U.S. Department of Labor

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

BRB No. 14-0424 BLA

CLIFFORD DANIEL[1]	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	
and	)	
	)	
UNITED PACIFIC INSURANCE COMPANY	)	DATE ISSUED: 08/24/2015
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

[1] The caption in the administrative law judge's Decision and Order reflects claimant's last name followed by his first name, i.e., "Daniel Clifford."

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

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5626) of Administrative Law Judge Joseph E. Kane denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of a subsequent claim filed on May 13, 2005.[2]

In the initial decision, Administrative Law Judge Pamela Lakes Wood noted that employer conceded that the x-ray evidence established the existence of clinical pneumoconiosis.[3] Judge Wood, 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. Judge Wood also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Wood further found that the medical opinion evidence established the existence of legal pneumoconiosis,[4] in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §718.202(a)(4). However, Judge Wood found that the evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, Judge Wood denied benefits.

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[2] Claimant initially filed a claim for benefits on October 29, 1980. Administrative Law Judge's Exhibit 1. In a Decision and Order dated December 28, 1984, Administrative Law Judge C. Richard Avery found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204. *Id.* Accordingly, Judge Avery denied benefits. *Id.*

[3] "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).

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

Claimant appealed, but while his appeal was pending before the Board, he timely requested modification. *See* 20 C.F.R. §725.310. At his request, the Board dismissed claimant's appeal. *Daniel v. Wolf Creek Collieries*, BRB No. 09-0609 BLA (July 24, 2009) (Order) (unpub.), and the case was remanded for modification proceedings.

In a Decision and Order dated August 15, 2014, Administrative Law Judge Joseph E. Kane (the administrative law judge) credited claimant with at least eleven years of coal mine employment,[5] and agreed with Judge Wood's findings that the evidence established the existence of both clinical and legal pneumoconiosis. The administrative law judge, therefore, agreed with Judge Wood'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. The administrative law judge further found that the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310. However, in considering the claim on the merits, the administrative law judge found that the evidence failed to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging the Board to affirm the denial of benefits. In the alternative, employer contends that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis and clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b)(2). 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

[5] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] The administrative law judge's finding of at least eleven years of coal mine employment is unchallenged on appeal, and is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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).

The Existence of Clinical Pneumoconiosis

We first address employer's contention that the administrative law judge erred in finding that the new evidence (*i.e.*, the evidence submitted since the denial of claimant's prior 1980 claim) established the existence of clinical pneumoconiosis.[7] When the case was before Administrative Law Judge Pamela Lakes Wood, employer stipulated that the new x-ray evidence established the existence of clinical pneumoconiosis. Director's Exhibits 76, 79. Although the parties subsequently submitted two new interpretations of a July 27, 2011 x-ray on modification, Claimant's Exhibit 3; Employer's Exhibit 1, the administrative law judge found that the x-ray was inconclusive. Decision and Order at 19. Weighing all of the new x-ray evidence of record, the administrative law judge agreed with Judge Wood that the new x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because this finding is not challenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer, however, contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 4-5. The administrative law judge initially considered the new medical opinion evidence submitted by the parties on modification, the opinions of Drs. Sikder, Repsher, and Dahhan. Drs. Sikder and Repsher diagnosed clinical pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 3. Although Dr. Dahhan initially diagnosed clinical pneumoconiosis

[7] Employer's arguments in its response brief are in support of another method by which the administrative law judge may reach the same result and deny benefits. Employer's Response Brief at 4-6. Therefore, those arguments are properly before the Board, and no cross-appeal is required of employer. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

based upon his positive interpretation of the July 27, 2011 x-ray, he subsequently changed his opinion after reviewing Dr. Wheeler's negative interpretation of the x-ray, and opined that there is no radiological finding to support a diagnosis of clinical pneumoconiosis. Employer's Exhibit 2.

In weighing the medical opinion evidence submitted on modification, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Sikder and Repsher, that claimant suffers from clinical pneumoconiosis, because he found that they are consistent with the x-ray evidence. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012); Decision and Order at 20-21. The administrative law judge accorded less weight to Dr. Dahhan's opinion because he found that the doctor failed to adequately explain his basis for changing his opinion regarding the existence of clinical pneumoconiosis. Decision and Order at 20. Because employer does not challenge the administrative law judge's basis for discrediting Dr. Dahhan's opinion, it is affirmed. *Skrack*, 6 BLR at 1-711. The administrative law judge further found that the other medical opinion evidence submitted since the denial of claimant's prior 1980 claim also supported a finding of clinical pneumoconiosis.[8] Decision and Order at 22. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of our affirmance of the administrative law judge's finding that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also affirm the administrative law judge's finding 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. 20 C.F.R. §725.309; Decision and Order at 16.

The Existence of Legal Pneumoconiosis

Employer next contends 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). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Sikder and Dahhan. Dr. Sikder diagnosed legal pneumoconiosis, in the form of COPD due to coal dust exposure and cigarette smoking. Claimant's Exhibit 2. Although Dr. Dahhan also diagnosed an obstructive pulmonary impairment, he attributed the impairment to cigarette smoking. Employer's Exhibit 2.

[8] In a report dated June 14, 2005, Dr. Baker diagnosed clinical pneumoconiosis. Director's Exhibit 14.

Dr. Dahhan opined that claimant's pulmonary impairment was not due to his coal mine dust exposure. *Id.*

The administrative law judge accorded less weight to Dr. Dahhan's opinion, that claimant's obstructive pulmonary impairment was not due to his coal mine dust exposure, because he found that the doctor's opinion was improperly based upon an assumption that coal mine dust exposure never or rarely causes disabling obstructive lung disease. Decision and Order at 21. Because employer does not challenge the administrative law judge's basis for discrediting Dr. Dahhan's opinion, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

The administrative law judge credited Dr. Sikder's diagnosis of legal pneumoconiosis, noting that Dr. Sikder is claimant's treating physician. Decision and Order at 20, 22. Employer argues, however, that the administrative law judge erred in crediting Dr. Sikder's diagnosis based solely upon her status as claimant's treating physician. We agree. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2002) (holding that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts."). The administrative law judge erred in failing to address whether Dr. Sikder's opinion, that claimant's COPD is due to coal mine dust exposure and cigarette smoking, was sufficiently reasoned. We, therefore, vacate 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).

The administrative law judge also found that the "preponderance of the previously submitted medical evidence, as discussed in Judge Wood's Decision and Order, supports a finding of . . . legal pneumoconiosis." Decision and Order at 22. This evidence includes Dr. Baker's June 14, 2005 medical report, wherein, Dr. Baker, like Dr. Sikder, diagnosed legal pneumoconiosis, in the form of COPD due to coal mine dust exposure and cigarette smoking. Director's Exhibit 14. We agree with employer that the administrative law judge erred in accepting Judge Wood's crediting of Dr. Baker's diagnosis of legal pneumoconiosis without determining for himself whether Dr. Baker's diagnosis was called into question by his reliance upon an inaccurate cigarette smoking history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); Employer's Brief at 4. On remand, the administrative law judge is instructed to consider whether the diagnoses of legal pneumoconiosis offered by Drs. Sikder and Baker are reasoned and documented, taking into consideration the objective evidence, underlying documentation, and rationale provided by the doctors in support of their opinions. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Total Disability

We next address employer's challenge to the administrative law judge's finding of total disability. Employer argues that the administrative law judge erred in finding that the medical opinion evidence submitted on modification established total disability pursuant to 20 C.F.R. §718.202(b)(2)(iv).[9] We disagree. Drs. Sikder, Dahhan, and Repsher submitted medical opinions in connection with claimant's request for modification. Although Dr. Repsher did not address whether claimant was totally disabled from a respiratory standpoint, Drs. Sikder and Dahhan opined that claimant is totally disabled.[10] Decision and Order at 24. Because it is based upon substantial evidence,[11] the administrative law judge's finding that the medical opinion evidence submitted on modification established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed. Moreover, the administrative law judge properly weighed the new pulmonary function study, blood gas study, and medical opinion evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 24. This finding is, therefore, affirmed.

[9] Because employer does not challenge the administrative law judge's finding that the pulmonary function study evidence submitted on modification established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[10] Employer notes that Dr. Sikder, in her July 28, 2011 report, based her diagnosis of a totally disabling pulmonary impairment, in part, upon the results of a July 28, 2011 pulmonary function study that the administrative law judge determined to be unreliable. Employer's Brief at 5. Employer, however, fails to note that the administrative law judge did, in fact, accord less weight to Dr. Sikder's 2011 assessment of claimant's pulmonary impairment for this reason. Decision and Order at 24. Significantly, employer does not challenge the administrative law judge's determination that Dr. Sikder's 2009 opinion that claimant was totally disabled from a pulmonary standpoint, and Dr. Dahhan's 2011 opinion, that claimant does not retain the respiratory capacity to perform his previous coal mine employment, are reasoned and documented. Decision and Order at 24; Director's Exhibit 98; Employer's Exhibit 2.

[11] Although employer notes that Dr. Baker opined in 2005 that claimant "should be able to do the work comparable to an underground miner," Director's Exhibit 14, employer fails to explain how this opinion undermines the subsequent opinions of Drs. Sikder and Dahhan in 2009 and 2011 that claimant is totally disabled from a respiratory standpoint. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988).

In light of our affirmance of the administrative law judge's finding that the evidence submitted since Judge Wood's denial of benefits established total disability, we affirm his finding that claimant established a change in conditions pursuant to 20 C.F.R. §725.310.

Total Disability Due to Pneumoconiosis

We next address claimant's contention that the administrative law judge erred in his evaluation of Dr. Sikder's opinion and, thus, erred in finding that claimant failed to establish, on the merits, that pneumoconiosis is a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). As the administrative law judge correctly summarized, a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 2-303 (6th Cir. 2001); Decision and Order at 25. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.[12] 20 C.F.R. §718.204(c)(1).

In evaluating whether claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered Dr. Sikder's disability causation opinion set forth in her July 20, 2011 report. The administrative law judge found that Dr. Sikder "did not explain whether [claimant's] pneumoconiosis is a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." Decision an Order at 25. However, Dr. Sikder indicated that claimant's clinical pneumoconiosis and legal pneumoconiosis (COPD due to coal mine dust exposure and smoking) had "a material adverse [effect] on the miner's respiratory condition." Claimant's Exhibit 2. Consequently, Dr. Sikder's opinion, if credited as a reasoned and documented opinion, is sufficient to support a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[13] We must

[12] The comments to the regulations make clear that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79,920, 79,946 (Dec. 20, 2000).

[13] The administrative law judge questioned Dr. Sikder's disability causation opinion because the doctor relied upon unreliable pulmonary function study results. Decision and Order at 25. The administrative law judge, however, did not explain why Dr. Sikder's reliance upon an unreliable pulmonary function study, evidence relevant to

therefore vacate the administrative law judge's finding that claimant failed to meet his burden to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Moreover, we agree with claimant that the administrative law judge erred in not addressing all of the relevant evidence of record. *See* 30 U.S.C. §923(b). Dr. Baker also addressed the cause of claimant's disabling respiratory impairment, opining that claimant's clinical pneumoconiosis and legal pneumoconiosis (COPD due to coal mine dust exposure and cigarette smoking) had "a material adverse effect on [claimant's] respiratory condition and contribute to his total impairment." Director's Exhibit 14. The record also contains the contrary opinions of Drs. Dahhan and Repsher.[14] Employer's Exhibits 1, 2. On remand, when considering whether the medical opinion evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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the *extent* of claimant's impairment at 20 C.F.R. §718.204(b)(2)(iv), would undermine her separate conclusion that claimant's clinical pneumoconiosis and legal pneumoconiosis had a material adverse effect on claimant's respiratory condition. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-75 (2004).

[14] Dr. Dahhan attributed claimant's pulmonary impairment solely to his smoking, and opined that it was not due to the inhalation of coal mine dust. Employer's Exhibit 2. Dr. Repsher opined that claimant's clinical pneumoconiosis "has not caused . . . any clinically significant loss of lung function." Employer's Exhibit 3. Dr. Repsher further opined that "almost all of [claimant's] loss of lung function is due to his long and heavy cigarette smoking habit." *Id.*

Accordingly, the administrative law judge's Decision and Order denying 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.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge