U.S. Department of Labor

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

BRB No. 16-0154 BLA

LYNN R. ROSSERO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	DATE ISSUED: 01/11/2017
	)	
Employer-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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Maia S. Fisher, Associate Solicitor of Labor, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05654) of Administrative Law Judge Thomas M. Burke, rendered on claimant's request for

modification of the denial of his claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Judge Burke (the administrative law judge) credited claimant with thirty and one-half years of coal mine employment and noted that employer agreed that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge found that the evidence submitted in connection with claimant's modification request, along with the previously submitted evidence, was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge therefore further determined that claimant established a mistake in a determination of fact in the prior denial of benefits pursuant to 20 C.F.R. §725.310. The administrative law judge also found that claimant's total disability is due to legal pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and total disability causation pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge properly considered the preamble to the 2001 regulatory revisions when weighing the medical opinion evidence of record.[2]

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[1] Claimant filed a claim on June 25, 2002. Director's Exhibit 2. The district director issued a Proposed Decision and Order on March 31, 2004, awarding benefits contingent on claimant terminating his coal mine employment within one year. Director's Exhibit 38. In a revised Proposed Decision and Order dated May 24, 2004, the district director awarded benefits. Employer submitted a letter contesting the revised Proposed Decision and Order and requesting a hearing. Director's Exhibit 43. Rather than transferring the case to the Office of Administrative Law Judges, the district director issued a second revised Proposed Decision and Order on February 4, 2010. Director's Exhibits 50, 52. The district director found that claimant submitted evidence establishing that his coal mine employed ended on July 22, 2004, and awarded benefits. Director's Exhibit 52. Employer again requested a hearing and the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Michael P. Lesniak. Director's Exhibits 53, 61. In a Decision and Order issued on October 4, 2011, Judge Lesniak denied benefits on the ground that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant filed a request for modification on September 20, 2012. Director's Exhibit 65.

[2] The administrative law judge's finding of thirty and one-half years of coal mine employment, and his finding that that claimant established the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984);

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

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).

Pursuant to 20 C.F.R. §725.310, modification may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). When considering a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake of fact, even the ultimate fact of entitlement. *Keating v. Director, OWCP,* 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

Under 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the conflicting medical opinions of Drs. Hajduk, Celko, Cohen, Houser, Renn, Fino, and Jarboe relevant to whether claimant has legal pneumoconiosis.[4] Drs. Hajduk, Celko, Cohen, and Houser opined that claimant suffers from chronic obstructive pulmonary

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Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] 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). The regulation also provides that "a disease 'arising out of coal mine employment' includes any 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).

disease (COPD) and emphysema due, in significant part, to coal dust exposure. Director's Exhibits 21, 59, 60; Claimant's Exhibits 4-6, 8. Drs. Renn, Fino and Jarboe, opined that claimant's COPD (chronic bronchitis and emphysema) is due solely to smoking and also opined that claimant's coal dust exposure did not contribute to his obstructive impairment. Employer's Exhibits 1-4, 7.

The administrative law judge credited the diagnoses of legal pneumoconiosis made by Drs. Celko, Cohen and Houser, because they were reasoned, supported by the evidence, and consistent with the medical science the Department of Labor (DOL) relied on in revising the regulatory definition of pneumoconiosis.[5] Decision and Order at 20-21. The administrative law judge assigned determinative weight to Dr. Celko's opinion, based on his status as claimant's treating physician. *Id*. He also credited Dr. Cohen's opinion, based on his superior credentials as a Board-certified pulmonologist and because Dr. Cohen has held numerous positions directly involving the diagnosis and treatment of pneumoconiosis. *Id*. at 21. The administrative law judge also noted that Dr. Houser is a Board-certified pulmonologist who received a teaching award from the Indiana University School of Medicine and who testified to performing approximately 7,000 black lung examinations over the course of his career.[6] *Id.*

In light of these credibility determinations, the administrative law judge found that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). He further found that "the reasons and evidentiary analysis of legal pneumoconiosis also supports a finding that [] claimant has established that coal dust exposure is a substantial contributing cause of his pulmonary disability." Decision and Order at 22. Thus, the administrative law judge concluded that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). *Id.* Because claimant established that he is totally disabled due to pneumoconiosis, the administrative law judge found that

[5] The administrative law judge found that Dr. Hajduk's opinion was "too equivocal to constitute legal pneumoconiosis" in light of his testimony that claimant's chronic obstructive pulmonary disease is "possibly" caused by coal mine employment. Decision and Order at 16, *quoting* Employer's Exhibit 9.

[6] The administrative law judge indicated that Drs. Renn, Fino, and Jarboe are also Board-certified pulmonologists. Decision and Order at 21. He further noted Dr. Fino's testimony that he has examined a significant number of miners in conjunction with black lung claims. *Id*. Regarding Drs. Renn and Jarboe, the administrative law judge stated, "they have restricted their practice to performing forensic medical consultations, their evaluations are mainly of coal miners or evidence in coal miner cases, and their prior practice included significant treatment of coal miners." *Id*.

claimant established a mistake in a determination of fact and demonstrated a basis for modification pursuant to 20 C.F.R. §725.310. *Id.*

Employer argues that the administrative law judge erred in relying on the preamble to the 2001 regulatory revisions when determining the credibility of the medical opinions of record. Employer maintains that the administrative law judge improperly gave the preamble the force of law without providing the parties notice of his intent to do so. In addition, employer alleges that the administrative law judge mischaracterized the studies upon which Dr. Renn relied to opine that claimant's obstructive lung disease is not related to coal dust inhalation. Employer contends that this error rendered invalid the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(c), that claimant has legal pneumoconiosis and is totally disabled by it.

Regarding the administrative law judge's use of the preamble to the 2001 regulatory revisions, the Board and multiple United States Circuit Courts of Appeals have held that an administrative law judge, as part of the deliberative process, may permissibly evaluate expert opinions in conjunction with DOL's discussion of prevailing medical science in the preamble. *See Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 25 BLR 2-581 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Moreover, the United States Circuit Courts of Appeal that have considered the issue have held that the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802, 25 BLR at 2-212; *Looney*, 678 F.3d at 316, 25 BLR at 2-132. In the present case therefore, the administrative law judge acted within his discretion by consulting the preamble for DOL's resolution of scientific issues relevant to coal dust exposure and obstructive lung disease, when weighing the medical opinion evidence. *See Obush*, 650 F.3d at 257, 24 BLR at 2-383.

With respect to employer's specific argument that the administrative law judge mischaracterized the medical studies Dr. Renn cited in his opinion, the administrative law judge noted Dr. Renn's statement that he calculated the loss in FEV1 attributable to claimant's coal dust exposure by relying on tables set forth in the medical literature. Decision and Order at 18-19; Employer's Exhibit 4 at 38. The administrative law judge then referred to Dr. Houser's opinion that the data cited by Dr. Renn reflected the average loss of lung function, which "obscured" the fact that "a number of exposed miners develop severe disease." Claimant's Exhibit 6; Decision and Order at 19. The

administrative law judge observed that Dr. Houser's comments are consistent with DOL's comments in the preamble, and quoted DOL's statement that:

> As the majority of miners may have small or, perhaps in some cases, no decline in pulmonary lung function, the average decline of the population studied can appear to be relatively small. *Despite this, the individual miners affected can have quite severe disease, and statistical averaging hides this effect*. The amended definition clarifies that these miners have a right to prove their case with evidence of a disabling obstructive lung disease that arose out of coal mine employment.

Decision and Order at 19, *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added). The administrative law judge then stated that "the medical articles referenced by Dr. Renn are not dismissive of the findings by Dr. Cohen but in fact support Dr. Cohen's findings that [c]laimant's coal dust exposure is a significant contributor to his pulmonary disability." Decision and Order at 19. Employer maintains that the administrative law judge's finding was both erroneous and dispositive of the result in this case.

We reject employer's argument. Employer does not challenge the administrative law judge's finding that the opinions of Drs. Celko, Cohen, and Houser were consistent with the evidence of record or his decision to accord greater weight to the opinions of those physicians, based on Dr. Celko's status as claimant's treating physician and the superior qualifications of Drs. Cohen and Houser. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge's determination regarding Dr. Renn's opinion merely reflects the administrative law judge's acknowledgment that statistical averaging does not necessarily reflect the severity of an individual miner's impairment. Indeed, the administrative law judge essentially found that tables in the medical literature showing the average loss in FEV1 attributable to coal dust inhalation do not detract from the probative value of the opinions of Drs. Houser and Cohen that, despite this data, coal dust exposure can cause severe impairment in an individual miner. Thus, contrary to employer's contention, the administrative law judge permissibly discounted this aspect of Dr. Renn's reasoning. We reject, therefore, employer's allegation that the administrative law judge mischaracterized the studies cited by Dr. Renn and affirm the administrative law judge's credibility findings as rational and within his discretion. *See Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997).

We affirm, therefore, the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c), based on the opinions of Drs. Cohen, Celko, and Houser. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002). Lastly, we affirm the administrative law judge's determinations that claimant established a mistake in a determination of fact and, thus, a basis for modification under 20 C.F.R. §725.310. *See Keating*, 71 F.3d at 1123, 20 BLR at 2-61-63.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge