U.S. Department of Labor

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

BRB No. 17-0191 BLA

DANNY J. BRYANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/29/2018
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice, LLP), Charleston, West Virginia, for employer.

Barry H. Joyner (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2016-BLA-05094) of Administrative Law Judge Drew A. Swank, rendered 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 subsequent claim filed on April 25, 2014.[1]

The administrative law judge credited claimant with 13.30 years of underground coal mine employment. Because claimant had fewer than fifteen years of qualifying coal mine employment, the administrative law judge found that 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) (2012).[2] The administrative law judge further found that the new medical opinion evidence established the existence of legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] Considering the claim on

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[1] This current claim is claimant's third. His most recent prior claim, filed on March 20, 2009, was denied by the district director on October 13, 2009 for failure to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 2. Claimant took no further action until he filed the instant claim on April 25, 2014. Director's Exhibit 4.

[2] 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 at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] "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).

[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). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing that he has pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §725.309(c).

the merits, the administrative law judge found that the evidence established that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i).[5] The administrative law judge also found, however, that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, the Director argues that the administrative law judge applied incorrect legal standards in his evaluation of the medical opinion evidence relevant to the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis, at 20 C.F.R. §718.204(c). Claimant responds, agreeing with the Director. Employer responds in support of the denial of benefits.[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.[7] 33 U.S.C. §921(b)(3), as incorporated by 30

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[5] We note that the administrative law judge did not address whether claimant established total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(ii)-(iv) and whether claimant met his burden under 20 C.F.R. §718.204(b)(2) based on his weighing of all the evidence together. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986). However, no objection has been raised in this regard. While the record contains an arterial blood gas study conducted by Dr. Zaldivar that produced non-qualifying values at rest and qualifying values during exercise, Dr. Zaldivar ultimately opined that claimant has a severe impairment and is totally disabled. Moreover, the other doctors of record opined that claimant is totally disabled. Therefore, it appears that the error by the administrative law judge in failing to consider all of the relevant evidence at 20 C.F.R. §718.204(b)(2) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As total disability was a basis of the prior denial of benefits, claimant has also established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

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

Legal Pneumoconiosis

The Director contends that the administrative law judge misapplied the preamble to the 2001 regulations in finding that the new medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Copley, Green, Zaldivar and Tuteur. Drs. Copley and Green diagnosed chronic obstructive pulmonary disease (COPD) related to coal dust exposure and smoking, while Drs. Zaldivar and Tuteur diagnosed COPD related solely to smoking. Director's Exhibits 11, 27; Claimant's Exhibit 1; Employer's Exhibits 2, 5. Noting that each of the physicians diagnosed claimant with COPD, and finding that "[COPD] is a form of legal coal workers' pneumoconiosis" as "referenced in the *Preamble*,"[8] the administrative law judge concluded that claimant established the existence of legal pneumoconiosis. Decision and Order at 15, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec, 20, 2000).

We agree with the Director that the administrative law judge erroneously concluded that a diagnosis of COPD establishes the existence of legal pneumoconiosis. Director's Brief at 7-8. Rather, claimant must establish that he has a chronic pulmonary disease or respiratory or pulmonary impairment "arising out of coal mine employment", i.e., a condition "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); Director's Brief at 7-8. Contrary to the administrative law judge's conclusion, whether a particular miner's COPD arose out of dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the

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[8] In particular, the administrative law judge noted that, in relevant part, the preamble states:

> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

Decision and Order at 23.

evidence of record. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861, 23 BLR 2-124, 2-159 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). As the administrative law judge applied an incorrect legal standard, we must vacate his finding that the new medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.[9]

Total Disability Due To Pneumoconiosis

Because we have vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and are remanding this case for the administrative law judge to reconsider that issue, we must also vacate the finding that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). To avoid any repetition of error if legal pneumoconiosis is established, we will address the Director's argument that the administrative law judge failed to apply the proper standard for disability causation at 20 C.F.R. §718.204(c). The Director's argument has merit.

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[9] While the administrative law judge addressed the etiology of claimant's COPD in conjunction with his discussion of disability causation at 20 C.F.R. §718.204(c), we agree with the Director that those findings are also in error. Director's Brief at 8. The administrative law judge discredited the opinions of Drs. Copley and Green that claimant's COPD was due to both coal dust exposure and cigarette smoking because the physicians stated that it was not possible to distinguish the relative contributions of each cause. Decision and Order at 21-22. Contrary to the administrative law judge's finding, where a doctor definitely attributes a lung disease or impairment to both dust exposure and cigarette smoking, and specifically opines that the role of coal mine dust was "significant," the physician's inability to assign specific percentages of impairment does not render the physician's opinion insufficient to support a finding of legal pneumoconiosis. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); Director's Brief at 8. We, therefore vacate the administrative law judge's finding that the opinions of Drs. Copley and Green are not credible as to the etiology of claimant's COPD. We note, however, as set forth *infra*, that in determining what weight to give a physician's opinion, the administrative law judge is charged with considering the documentation supporting the opinion and the reasoning the physician employs. *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).

Prior to evaluating the medical opinions at 20 C.F.R §718.204(c), the administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 18. Pneumoconiosis is a "substantially contributing cause" of a miner's 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 18-19. Nonetheless, the administrative law judge instead considered whether the opinions of Drs. Copley and Green established that claimant's COPD is due to coal mine dust exposure, which is the relevant inquiry in determining the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Decision and Order at 21-22. Where an administrative law judge finds that legal pneumoconiosis is established in the form of COPD, the administrative law judge must consider at 20 C.F.R. §718.204(c) whether that condition is a "substantially contributing cause" of a claimant's disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Therefore, we vacate the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Remand Instructions

On remand, the administrative law judge must first consider whether the medical opinion evidence establishes the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). 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 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). If the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he must address whether the existence of legal pneumoconiosis is established based on a review of all the relevant evidence, pursuant to 20 C.F.R.§718.202(a)(1)-(4).[10] *See Compton*, 211 F.3d at

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[10] As the administrative law judge properly acknowledged, a finding of legal pneumoconiosis subsumes the inquiry of whether the legal pneumoconiosis arose out of

212, 22 BLR at 2-176. If the administrative law judge again finds that claimant's COPD is legal pneumoconiosis, the administrative law judge must then determine whether legal pneumoconiosis is a substantially contributing cause of claimant's total disability, pursuant to 20 C.F.R. §718.204(c).

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coal mine employment pursuant to 20 C.F.R. §718.203. *See* 20 C.F.R. §718.201(a)(2), (b); *Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 16.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge