U.S. Department of Labor

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

BRB No. 18-0603 BLA

ROY J. MCKENZIE,	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITE ASH MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/30/2019
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

John Earl Hunt, Allen, Kentucky, for claimant.

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

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-05095) of Administrative Law Judge John P. Sellers, III rendered on a subsequent claim filed on November 4, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Because claimant did not establish at least fifteen years of coal mine employment,[2] he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant is entitled to benefits under 20 C.F.R. Part 718, the administrative law judge found he did not establish legal pneumoconiosis but did establish clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203. He also found claimant established a totally disabling respiratory or pulmonary impairment, but did not establish his total disability is due to pneumoconiosis and thus denied benefits. 20 C.F.R. §718.204(b)(2), (c).

On appeal, claimant argues the administrative law judge lacked the authority to hear and decide the case because he was not properly appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Claimant further contends the administrative law judge erred in finding the medical opinions do not establish legal pneumoconiosis and disability causation. He also contends he was not provided a complete

[1] This is claimant's second claim for benefits. The administrative law judge noted the district director was not able to obtain the record of claimant's March 5, 1979 claim and it was "safe to assume" that the record of that claim had been destroyed. Decision and Order at 2.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he has at least fifteen 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. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

pulmonary evaluation as required under the Act.[4] Employer/carrier (employer) responds in support of the denial of benefits, arguing claimant was provided with a complete pulmonary evaluation. It also contends the administrative law judge erred in finding clinical pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response arguing claimant forfeited his Appointments Clause challenge by failing to raise it before the administrative law judge. The Director concedes the Board should remand the case to the district director for further development of the medical evidence to provide claimant with a complete pulmonary evaluation. Employer has filed a reply reiterating its argument that claimant received a complete pulmonary evaluation.

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

Appointments Clause

Claimant urges the Board to vacate the administrative law judge's Decision and Order Denying Benefits and remand the case to be heard by a different constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Claimant's Brief at 24. We agree with the Director, however, that claimant forfeited his Appointments Clause[5] argument by failing to raise it when the case was before the administrative law judge. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established less than fifteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019) (published) (holding claimant's *Lucia* challenge is forfeited because she did not raise it before the administrative law judge).

Lucia was decided over two months before the administrative law judge issued his Decision and Order Denying Benefits, but claimant failed to object while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed claimant's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a new judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, claimant waited to raise the issue until after the administrative law judge issued an adverse decision. Because claimant has not raised any basis for excusing his forfeiture of the issue, we reject his argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Denial of Benefits

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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

We reject claimant's argument that the administrative law judge erred in finding he did not establish legal pneumoconiosis.[6] Claimant's Brief at 16-17. To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic lung disease or

[6] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Mettu diagnosed chronic bronchitis caused by a history of cigarette smoking. Director's Exhibit 19 at 5. He did not opine the lung disease was significantly related to, or substantially aggravated by, coal mine dust exposure. *Id.* Thus contrary to claimant's argument, the administrative law judge correctly found Dr. Mettu's opinion does not support claimant's burden of establishing legal pneumoconiosis.[7] 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 21; Claimant's Brief at 17.

Drs. Baker and Sikder diagnosed chronic obstructive pulmonary disease due to cigarette smoking and coal mine dust exposure. Claimant's Exhibits 10-12. The administrative law judge assigned their opinions diminished weight because he found they relied on an inflated history of coal mine employment and an inaccurate cigarette smoking history, and did not adequately explain their conclusions. Decision and Order at 22-23.

Claimant does not challenge the administrative law judge's findings that Drs. Baker and Sikder relied on an inaccurate cigarette smoking history when diagnosing legal pneumoconiosis.[8] Thus we affirm this credibility finding. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (holding the effect of an inaccurate smoking history on the credibility of a medical opinion is a determination for the administrative law judge to make); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-23.

