10] and discounted Dr. Jarboe's opinion that claimant's

[7] "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 dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

[9] The administrative law judge found that the opinions of Drs. Repsher and Dahhan were entitled to little probative weight. Decision and Order at 21-22, 24-25; Employer's Exhibit 2; Director's Exhibit 20. As no party challenges these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[10] Dr. Baker examined claimant on October 9, 2009, and provided a deposition on August 9, 2011. Dr. Baker diagnosed clinical pneumoconiosis, chronic obstructive pulmonary disease (COPD), hypoxemia, chronic bronchitis, and ischemic heart disease.

COPD is due to heavy smoking and untreated asthma.[11] *Id*.; Director's Exhibit 21; Employer's Exhibits 1, 6; Claimant's Exhibit 2.

Initially, employer contends that the administrative law judge's rejection of Dr. Jarboe's opinion is irrational, not supported by substantial evidence, and contrary to law. We disagree. The administrative law judge permissibly accorded little probative weight to Dr. Jarboe's opinion because he found that it was premised in large part upon the doctor's belief that miners experience greater losses of lung function when they first start work in the mining industry. Because claimant had no decrement in his lung function within eighteen years after his first exposure to coal dust, Dr. Jarboe concluded that claimant's disabling respiratory impairment is unrelated to coal dust exposure. The administrative law judge reasonably found that Dr. Jarboe's view cannot be reconciled with the regulation at 20 C.F.R. §718.201(c) acknowledging that pneumoconiosis is a progressive and irreversible disease that may first become detectable after the cessation of coal dust exposure.[12] Decision and Order at 24; Employer's Exhibit 1 at 5-6; *see* 20

He opined that claimant's COPD, hypoxemia, and chronic bronchitis are due to cigarette smoking and coal dust exposure. Director's Exhibit 21; Employer's Exhibit 6.

Dr. Ranavaya examined claimant on June 3, 2010, and diagnosed clinical pneumoconiosis and COPD caused by a combination of a fifty pack-year history of cigarette smoking and thirteen years of occupational exposure to dust. Claimant's Exhibit 2.

[11] Dr. Jarboe examined claimant on August 12, 2010, and found no evidence of clinical or legal pneumoconiosis, but diagnosed COPD due to cigarette smoking and intrinsic bronchial asthma. He also diagnosed coronary artery disease and mild obesity. Dr. Jarboe explained that claimant's respiratory impairment is not due to coal dust exposure because claimant's airway disease is reversible and he has a very high residual volume and severe reduction in diffusion capacity. Dr. Jarboe further opined that "had coal dust contributed to [claimant's] loss of function, one would have anticipated some decrement in function some eighteen years after his initial exposure to coal dust." Employer's Exhibit 1 at 6. He noted that claimant continued to smoke cigarettes very heavily and did not receive aggressive treatment for his asthma. Employer's Exhibit 1.

[12] Because the administrative law judge provided at least one valid reason for according less weight to Dr. Jarboe's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Jarboe's opinion.

C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506, BLR (4th Cir. 2015). As substantial evidence supports the administrative law judge's findings, we affirm his weighing of Dr. Jarboe's opinion.

Employer next argues that the administrative law judge failed to address the fact that Drs. Baker and Ranavaya relied on an inflated coal dust exposure history of thirteen years, contrary to the administrative law judge's finding of only 10.55 years of coal mine employment. Employer asserts that the administrative law judge provided no rationale as to why the "nearly three-year misunderstanding (or about 1/3 more than actually found) in the length of coal mine employment" did not affect the credibility of the physicians' opinions. Employer's Brief at 13. Employer's argument has merit. Where a discrepancy exists between the administrative law judge's finding and a physician's assumption regarding the length of coal mine employment, the administrative law judge must note the discrepancy, determine whether it is significant, and explain how it affects the credibility of the physician's opinion. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308-09 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). In this case, because the administrative law judge has not addressed whether the reliance on a thirteen-year coal mine employment history has any impact on the credibility of the opinions of Drs. Baker and Ranavaya, we vacate the administrative law judge's findings of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(b), and remand this case for further consideration of these opinions. *See Creech*, 841 F.2d at 709, 11 BLR at 2-91. On remand, the administrative law judge is instructed to consider whether the discrepancy between his own length of coal mine employment determination and the employment histories recorded by Drs. Baker and Ranavaya undermines the credibility of their opinions that claimant is totally disabled due to legal pneumoconiosis.

In the interest of judicial economy, we will also address employer's other challenges to the administrative law judge's weighing of the opinions of Drs. Ranavaya and Baker. With respect to Dr. Ranavaya's opinion, employer asserts that it was based solely on an inflated coal dust exposure history and a faulty diagnosis of clinical pneumoconiosis. Thus, employer maintains that the opinion cannot support an award of benefits, as it does not constitute either a well-reasoned diagnosis of legal pneumoconiosis or a well-reasoned conclusion that legal pneumoconiosis is a substantially contributing cause of claimant's respiratory disability. Employer's Brief at 11. We disagree.

In evaluating Dr. Ranavaya's opinion, the administrative law judge acknowledged that the physician did not effectively distinguish between clinical and legal pneumoconiosis in his report. Decision and Order at 23; Claimant's Exhibit 2. However,

as Dr. Ranavaya attributed claimant's disabling COPD to both smoking and coal dust exposure,[13] which meets the definition of legal pneumoconiosis, the administrative law judge reasonably concluded that the opinion was "sufficiently broadly based to encompass both clinical and legal pneumoconiosis within the meaning of the Act and the regulations." *Id.*; *see* 20 C.F.R. §718.201(a)(2); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). Because the administrative law judge found the weight of the x-ray evidence to be negative for pneumoconiosis, he properly discredited Dr. Ranavaya's diagnosis of clinical pneumoconiosis by x-ray, but permissibly found that this did not undermine the physician's diagnosis of legal pneumoconiosis. After determining that Dr. Ranavaya based his opinion on claimant's occupational and smoking histories, physical examination findings, and objective test results, the administrative law judge reasonably concluded that the opinion was documented, reasoned, and entitled to probative weight. Decision and Order at 23, 25, 29; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Thus, we reject employer's argument that Dr. Ranavaya's opinion cannot support an award of benefits.

With respect to Dr. Baker's opinion, employer asserts that the physician's deposition testimony reflects that he premised his diagnosis of legal pneumoconiosis on generalized assumptions and the speculative "possibility that some of [claimant's] condition could be due to his coal dust exposure."[14] Employer's Brief at 14, *citing* Employer's Exhibit 6 at 38. Employer argues that Dr. Baker's diagnosis was not made with a reasonable degree of medical certainty, since Dr. Baker admitted that it "would be difficult to say" whether there was some contribution to claimant's disabling impairment from his coal dust exposure, and that all of claimant's condition could be explained by his smoking history. Employer's Brief at 9-10, referencing Employer's Exhibit 6 at 19, 34, 38-41. Thus, employer maintains that Dr. Baker's opinion is too equivocal and

[13] Dr. Ranavaya opined that claimant's fifty pack-year smoking history and thirteen-year coal mine employment history were the two major risk factors for his totally disabling COPD. Claimant's Exhibit 2. Observing that thirteen years of occupational exposure to coal dust was a sufficient amount of time in which to contract pneumoconiosis, Dr. Ranavaya concluded that pneumoconiosis "significantly contributed to and substantially aggravated" claimant's disabling COPD. *Id.*

[14] Employer also points to Dr. Baker's statement in his report that claimant's total pulmonary disability "is due significantly to his cigarette smoking, but there has been some contribution from his coal dust exposure as well." Employer's Brief at 9, *citing* Director's Exhibit 21.

speculative to constitute a well-reasoned diagnosis of total disability due to legal pneumoconiosis.

Employer's arguments have some merit. In assessing the credibility of Dr. Baker's opinion, the administrative law judge failed to sufficiently address the less-than-certain language contained in Dr. Baker's deposition testimony, thereby failing to satisfy the requirements of the Administrative Procedure Act[15] that an administrative law judge address all relevant evidence, resolve the conflicts, and set forth the rationale underlying his findings. We note, however, that the use of less-than-certain language does not automatically disqualify a physician's opinion as equivocal. *Hobet Min., Inc. v. Terry*, 219 F. App'x 310, 313 (4th Cir. 2007), *citing Perry v. Mynu Coals, Inc*., 469 F.3d 360, 365-66, 23 BLR 2-374, 2-385-86 (4th Cir. 2006). Rather, Dr. Baker's deposition testimony must be considered in conjunction with his report, and the less-than-certain statements must be read in context to determine whether the opinion in its entirety is equivocal or was merely expressed in cautious medical language.

[15] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this 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