U.S. Department of Labor

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

BRB No. 18-0478 BLA

MARTY W. KIBLINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 09/16/2019
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, 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-05533) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed on March 23, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 9.91 years of coal mine employment[1] and found he is totally disabled due to legal pneumoconiosis.[2] 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). She therefore awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.[3]

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.[4] 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 he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability 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*

[1] Because claimant established fewer than fifteen years of coal mine employment, he did not 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); 20 C.F.R. §718.305.

[2] 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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. *Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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

To prove legal pneumoconiosis, claimant must establish that 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). The administrative law judge considered five medical opinions, each of which diagnosed claimant with chronic obstructive pulmonary disease (COPD). Drs. Everhart, Green, and Raj attributed claimant's COPD to smoking and coal mine dust exposure, while Drs. Castle and Zaldivar related it solely to smoking. Director's Exhibit 14; Claimant's Exhibits 1, 5; Employer's Exhibits 1, 6-8. The administrative law judge found that claimant established legal pneumoconiosis based on Dr. Green's opinion and rejected the contrary opinions of Drs. Zaldivar and Castle as not well-reasoned.[5] Decision and Order at 25-29; *see* 20 C.F.R. §718.202(a)(4).

Initially, we reject employer's assertion that Dr. Green's opinion does not satisfy the definition of legal pneumoconiosis. Employer's Brief at 8. Dr. Green specifically opined that the etiologies of claimant's "severe ventilatory insufficiency" and "severe hypoxemia" are "multifactorial with a significant contribution" from claimant's "13 year occupational history of exposure to respirable coal and rock dust." Claimant's Exhibit 1 at 3-4. Because Dr. Green diagnosed a chronic lung disease significantly related to coal mine dust exposure, his opinion supports a finding of legal pneumoconiosis. 20 C.F.R. §718.201(b).

Employer next contends the administrative law judge failed to properly address whether Dr. Green's diagnosis of legal pneumoconiosis was undermined by his erroneous diagnosis of clinical pneumoconiosis.[6] Employer's Brief at 8. Contrary to employer's

[5] The administrative law judge found the opinions of Drs. Everhart and Raj diagnosing legal pneumoconiosis not well-reasoned and gave them "little weight." Decision and Order at 29.

[6] 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). The administrative law judge found that claimant did not establish clinical pneumoconiosis. Decision and Order at 29.

contention, Dr. Green diagnosed two distinct respiratory diseases. Claimant's Exhibit 1. He opined that the radiographic findings of small opacities supported a "clinical diagnosis of coal worker's pneumoconiosis" and he separately diagnosed COPD based on the pulmonary function testing, which showed "a severe degree of chronic airflow obstruction." *Id*. at 2-3. The administrative law judge had discretion to credit Dr. Green's opinion relating the cause of claimant's COPD to cigarette smoke and coal mine dust exposure, without regard to his findings on clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

We also reject employer's assertion the administrative law judge erred in finding Dr. Green's opinion reasoned and documented. Employer's Brief at 12-14. She permissibly relied on his opinion because she found it based on the totality of information from his examination, including relevant work and social histories, claimant's symptoms, physical findings, and the results of objective tests.[7] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Hicks*, 138 F.3d at 532 n.9; Decision and Order at 17-18, 25-26. Thus, we affirm the administrative law judge's determination that Dr. Green's opinion is sufficiently credible to establish legal pneumoconiosis and satisfy claimant's burden of proof. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 26.

We further reject employer's assertion that the administrative law judge selectively analyzed Dr. Castle's opinion. Employer's Brief at 14. Dr. Castle excluded coal dust exposure as a causative factor for claimant's COPD based, in part, on his belief that claimant smoked cigarettes at a higher rate than the administrative law judge determined. Dr. Castle relied on a smoking history "probably in excess of 80 pack-years," while the

[7] The administrative law judge stated that Dr. Green "generally" diagnosed claimant with coal worker's pneumoconiosis and chronic obstructive pulmonary disease (COPD) with a "significant contribution" from coal mine dust exposure. Decision and Order at 26. She found "his opinion that claimant has legal pneumoconiosis" to be well-reasoned and well-documented because he "rationally connected [his] findings" on causation of claimant's respiratory diseases "to accurate coal mine dust and smoking exposure histories." *Id*. Contrary to employer's assertion, although the administrative law judge did not indicate what she meant by the term "generally," it is not necessary to remand this case for additional explanation. She accurately characterized Dr. Green as diagnosing legal pneumoconiosis and adequately explained why she found his opinion credible. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

administrative law judge found claimant had a 40 pack-year smoking history.[8] Employer's Exhibit 8 at 9. The administrative law judge permissibly rejected Dr. Castle's opinion because he relied on a smoking history "almost twice as great as the preponderant smoking history of record."[9] Decision and Order at 26-27; *see Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (The effect of an inaccurate smoking history on the credibility of a medical opinion is for the administrative law judge to determine.).

We also affirm the administrative law judge's finding that Dr. Zaldivar's opinion is not adequately reasoned. Decision and Order at 27-28. Dr. Zaldivar relied, in part, on the absence of radiographic evidence of coal dust deposits in claimant's lungs as a basis for excluding coal mine dust exposure as a causative factor for claimant's COPD/emphysema. Employer's Exhibit 12 at 11-12, 22-23. The administrative law judge permissibly found his rationale inconsistent with the Department of Labor's position that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); 20 C.F.R. §718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-312 (4th Cir. 2012); Decision and Order at 22. Further, she permissibly rejected Dr. Zaldivar's opinion on legal pneumoconiosis because he failed to adequately explain why coal mine dust exposure was not an "additive" factor, along with smoking, in causing or aggravating claimant's COPD.[10] *See* 65 Fed. Reg. at 79,940; *Westmoreland Coal Co. v. Stallard*, 876

[8] The administrative law judge permissibly relied on claimant's "credible testimony" and his statements to various physicians in finding he smoked for approximately 40 pack-years. Decision and Order at 5; *see Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803-04 (4th Cir. 1998).

[9] Employer contends Dr. Castle's opinion "is predicated upon a totality of clinical factors and not just [claimant's] smoking history." Employer's Brief at 17. The administrative law judge rationally found, however, that Dr. Castle specifically relied on an inflated smoking history to explain why he believed claimant's "physiologic" findings were consistent with smoking and not coal mine dust exposure. Decision and Order at 26. Because the administrative law judge gave a permissible reason for discrediting Dr. Castle's opinion on legal pneumoconiosis, we need not remand this case for the administrative law judge to address any additional reasons given by Dr. Castle for his diagnoses. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] The administrative law judge noted that while Dr. Zaldivar "relied on an accurate smoking history, he also considered claimant's 'lifelong' exposure to tobacco smoke in the form of second-hand smoke during his childhood." Decision and Order at 28, *quoting*

F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 27-28.

As the trier of fact, the administrative law judge is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). We consider employer's arguments with respect to Drs. Green, Castle, and Zaldivar to be a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding that claimant established legal pneumoconiosis based on Dr. Green's opinion, 20 C.F.R. §718.202(a)(4), and on consideration of the evidence as a whole, 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 209.

Total Disability Causation

Employer argues that the administrative law judge erred in finding claimant's legal pneumoconiosis a substantially contributing cause of his total respiratory disability. 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted the opinions of Drs. Castle and Zaldivar on the issue of disability causation because neither physician diagnosed legal pneumoconiosis, contrary to her finding that claimant established the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 38. Having found Dr. Green's reasoned opinion established that claimant's *disabling* COPD is legal pneumoconiosis, she rationally found his opinion also established that claimant's respiratory disability is due to legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 27. Thus, we affirm the administrative law judge's determination that claimant established disability causation based on Dr. Green's opinion. *See* 20 C.F.R. §718.204(c).

Employer's Exhibit 1. The administrative law judge permissibly found this aspect of Dr. Zaldivar's opinion to be speculative because, although there is evidence claimant's father smoked, "the evidence fails to demonstrate the degree to which [c]laimant was exposed to secondhand smoke" and thus does not support a finding of "lifelong tobacco exposure [that] was greater than the proven 40-pack year smoking history." Decision and Order at 28; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

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