Further, claimant generally argues the opinions of Drs. Baker and Sikder are well-reasoned and documented. Claimant's Brief at 16-17, 19-23. The Board must limit its

[7] Claimant notes his medical treatment records contain diagnoses of chronic obstructive pulmonary disease. Claimant's Brief at 16-17. Contrary to claimant's argument, because no doctor opined that this disease was significantly related to, or substantially aggravated by, coal mine dust exposure, his treatment records do not support his burden of establishing legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Claimant's Brief at 16-17.

[8] The administrative law judge noted Dr. Sikder "relied on a smoking history of 35 pack-years, whereas [the administrative law judge] found that [claimant] . . . had a smoking history approaching 63 pack-years." Decision and Order at 22. The administrative law judge also noted that Dr. Baker identified a "smoking history of 35 to 46 years, but did not indicate if this was meant to be 35 to 46 pack-years, total, or merely a statement of the duration of [claimant's] smoking." *Id.*

review to contentions of error that are specifically raised by the parties.[9] *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because claimant raises no specific challenge to these credibility findings, we affirm his findings that the opinions of Drs. Baker and Sikder are not well-reasoned.[10] Further, we affirm his finding that claimant failed to establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).[11]

Clinical Pneumoconiosis

We reject employer's argument that the administrative law judge erred in finding claimant established clinical pneumoconiosis[12] based on the x-ray evidence.[13] Employer's

[9] Claimant argues the administrative law judge erred in finding Drs. Baker and Sikder overestimated his coal mine employment history. Claimant's Brief at 16-17, 19-23. Because the administrative law judge provided other valid reasons for discrediting the opinions of Drs. Baker and Sikder, we need not address this argument. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Claimant asserts the administrative law judge should have credited Dr. Sikder's opinion because he was claimant's treating physician. Claimant's Brief at 21. Contrary to claimant's argument, an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, the opinions of treating physicians get the deference they deserve based on their power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002).

[11] Because claimant has the burden of proof to establish legal pneumoconiosis and we affirm the administrative law judge's discrediting of the opinions of Drs. Baker and Sikder, the only opinions supportive of that burden, we need not address the arguments regarding the weight the administrative law judge accorded the opinions of Drs. Rosenberg and Vuskovich as these doctors opined claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 16-17; Employer's Brief at 18-19.

[12] 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).

[13] Although not raised in a cross-appeal, employer's argument is properly before the Board, as the argument is supportive of the administrative law judge's decision denying

Brief at 16-17.

The administrative law judge considered ten interpretations of four x-rays taken on February 17, 2016, July 20, 2016, April 1, 2017, and September 13, 2017. 20 C.F.R. §718.202(a)(1); Decision and Order at 5, 17. He noted he may consider the radiological qualifications of the physicians who render x-ray interpretations, and correctly identified that all of the physicians who did so in this case are dually qualified as B readers and Board-certified radiologists. *Id*. Because Drs. Kendall, Crum, and Alexander read the February 17, 2016 x-ray as positive for pneumoconiosis while Drs. Seaman and Meyer read it as negative, he found this x-ray is positive for the disease based on a preponderance of the readings from the dually-qualified radiologists. Decision and Order at 17. He found the July 20, 2016 x-ray also positive for pneumoconiosis because Dr. Crum read it as positive for the disease and no physician read it as negative. *Id*. He found the April 1, 2017 and September 13, 2017 x-rays inconclusive because an equal number of dually-qualified radiologists read the respective films as positive and negative for pneumoconiosis. *Id*. Specifically, Dr. Alexander read the April 1, 2017 x-ray as positive for pneumoconiosis but Dr. Meyer read it as negative, and Dr. Kendall read the September 13, 2017 x-ray as positive for pneumoconiosis while Dr. Seaman read it as negative. *Id*.

Contrary to employer's argument, the administrative law judge performed a quantitative and qualitative analysis of the conflicting readings of the four x-rays, permissibly taking into consideration both the number of readings and the relative qualifications of the interpreting physicians. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). He permissibly found claimant established clinical pneumoconiosis based on the x-ray evidence because, taking into account the physicians' qualifications, two x-rays are positive and two x-rays are inconclusive. *See Woodward*, 991 F.2d at 321; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

Because it is unchallenged, we affirm the administrative law judge's finding crediting the medical opinion evidence that claimant has clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Skrack*, 6 BLR at 1-711; Decision and Order at 18-21.

The administrative law judge also considered the CT scan evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 18. He found it did not establish clinical pneumoconiosis because Dr. Meyer read an April 22, 2015 CT scan as negative for the disease. *Id*.; *see* Employer's Exhibit 11. Contrary to employer's argument, the

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benefits. 20 C.F.R §802.212(b); *see Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc).

administrative law judge weighed the CT scan evidence against the x-ray evidence. Decision and Order at 20-21. He noted that the CT scan was taken in April 2015, whereas the x-rays were taken in 2016 and 2017. *Id*. The administrative law judge permissibly assigned greater weight to the x-ray evidence that establishes clinical pneumoconiosis and diminished weight to the negative CT scan because pneumoconiosis is a progressive and irreversible disease and the x-rays were taken more recently. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward* 991 F.2d at 319-20; *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881 (6th Cir. 2012). Thus we affirm the administrative law judge's finding that claimant established clinical pneumoconiosis. 20 C.F.R. §718.202(a).

Disability Causation

Claimant next argues that the administrative law judge erred in finding he did not establish total disability due to pneumoconiosis. Claimant's Brief at 17-23. To establish that his total disability is due to pneumoconiosis, claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment 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); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599-601 (6th Cir. 2014). Because claimant established the existence of clinical pneumoconiosis but not legal pneumoconiosis, the relevant inquiry before the administrative law judge was whether claimant's clinical pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Contrary to claimant's argument, the administrative law judge correctly found that neither Dr. Baker nor Dr. Sikder opined that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability and thus are insufficient to establish claimant's burden of proof. *Groves*, 761 F.3d at 599-601; Decision and Order at 29; Claimant's Exhibits 10-12; Claimant's Brief at 22-24. We must, however, vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c). As discussed below, Dr. Mettu's failure to address this issue establishes that claimant did not receive a complete pulmonary evaluation.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994).

The Director concedes the Department of Labor (DOL) failed to satisfy its obligation because Dr. Mettu, who conducted the DOL-sponsored pulmonary evaluation, "failed to address the extent to which the [clinical] pneumoconiosis he diagnosed contributed to claimant's disabling pulmonary impairment."[14] Director's Brief at 10-11. Because Dr. Mettu's opinion does not address an essential element of entitlement, i.e., whether claimant is totally disabled due to clinical pneumoconiosis, the Director requests the case be remanded for Dr. Mettu to provide a supplemental report addressing the issue. *Id.* Based on these facts, and given the Director's concession that the DOL failed to provide claimant with a complete pulmonary evaluation as the Act requires, we grant the Director's request to remand this case.[15] 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-137-140 (2009) (en banc). Consequently, we vacate the administrative law judge's denial of benefits.

[14] As the administrative law judge noted, when asked to address the extent to which chronic bronchitis and clinical pneumoconiosis "contributed to [claimant's] pulmonary impairment, Dr. Mettu stated that [claimant's] pulmonary impairment was caused by his smoking history of 46 pack-years. As for his second diagnosis of clinical pneumoconiosis, Dr. Mettu wrote simply: 'He has clinical pneumoconiosis due to coal dust.'" Decision and Order at 29, *quoting* Director's Exhibit 19. Based on the foregoing, the administrative law judge found Dr. Mettu did not address whether claimant is totally disabled due to clinical pneumoconiosis. *Id.*

[15] We reject employer's contention that the Director waived the complete pulmonary evaluation issue by failing to argue it below. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); Employer's Reply Brief at 1-3.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the district director for further development of the evidence.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge