U.S. Department of Labor

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

BRB No. 17-0355 BLA

LAVODUS S. MARCUM o/b/o the Estate of DENNIS MARCUM	)	
Claimant-Respondent	)	
v.	)	
ABBS RESOURCES, INCORPORATED	)	DATE ISSUED: 04/04/2018
Employer	)	
and	)	
WEST VIRGINIA COAL WORKERS' COMPENSATION PROGRAMS	)	
Carrier-Petitioner	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Andrea Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Decision and Order Awarding Benefits (2016-BLA-5069) of Administrative Law Judge Drew A. Swank, rendered on a miner's subsequent claim[1] filed on July 28, 2014,[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with fourteen years of coal mine employment[3] and found that the newly submitted evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309.[4] The administrative law judge further found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

[1] The miner died on January 11, 2017, and the miner's widow, Lavodus S. Marcum, hereinafter claimant, is pursuing the claim on behalf of the miner's estate. Decision and Order at 1 n.1.

[2] The miner filed five prior claims, each of which was denied. Director's Exhibits 1-5. The miner's last claim was denied on December 2, 2005, because the evidence was insufficient to establish total respiratory or pulmonary disability. Director's Exhibit 5.

[3] Because the miner had less than fifteen years of coal mine employment, the administrative law judge correctly found that claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; Decision and Order at 13.

[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. §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). In this case, because the prior claim was denied for failure to establish total disability, claimant had to establish this element in order to obtain a review of the miner's claim on the merits. Director's Exhibit 5.

§§718.202(a)(1), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, carrier challenges the administrative law judge's findings relevant to the existence of pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Carrier has filed a reply brief reiterating its contentions.[5]

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.[6] 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 demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element of entitlement precludes an award of benefits. *See 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).

The existence of pneumoconiosis may be established by: x-ray evidence; autopsy or biopsy evidence; operation of one the presumptions described in 20 C.F.R. §§718.304-306; or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven interpretations of two x-rays dated October 1, 2014, and June 24, 2015. Drs. Alexander and Miller, both dually-qualified as Board-certified radiologists and B readers, read the October 1, 2014 x-ray as positive for pneumoconiosis while Dr. Seaman, also dually-qualified, read it as negative for pneumoconiosis. Director's Exhibits 17, 29, 35. Drs. Smith and Miller, both dually-qualified radiologists, read the June 24, 2015 x-ray as positive for pneumoconiosis, while

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fourteen years of coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Because the miner's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

Dr. Scott, also dually-qualified, and Dr. Zaldivar, a B reader, read the x-ray as negative for pneumoconiosis. Director's Exhibits 34, 37; Claimant's Exhibit 1; Employer's Exhibit 6.

The administrative law judge initially noted that an interpretation by a dually-qualified radiologist may be given greater weight than an interpretation by a B-reader. Decision and Order at 8. The administrative law judge summarized the radiological credentials of each of the interpreting physicians, including any relevant professorships. *Id*. at 9. He observed that four of the seven readings were positive for pneumoconiosis and three were negative. *Id*. The administrative law judge concluded: "based upon the totality of the evidence, including the qualifications of the readers and the fact that a majority of the X-ray readings were positive . . . [c]laimant has proven by a preponderance of the evidence that he has simple coal workers' pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(1). *Id*.

Employer generally contends that the administrative law judge did not adequately consider the relevant professorships. Contrary to employer's contention, although the administrative law judge may give greater weight to the interpretations of a physician based upon his academic qualifications as a professor of radiology, an administrative law judge is not required to do so. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). We affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis[7] pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.[8] *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

[7] 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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] Employer notes that Dr. Willis commented on the ILO form, "consider [IPF (idiopathic pulmonary fibrosis)]" in reading the October 1, 2014 x-ray. Director's Exhibit

After determining that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge made no further findings pursuant to 20 C.F.R. §718.202(a)(2)-(4). Carrier correctly argues that the administrative law judge erred in finding clinical pneumoconiosis established based solely on x-ray evidence without considering all of the relevant evidence. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises has held that all relevant evidence must be considered together, rather than merely within the discrete subsections of 20 C.F.R. §718.202(a)(1)-(4). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000) In this case, in addition to the x-ray evidence, the record contains CT scans, biopsy evidence, medical opinions by Drs. Rasmussen, Cohen, Zaldivar and Castle, and treatment records, relevant to the issue of whether the miner had clinical pneumoconiosis. Director's Exhibits 17, 34; Claimant's Exhibits 2-4; Employer's Exhibits 3, 8, 9. Because the administrative law judge erred in not rendering findings pursuant to 20 C.F.R. §718.202(a)(2)-(4),[9] and then failed to weigh together all of the relevant evidence in accordance with *Compton*, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis and remand the case for further consideration of this issue.

Carrier further argues that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We agree. The administrative law judge credited the opinions of Drs. Rasmussen and Cohen that the miner's respiratory disability was due to clinical pneumoconiosis, over the contrary

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17. However, because Dr. Willis specifically read the x-ray as positive for pneumoconiosis on the ILO form (p and s opacities with a profusion of 1/2 in all lung zones), we see no error in the administrative law judge's reliance on that interpretation to find that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). 20 C.F.R. §718.102; Director's Exhibit 17.

[9] After finding that claimant established clinical pneumoconiosis, the administrative law judge did not specifically address whether the evidence was sufficient to establish legal pneumoconiosis. The x-ray and biopsy evidence in this case shows pulmonary fibrosis and emphysema, and Drs. Rasmussen, Cohen, Zaldivar, and Castle provided conflicting opinions as to whether coal dust exposure significantly contributed to, or substantially aggravated the miner's respiratory condition. Director's Exhibit 17; Claimant's Exhibits 3, 4; Employer's Exhibits 8, 9. If claimant is unable to establish the existence of clinical pneumoconiosis and disability due to clinical pneumoconiosis on remand, the administrative law judge must resolve whether the miner's pulmonary fibrosis or emphysema constitutes legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2); 718.202(a)(4).

opinions of Drs. Zaldivar and Castle that the miner's disabling respiratory or pulmonary impairment was due to idiopathic pulmonary fibrosis or smoking. Decision and Order at 15; Director's Exhibits 17, 34; Claimant's Exhibits 2, 6; Employer's Exhibits 3, 8, 9. The administrative law judge specifically rejected the opinions of Drs. Zaldivar and Castle because they did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that the miner had the disease. Decision and Order at 15. Because we have vacated the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis, we also vacate his finding that claimant established total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c).

Thus, we vacate the award of benefits and remand this case for further consideration. We instruct the administrative law judge to render findings pursuant to 20 C.F.R. §718.202(a)(1)-(4) and an overall determination, based on consideration of all the relevant evidence, as to whether the miner had either clinical or legal pneumoconiosis. If the administrative law judge reaches the issue of disability causation on remand, the administrative law judge must reconsider the opinions of Drs. Rasmussen, Cohen, Zaldivar and Castle and determine whether claimant established that the miner's respiratory or pulmonary disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In rendering his credibility determinations on remand, the administrative law judge must address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge is further instructed to set forth the bases for all of his credibility determinations, and the underlying rationale for his decision, as required by the Administrative Procedure Act.[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge