U.S. Department of Labor

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

BRB No. 18-0452 BLA

ERNIE JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	DATE ISSUED: 09/23/2019
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05547) of Administrative Law Judge Steven D. Bell rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 26, 2015.[1]

Based on his finding that claimant had 10.66 years of coal mine employment,[2] the administrative law judge concluded claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He also found no evidence of complicated pneumoconiosis, precluding invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant is entitled to benefits without the presumptions, the administrative law judge found the new evidence established total disability and, therefore, a change in an applicable condition of entitlement.[4] He further found, based on all the evidence, claimant

[1] Claimant's initial claim was denied by the Bureau of Disability Insurance on September 18, 1973 on the basis that he was not totally disabled because he was still employed. Director's Exhibit 1. A subsequent claim, filed on February 3, 2000, was withdrawn and administratively closed. Decision and Order at 2 & nn.6-8; Director's Exhibits 1, 50, 18. Claimant did not take any further action before filing his current claim. Director's Exhibit 3.

[2] In rendering this finding, the administrative law judge determined claimant worked as a field representative and safety inspector for the United Mine Workers of America (UMWA) from 1973 through 1986. Noting the United States Court of Appeals for the Sixth Circuit has held federal mine inspectors are not miners under the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act), and finding claimant's work for the UMWA analogous, the administrative law judge declined to credit claimant with this period of employment. Decision and Order at 7-8, *citing Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014).

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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.

[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.

established legal, but not clinical, pneumoconiosis and that his total disability is due to legal pneumoconiosis.[5] Consequently, the administrative law judge awarded benefits.

On appeal, employer asserts the administrative law judge erred in finding claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis. Claimant responds in support of the 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. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

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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). Because claimant's initial claim was denied because he did not establish that he was totally disabled, he could meet his burden under 20 C.F.R. §725.309(c) by establishing that element of entitlement.

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

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of a totally disabling respiratory impairment and, therefore, demonstrated a change in an applicable condition of entitlement. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 11-12.

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

Legal Pneumoconiosis

In order to establish legal pneumoconiosis, claimant must prove he has "a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Employer contends the administrative law judge erred in finding claimant met this standard based on the medical opinion evidence.[8] *See* 20 C.F.R. §718.202(a)(4); Employer's Brief at 11-19. We disagree.

The administrative law judge considered the opinions of Drs. Green, Raj, Dahhan, and Fino. Decision and Order at 24-27; Director's Exhibit 13; Claimant's Exhibits 1, 4; Employer's Exhibits 10-13. Dr. Green diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and smoking. Director's Exhibit 13; Claimant's Exhibit 1. Dr. Raj similarly diagnosed legal pneumoconiosis due to a pulmonary impairment in which "coal/rock dust exposure has [a] substantial significant role . . . ." Claimant's Exhibit 4. In contrast, Drs. Dahhan and Fino opined claimant does not have legal pneumoconiosis but has a respiratory impairment due to causes other than coal mine dust. Employer's Exhibits 10-13.

The administrative law judge credited Drs. Green and Raj over Drs. Dahhan and Fino because he found their opinions better reasoned and documented. Decision and Order at 24-27. He therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 27.

We reject employer's assertion the administrative law judge erred in discrediting the opinion of Dr. Dahhan. *See* Decision and Order at 26-27; Employer's Brief at 13-15. Dr. Dahhan opined claimant's mild respiratory impairment is due to coronary artery

[8] The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis through any of the available methods at 20 C.F.R. §§718.107, 718.202(a)(1)-(4). Decision and Order at 22-24.

disease, bypass surgery, obesity, and smoking.[9] Employer's Exhibits 10, 12. The administrative law judge permissibly discredited his opinion as conclusory because he did not adequately explain why claimant's coal mine dust exposure did not also substantially contribute to his impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 26. Thus, we affirm the administrative law judge's decision to give little weight to Dr. Dahhan's opinion.

Similarly, we reject employer's contention that the administrative law judge erred in finding Dr. Fino's opinion entitled to little weight. *See* Decision and Order at 27; Employer's Brief at 16-17. Dr. Fino diagnosed claimant with asthma based in part on the variable obstruction seen on his objective studies. Employer's Exhibits 11; 13 at 10. Dr. Fino acknowledged coal mine dust can cause obstructive lung disease, but stated he "would not expect coal mine dust-induced lung disease to improve with bronchodilators or improve over time because it's a permanent condition." Employer's Exhibit 13 at 10. The administrative law judge permissibly found Dr. Fino's opinion unpersuasive because both the August 24, 2016 pulmonary function study he administered and Dr. Ammisetty's December 5, 2016 study demonstrated lower values after the administration of bronchodilators, and claimant's overall lung function values have been decreasing, not improving, since Dr. Fino's August 24, 2016 examination.[10] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 26-27. Noting Dr. Fino's assertion that asthma can sometimes be unresponsive to bronchodilators,[11] the administrative law judge further permissibly discredited his opinion because he did not adequately explain why coal dust exposure did not cause claimant's

[9] Dr. Dahhan also noted that claimant has hyperlipidemia, prostatic cancer, and anxiety, which he stated are conditions of the general public and are not due to coal dust exposure. Employer's Exhibit 10.

[10] Employer challenges this conclusion, noting Dr. Ammisetty's December 5, 2016 pulmonary function study produced "completely non-qualifying results." Employer's Brief at 16; Claimant's Exhibit 2. Consistent with the administrative law judge's observation, however, the December 5, 2016 non-qualifying study and Dr. Raj's January 13, 2017 qualifying study both demonstrated predominantly lower numerical values than Dr. Fino's August 24, 2016 study. Decision and Order at 12; *see* Claimant's Exhibits 2, 4; Employer's Exhibit 11.

[11] Dr. Fino testified asthma "is variable. . . . There will be times when it doesn't improve with bronchodilators and times when it does." Employer's Exhibit 13 at 13.

asthma beyond his assertion that asthma is a disease of the general public.[12] *Napier*, 301 F.3d at 713-14; *Groves*, 277 F.3d at 836; Decision and Order at 27. We affirm these determinations as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08 (6th Cir. 2005).

There is also no merit to employer's assertion that the administrative law judge erred in crediting Dr. Green's diagnosis of legal pneumoconiosis because he did not explicitly state claimant's respiratory impairment was related to coal dust exposure. Employer's Brief at 17-18. Contrary to employer's contention, Dr. Green specifically opined claimant's "history of exposure to respirable coal and rock dust is a significant contributing and aggravating factor for the diagnosis of coal worker[s'] pneumoconiosis and chronic obstructive pulmonary disease." Director's Exhibit 13. As employer has not raised any other issues with the administrative law judge's weighing of Dr. Green's opinion, we affirm his finding that it is reasoned and documented and supports the conclusion that claimant has legal pneumoconiosis. *See Martin*, 400 F.3d at 306-08; *Napier*, 301 F.3d at 713-14; Decision and Order at 25, 27.

We agree with employer, however, that in crediting Dr. Raj's opinion on legal pneumoconiosis the administrative law judge did not properly account for the fact that Dr. Raj relied on a twenty-three year coal mine employment history, rather than the 10.66 years he found after determining claimant's work with the United Mine Workers of America (UMWA) was not coal mine employment. Decision and Order at 16-17, 26; Claimant's Exhibit 4. In light of this discrepancy, the administrative law judge did not adequately explain his finding that Dr. Raj "relied on an accurate understanding of [c]laimant's dust exposure." Decision and Order at 26. Moreover, the Board has held that work found not to be coal mine employment cannot be used to establish that a claimant has legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a); *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016).

Any error in the administrative law judge's crediting of Dr. Raj's opinion is harmless, however, due to our affirmance of the administrative law judge's findings that Dr. Green provided a reasoned diagnosis of legal pneumoconiosis and there are no credible contrary opinions on this issue. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We affirm,

[12] The preamble to the 2001 revised regulations recognizes that "the term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, *and asthma*," and that COPD may be caused by coal mine dust exposure. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added).

therefore, the administrative law judge's determination that claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a).

Total Disability Causation

Employer also asserts the administrative law judge failed to adequately address whether the evidence establishes claimant's totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); Employer's Brief at 19-20. Employer's contention lacks merit.

The administrative law judge articulated the proper standard for establishing disability causation, i.e., claimant must prove that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); Decision and Order at 30. Pneumoconiosis is a "substantially contributing cause" of a miner's total disability if it had "a material adverse effect on [his] respiratory or pulmonary condition," or if it "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] 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 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012).

Moreover, the administrative law judge fully considered and weighed the medical opinion evidence relevant to the cause of claimant's respiratory disability. Contrary to employer's contention,[13] the administrative law judge rationally discredited the opinions of Drs. Dahhan and Fino because they did not diagnose legal pneumoconiosis.[14] *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *vacated sub nom*., *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan*

[13] We reject employer's assertion that remand is required because the administrative law judge discussed case law from the United States Court of Appeals for the Fourth Circuit in discrediting the opinions of Drs. Dahhan and Fino. Employer's Brief at 19. As the administrative law judge recognized, the Sixth Circuit has similarly held an administrative law judge may accord less weight to physicians who opined that a claimant is not totally disabled due to legal pneumoconiosis because they did not diagnose legal pneumoconiosis which the administrative law judge's found was established. Decision and Order at 30 n.205, *citing Adams v. Director, Office of Workers Compensation Programs,* 886 F.2d 818, 826 (6th Cir. 1989).

[14] The administrative law judge further found neither Dr. Dahhan nor Dr. Fino offered an opinion on disability causation independent of their belief that the miner does not have legal pneumoconiosis. Decision and Order at 31.

v. Consolidated Coal Co., 46 F.3d 15 (6th Cir. 1995); *Adams v. Director, OWCP*, 896 F.2d 818, 826 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 30-31.

We also reject employer's assertion the administrative law judge erred in crediting Dr. Green's opinion. Employer's Brief at 19. As set forth above, Dr. Green diagnosed legal pneumoconiosis in the form of COPD significantly contributed to and aggravated by coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibit 1. He further opined claimant "is totally disabled from a pulmonary capacity standpoint . . . on the basis of his pulmonary function studies demonstrating *severe chronic airflow obstruction* . . . ." Director's Exhibit 13 (emphasis added); *see also* Claimant's Exhibit 1. The administrative law judge reasonably inferred these statements, taken together, support a finding that Dr. Green considered claimant's COPD/legal pneumoconiosis to be a substantially contributing cause of his disability.[15] *See Burns*, 855 F.2d at 501; Decision and Order at 31.

Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that the credible medical opinions establish pneumoconiosis is a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c); *see Martin*, 400 F.3d at 305; Decision and Order at 31.

[15] The administrative law judge also credited Dr. Raj's opinion as supporting total disability due to legal pneumoconiosis. Decision and Order at 31. As we have identified error in the administrative law judge's crediting of Dr. Raj's diagnosis of legal pneumoconiosis, his finding that Dr. Raj's opinion supports disability causation cannot be affirmed. But again, remand is not required given our affirmance of the administrative law judge's findings that Dr. Green's opinion supports claimant's burden at disability causation and there are no credible contrary opinions on this issue. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge