U.S. Department of Labor

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

BRB No. 16-0688 BLA

JOHN R. WILLIAMSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	
and	)	
	)	
Self-Insured through THE PITTSTON COMPANY	)	DATE ISSUED: 08/24/2017
	)	
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 Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Elizabeth A. Combs (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2014-BLA-5605) of Administrative Law Judge John P. Sellers, III (the administrative law judge) 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 a miner's claim filed on June 25, 2013.

Based on the parties' stipulation that claimant worked eleven years in coal mine employment, the administrative law judge found that claimant 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).[1] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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,

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] "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). "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 has eleven years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Existence of Legal Pneumoconiosis

Because claimant cannot invoke the Section 411(c)(4) presumption and there is no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, to be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment 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 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).

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish that claimant suffers from legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4).[6]

The administrative law judge considered the medical opinions of Drs. Mettu, Jarboe, and Castle in determining whether claimant could establish the existence of legal pneumoconiosis. Decision and Order at 6-12, 15-17; Director's Exhibits 9, 10a; Employer's Exhibits 1, 3, 4. Dr. Mettu examined claimant on behalf of the Department of Labor (DOL) on July 11, 2013 and initially diagnosed a reversible airway disease, and stated "cause could be by hyper-reactive airway disease such as asthma." Director's Exhibit 9 at 41. In a supplemental letter, dated July 31, 2013, Dr. Mettu stated:

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[4] 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); Hearing Transcript at 10.

[5] None of the medical opinions of record diagnosed clinical pneumoconiosis. Director's Exhibit 9, 10a; Employer's Exhibits 1, 3, 4.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 14; Claimant's Brief at 3.

> [claimant] has reversible airway disease caused by hyper[-]reactive airway disease. Hyper[-]reactive airway disease can be caused by (asthma) or dust exposure. Hyper[-]reactive airway disease (asthma) substantially aggravated by coal dust exposure.

Id. at 43. Subsequently, Dr. Mettu testified that claimant's impairment "could be" related to "previous dust exposure or maybe other chemical . . . fumes," and after employer's counsel reiterated that claimant worked as a truck mechanic, Dr. Mettu testified that "probably [claimant] didn't have the [dust] exposure at that time" and that claimant's impairment was "probably not related to the coal mine." Director's Exhibit 10a at 18-19. Drs. Jarboe and Castle opined that claimant does not have legal pneumoconiosis, but suffers from a restrictive lung disease, which Dr. Jarboe attributed to bronchial asthma, obesity, and possibly congestive heart failure, and Dr. Castle attributed to obesity. Employer's Exhibits 1 at 7-9, 3 at 9, 4 at 38-40.

The administrative law judge found that Dr. Mettu's opinion was equivocal and insufficient to carry claimant's burden of establishing legal pneumoconiosis, and that the opinions of Drs. Jarboe and Castle did not aid claimant in proving his case, as both physicians specifically stated that claimant does not have legal pneumoconiosis. Decision and Order at 15-17. Thus, the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that Dr. Mettu's written opinion is sufficient to establish that claimant has legal pneumoconiosis, and that the administrative law judge erred in failing to adequately explain his reasons for rejecting Dr. Mettu's opinion. Claimant asserts that Dr. Mettu's written opinions, from the July 11, 2013 DOL examination and the July 31, 2013 supplemental letter, were "based on [claimant's] actual work history," which included exposure to coal mine dust. Claimant's Brief at 4. Whereas, "the equivocal opinions of Dr. Mettu," given during his deposition testimony, "were in response to questions by the employer's counsel" and based on an inaccurate understanding of the dust exposure involved in claimant's coal mine employment. *Id*. In support of his argument, claimant cites the district director's finding in his Proposed Decision and Order that Dr. Mettu's initial opinion was reasoned and constituted a diagnosis of legal pneumoconiosis.[7] *Id*. at 3-4. Claimant's arguments are without merit.

Initially, we note that the district director's determinations are not binding on the administrative law judge, who must perform a *de novo* review of the evidence in order to determine whether entitlement to benefits has been established. *See* 20 C.F.R.

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings with respect to the opinions of Drs. Jarboe and Castle. Decision and Order at 8-12; 17; *see Skrack*, 6 BLR at 1-711.

§725.455(a); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985). Thus, to the extent that claimant's reference to the district director's finding regarding Dr. Mettu's opinion can be construed as an allegation of error by the administrative law judge for making a conflicting finding, it has no merit. 20 C.F.R. §725.455(a); *see Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero*, 7 BLR at 1-863.

Furthermore, contrary to claimant's assertion, the administrative law judge considered Dr. Mettu's written opinions, and permissibly found Dr. Mettu's statements that claimant's reversible airway disease "could be [a] hyper-reactive airway disease such as asthma" and that hyper-reactive airway disease "can be" caused by asthma or dust exposure, "insufficient to constitute a diagnosis of legal pneumoconiosis." *See* Decision and Order at 15, *quoting* Director's Exhibit 9 at 41, 43; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). In addition, the administrative law judge acknowledged Dr. Mettu's July 31, 2013 statement, "[h]yper[-]reactive airway disease (asthma) substantially aggravated by coal dust exposure," and permissibly determined that while Dr. Mettu "seemed to imply that asthma can be substantially aggravated by coal dust exposure, he did not state that the *[c]laimant's* condition was substantially aggravated by coal dust exposure." Decision and Order at 15-16 (emphasis added), *citing* Director's Exhibit 9 at 43; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, the administrative law judge permissibly found that Dr. Mettu did not "provide a well-reasoned opinion establishing that [c]laimant had legal pneumoconiosis." Decision and Order at 16; *see Ogle*, 737 F.3d at 1072-73, 25 BLR at 2-446-47; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Moreover, the administrative law judge noted that Dr. Vuskovich reviewed the pulmonary function studies that Dr. Mettu relied upon in forming his diagnosis, and concluded that Dr. Mettu did not accurately report claimant's spirometry results, as he did not report the highest values of three attempts. Decision and Order at 16; Director's Exhibit 10 at 3-5. Indeed, Dr. Mettu testified that he reported the values with "smooth and even" flow and volume loops, "[n]ot necessarily the highest volume." Director's Exhibit 10a at 16. The administrative law judge observed that the "regulations contemplate that the highest FEV1, FVC, and MVV from the trials should be used to determine the [c]laimant's level of disability." Decision and Order at 16; *see* 20 C.F.R. Part 718, Appendix B(2)(v). Therefore, the administrative law judge permissibly gave less weight to Dr. Mettu's opinion regarding the nature and extent of claimant's reversible airway disease, as Dr. Mettu "did not consider [c]laimant's best efforts on the Department-sponsored pulmonary function test" in forming his diagnosis. Decision and Order at 16; *see* 20 C.F.R. Part 718, Appendix B(2)(v); *Duke v. Director, OWCP*, 6 BLR 1-673, 675-76 (1983).

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The determination of whether a medical opinion is documented and reasoned is for the administrative law judge, and we may not reweigh the evidence or substitute our judgment. *Moseley v. Peabody Coal Co*., 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985); *Anderson*, 12 BLR at 1-113. As substantial evidence supports the administrative law judge's credibility determinations, and the administrative law judge adequately explained his reasons for finding Dr. Mettu's opinion insufficiently reasoned to support a finding of legal pneumoconiosis, his finding that claimant failed to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) is affirmed. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 16.

Finally, weighing all of the evidence together, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-217-18 (6th Cir. 2012); Decision and Order at 17. In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's determination that an award of benefits in this claim is precluded. *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge