U.S. Department of Labor

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

BRB No. 19-0543 BLA

PAUL H. BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAILEY MINING COMPANY	)	DATE ISSUED: 10/21/2020
	)	
and	)	
	)	
OLD REPUBLIC 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 on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, District of Columbia, for Employer/Carrier.

Jeffrey S. Goldberg (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry W. Price's Decision and Order on Remand (2016-BLA-05252) awarding benefits rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim filed on May 27, 2014.[1]

In his initial Decision and Order Denying Benefits, the administrative law judge credited Claimant with fourteen years of coal mine employment and thus found he could 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)(2018).[2] Considering whether Claimant established entitlement to benefits without benefit of this presumption,[3] the administrative law judge found the new evidence did not establish pneumoconiosis, and therefore Claimant did not establish a change in an applicable condition of entitlement. He denied benefits accordingly.[4]

[1] Claimant previously filed a claim on May 16, 1988. Director's Exhibit 1 at 1024. Administrative Law Judge Charles W. Campbell denied that claim because Claimant did not establish pneumoconiosis. *Id*. at 4. Claimant took no further action until filing the current claim on May 27, 2014. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge found the Section 411(c)(3) presumption inapplicable. *See* 20 C.F.R. §718.304; Decision and Order at 9.

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must deny the subsequent claim unless he 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. §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.

Pursuant to Claimant's appeal, the Benefits Review Board affirmed the administrative law judge's findings that he had fourteen years of coal mine employment and that the new evidence did not establish clinical pneumoconiosis. The Board vacated, however, his finding the opinions of Drs. Forehand and Bush did not establish legal pneumoconiosis[5] or a change in the applicable condition of entitlement. Thus, the Board vacated the denial of benefits and remanded the case to the administrative law judge with instructions to reweigh the medical opinion evidence and determine whether Claimant established legal pneumoconiosis. *Bailey v. Bailey Mining Co.*, BRB No. 18-0113 BLA (Feb. 28, 2019) (unpub.).

On remand, the administrative law judge found Claimant established legal pneumoconiosis and, thus, a change in an applicable condition of entitlement. He further determined Claimant established total respiratory or pulmonary disability and that his total disability is due to legal pneumoconiosis, and awarded benefits accordingly.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. Employer also contends the administrative law judge erred in precluding it from conducting discovery on the preamble to the 2001 regulatory revisions and in relying on it to weigh the medical opinion evidence. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, urging the Board to reject Employer's arguments concerning the preamble because, *inter alia*, it waived any objections. Employer filed a reply brief arguing it was not required to request

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§725.309(c)(3). Because Claimant's prior claim was denied for failure to establish pneumoconiosis, he was required to establish this element in order for the subsequent claim to be considered on the merits. Director's Exhibit 1.

[5] The Board agreed with Claimant that the administrative law judge did not adequately explain his determination that the opinions of Drs. Forehand and Baker were based on generalities. *Bailey v. Bailey Mining Co.*, BRB 18-0113 BLA, slip op. at 7-8 (Feb. 28, 2019). The Board further held, "contrary to the administrative law judge's characterization, while Dr. Forehand cited medical literature to support his opinion, he also explained his diagnosis of legal pneumoconiosis in relation to claimant's specific history of exposure to coal mine dust." *Id*. at 9, *citing* Director's Exhibit 10 at 18-19.

discovery on the preamble, and reiterating its allegation that the administrative law judge was not permitted to rely on the preamble.[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).

Entitlement - 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th

[6] We affirm as unchallenged on appeal the administrative law judge's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 45. The administrative law judge applied case law from the United States Court of Appeals for the Fourth Circuit in his Decision and Order but Employer does not allege any resulting error and, as discussed *infra*, the administrative law judge's findings are nevertheless rational and supported by substantial evidence.

Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The administrative law judge considered whether the opinions of Drs. Forehand and Baker satisfied Claimant's burden.[8] Dr. Forehand diagnosed chronic obstructive pulmonary disease (COPD) based on Claimant's shortness of breath and the results of a pulmonary function study showing an obstructive respiratory impairment. Director's Exhibit 10 at 18. He noted that "because of the severity of [C]laimant's obstructive disease, the precise extent to which cigarette smoking and the occupational exposure to coal mine dust contributed to [C]laimant's respiratory impairment cannot be determined." *Id*. at 19. He explained, however, there was a substantial contribution made by Claimant's "overexposure to hazardous silica" as a roof bolter, cutting machine operator, scoop operator, and belt man. *Id*. at 18. He further explained that Claimant's "exposure to silica and coal dust put him at extremely high probability of developing obstructive lung disease and coal workers' pneumoconiosis." *Id.* Additionally, he noted that the effects of smoking and coal dust exposure are additive because "cigarette smoke interferes with the clearance of dust particles from the terminal airways." *Id.*

Dr. Baker diagnosed COPD with a severe obstructive ventilatory defect based on Claimant's pulmonary function studies, and chronic bronchitis based on his history and symptom complex. Director's Exhibit 17 at 6, 21; Claimant's Exhibit 16. He opined that Claimant's COPD and chronic bronchitis are due to a combination of his coal dust exposure and smoking, and noted their effects would be additive in causing his chronic bronchitis. *Id.* He stated that while Claimant's cigarette smoking greatly exceeds his years spent in the mines and may be the primary cause of his obstructive impairment, he felt coal dust contributed at least in part and "[o]n this basis, his condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment and represents legal pneumoconiosis." *Id*. The administrative law judge credited the opinions of Drs. Forehand and Baker as well-reasoned and consistent with the preamble to the 2001 regulatory revisions and determined they established Claimant has legal pneumoconiosis. Decision and Order at 7.

Employer asserts the administrative law judge erred in relying on the preamble when weighing the opinions of Drs. Forehand and Baker. Employer's Brief at 19-22; Employer's Reply Brief at 2. Employer maintains that by "announcing his decision to rely on the [p]reamble" in his Decision and Order on remand, the administrative law judge

[8] We affirm, as unchallenged on appeal, the administrative law judge's discrediting of the medical opinions of Drs. Fino and Vuskovich attributing Claimant's respiratory impairment solely to smoking. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6-7.

deprived Employer of the opportunity to conduct "any discovery on it." Employer's Brief at 20. We decline to address this argument. In his initial Decision and Order, the administrative law judge noted Dr. Fino's own references to the preamble and found certain aspects of his opinion "problematic" as they conflicted with positions the Department of Labor (DOL) expressed in the preamble. 2017 Decision and Order at 14-15, 18, 28-29; *see also Bailey*, 18-0113 BLA, slip op. at 7. Employer did not raise the issue of discovery when that decision was before the Board previously, when the case was remanded, or at any time prior to this appeal. By failing to raise its challenge to the administrative law judge's alleged failure to allow it to conduct discovery on the preamble at the earliest opportunity, Employer forfeited it.[9] *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeiture as it serves the "obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they are previously aware"); *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003).

We reject Employer's additional allegations that by referring to the preamble when crediting the opinions of Drs. Forehand and Baker, the administrative law judge "added evidence to the record" and erroneously treated the preamble, written by the DOL's lawyers, as a scientific document. Employer's Brief at 21. The Sixth Circuit and the Board have held that evaluating expert opinions in conjunction with the DOL's discussion of the prevailing medical science contained in the preamble is a valid part of the administrative law judge's deliberative process. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011).

Employer next argues the administrative law judge erred in crediting the opinions of Drs. Forehand and Baker, in part, because he did not require them to "rule in" Claimant's coal mine dust exposure as a cause of his obstructive lung disease, and applied a presumption of disease causation.[10] Employer's Brief at 12-17. We disagree. The

[9] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S.Ct. 13, 17 n.1 (2017), *quoting United States v. Olano*, 507 U.S. 725, 733 (1993).

[10] Employer argues the administrative law judge erred in relying on *Cornett* in weighing the opinions of Drs. Forehand and Baker. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Employer's Brief at 18. Employer's argument is without foundation as the administrative law judge made no reference to *Cornett* in his discussion of either physician's opinion. Decision and Order at 5-8.

administrative law judge correctly recognized that a claimant seeking to establish legal pneumoconiosis must prove his pulmonary impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 3. He further accurately stated that "there is no presumption that obstructive lung disease is caused by exposure to coal dust; rather, a physician must establish that connection through a reasoned medical opinion," and "each miner bears the burden of proving that *his* obstructive lung disease did in fact arise out of his coal mine employment." Decision and Order at 6, *quoting National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002); *see* 65 Fed. Reg. 79,920, 79,938; 20 C.F.R. §718.202(a)(4).

As for the specific weighing of the medical opinion evidence, the determination of whether a medical opinion is reasoned and documented is committed to the discretion of the administrative law judge and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). In this case, the administrative law judge permissibly found the opinions of Drs. Forehand and Baker well-reasoned because they considered the causal effects of both Claimant's coal mine dust exposure and smoking history, and acknowledged their additive effects.[11] Decision and Order at 5-8; Employer's Brief at 17-19. The DOL has recognized the effects of smoking and coal mine dust exposure can be additive, and the administrative law judge permissibly considered the opinions of Drs. Forehand and Baker as consistent with that position. *See* 65 Fed. Reg. at 79,940; *Adams*, 694 F.3d at 801-802; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 7-8. Further, he permissibly found the physicians adequately explained how Claimant's respiratory or pulmonary impairment is caused by both coal mine dust exposure and smoking. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 5-8; Director's Exhibits 10; 17 at 6, 21; Claimant's Exhibit 16.

We therefore affirm the administrative law judge's determination that the medical opinions of Drs. Forehand and Baker establish Claimant suffers from legal pneumoconiosis

[11] Employer argues that Dr. Baker's opinion "relies only on the risk of causation or general causation in finding that because coal dust exposure can cause obstruction, [Claimant's] obstruction 'can be' related to his coal dust exposure." Employer's Brief at 15. We reject Employer's contention because it ignores the rest of Dr. Baker's statements, summarized above. Director's Exhibit 17 at 6.

as rational and supported by substantial evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 8.

Disability Causation

The administrative law judge next found Claimant established he is totally disabled due to legal pneumoconiosis. Decision and Order at 12. Employer argues the administrative law judge erred in finding Claimant satisfied his burden to "rule in" legal pneumoconiosis as a substantial contributing cause of his total disability. Employers Brief at 12. We disagree.

He articulated the proper standard under the regulations for establishing disability causation, i.e., Claimant must establish that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 11. He further recognized pneumoconiosis is a "substantially contributing cause" of disability if it: (i) Has a material adverse effect on the Miner's respiratory or pulmonary condition; or (ii) Materially 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); Decision and Order at 11.

The administrative law judge considered the opinions of Drs. Forehand, Baker, Fino and Vuskovich, and determined they all agreed Claimant's COPD renders him totally disabled. Decision and Order at 12; Director's Exhibits 10; 15; 16; 17; Claimant's Exhibit 16; Employer's Exhibit 4. Because the administrative law judge found Claimant's COPD constitutes legal pneumoconiosis, he found Claimant's disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 12. Because we have affirmed the administrative law judge's finding Claimant's COPD is legal pneumoconiosis and Employer raises no other specific arguments on disability causation, we further affirm his determination that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 12. Having affirmed the administrative law judge's determination that Claimant established the requisite elements of entitlement, we further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge