U.S. Department of Labor

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

BRB No. 15-0060 BLA

DENNY R. MARCUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 09/29/2015
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision on Reconsideration (2011-BLA-5277) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

944 (2012) (the Act). This case involves a subsequent claim filed on July 16, 2009.[1]

After crediting claimant with 14.45 years of coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2009 claim on the merits.[3] Although the administrative law judge found that the x-ray evidence did not establish the existence of clinical pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(1), she found that the medical opinion evidence established the existence of legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law

[1] Claimant's initial claim, filed on November 29, 2006, was denied by the district director for failure to establish any of the elements of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 12. 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).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012). Because claimant was credited with less than fifteen years of qualifying coal mine employment, claimant is not entitled to the Section 411(c)(4) presumption. Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all the elements of entitlement under 20 C.F.R. Part 718.

[4] "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).

[5] "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).

judge awarded benefits. By Order dated November 17, 2014, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[6]

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 Assocs., Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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).[7] In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of this affirmance, we also affirm the administrative law judge's determination that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309.

[7] Employer argues that the administrative law judge, in addressing whether the evidence established the existence of clinical pneumoconiosis, erred in her consideration of the x-ray and medical opinion evidence. Employer's Brief at 11-14. Because the administrative law judge found that the x-ray and medical opinion evidence did not support claimant's burden to establish the existence of clinical pneumoconiosis, a determination favorable to employer, we decline to address employer's contentions of error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 27.

considered the medical opinions of Drs. Forehand, Splan, Jarboe, and Fino. Dr. Forehand diagnosed legal pneumoconiosis, in the form of a disabling gas exchange impairment (arterial hypoxemia) due to coal mine dust exposure and cigarette smoking. Employer's Exhibit 9 at 15. Dr. Forehand additionally opined that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and cigarette smoking. *Id.* at 27. Dr. Splan also diagnosed legal pneumoconiosis, in the form of COPD due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 3. Drs. Jarboe and Fino, however, opined that claimant does not suffer from legal pneumoconiosis. Although Dr. Jarboe agreed that claimant suffers from a totally disabling gas exchange impairment, he attributed the impairment solely to granulomatous scarring in the lungs and cigarette smoking. Employer's Exhibit 2 at 29. Although Dr. Fino opined that claimant is disabled by a "significant oxygen transfer abnormality," he attributed claimant's impairment to granulomatous changes, cigarette smoking, and "blood clots to the lungs." Employer's Exhibit 4 at 18-19.

In weighing the conflicting evidence, the administrative law judge found that Dr. Forehand's opinion that claimant has legal pneumoconiosis, in the form of a disabling gas exchange abnormality due to coal mine dust exposure and cigarette smoking, was well reasoned. Decision and Order at 28-29. The administrative law judge found that Dr. Splan's diagnosis of legal pneumoconiosis was also well reasoned. *Id.* at 29. Conversely, the administrative law judge found that the opinions of Drs. Jarboe and Fino, that claimant does not suffer from legal pneumoconiosis, were not well reasoned because neither physician adequately explained why claimant's fourteen years of coal mine dust exposure did not contribute, along with other factors, to his disabling gas exchange impairment. *Id.* at 29-30. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in finding that Dr. Forehand's opinion was sufficient to establish the existence of legal pneumoconiosis. We disagree. In crediting Dr. Forehand's determination that claimant suffers from legal pneumoconiosis, the administrative law judge noted that Dr. Forehand "took relevant histories, conducted physical examinations, and performed objective tests." Decision and Order at 28. The administrative law judge specifically noted that Dr. Forehand "examined . . . [c]laimant three times, tested him four times, and reviewed other evidence in the record."[8] *Id.* at 30. The administrative law judge further addressed the basis for Dr. Forehand's diagnosis, stating that:

[8] The administrative law judge noted that Dr. Forehand provided deposition testimony on two occasions, August 3, 2010 and November 15, 2011. Decision and Order at 14, 17; Employer's Exhibits 5, 9.

> [Dr. Forehand] believed that the Claimant's disabling respiratory impairment was due at least in part to coal mine dust exposure. He did not believe that cigarette smoking was a primary cause of the Claimant's hypoxemia, given the non-qualifying results of pulmonary function testing. He did not believe that the hypoxemia was caused by the Claimant's heart disease because his heart was not enlarged. Dr. Forehand said that his opinion would not change if the x-ray were [sic] found to be negative for pneumoconiosis, since coal dust can cause impairment even absent a positive chest x-ray. Dr. Forehand's opinion is consistent with the evidence available to him.

Decision and Order at 28. The administrative law judge, therefore, found that Dr. Forehand's diagnosis of legal pneumoconiosis was "well documented and reasoned." *Id.* at 29.

Upon review of the administrative law judge's decision, we conclude that substantial evidence supports the administrative law judge's permissible determination that Dr. Forehand's opinion was reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Further, contrary to employer's contention, Dr. Forehand's opinion is sufficient to establish legal pneumoconiosis, as he opined that claimant's disabling gas exchange impairment is due in part to coal mine dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2002).

Employer also contends that the administrative law judge erred in relying on Dr. Splan's opinion to support a finding of legal pneumoconiosis. We disagree. The administrative law judge noted that Dr. Splan "took relevant histories, conducted a physical examination, and performed objective tests." Decision and Order at 29. Dr. Splan explained that he based his finding of legal pneumoconiosis (COPD due to coal mine dust exposure and cigarette smoking) on claimant's "work time exposure to coal dust, symptoms of dyspnea, chest x-ray findings, spirometry and blood gas reports." Claimant's Exhibit 3. The administrative law judge found that Dr. Splan's opinion was "supported by the evidence available to him," and was sufficient to support a diagnosis of legal pneumoconiosis. Decision and Order at 29. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Splan's opinion was reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 30.

Employer next argues that the administrative law judge erred in her consideration of the opinions of Drs. Jarboe and Fino. We disagree. Although employer accurately notes that Drs. Jarboe and Fino opined that other conditions (granulomatous changes,

cigarette smoking, and blood clots) could account for claimant's disabling gas exchange impairment, Employer's Brief at 18-21, the administrative law judge permissibly questioned their opinions because neither physician adequately explained why claimant's fourteen years of coal dust exposure did not contribute, along with these other factors, to his impairment. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Jarboe and Fino.[9] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 21-22. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[10]

[9] Because the administrative law judge provided a proper basis for according less weight to the opinions of Drs. Jarboe and Fino, *i.e.*, that they did not adequately explain why claimant's coal mine dust exposure did not contribute to his pulmonary impairment, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Employer generally asserts that the medical evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 11. Employer, however, alleges no specific error in regard to the administrative law judge's consideration of the evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order and Decision on Reconsideration awarding benefits are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge