

U.S. Department of Labor

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



BRB No. 16-0596 BLA

AUDREY V. DRENNEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
AMVEST WEST VIRGINIA COAL, LLC)	DATE ISSUED: 07/18/2017
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2015-BLA-5177) of Administrative Law Judge Richard A. Morgan, rendered on a miner's subsequent claim filed on August 29, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge found that claimant established twelve years of underground coal mine employment,² total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309.³ The administrative law judge also found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), but not legal pneumoconiosis. The administrative law judge further found that claimant failed to establish total disability due to either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, the Director argues that the Board should reverse the administrative law judge's findings that claimant failed to establish the existence of legal

¹ Claimant filed an initial claim for benefits on November 2, 2010, which was denied by the district director on June 10, 2011, because the evidence did not establish total disability. Director's Exhibit 1. Claimant did not take any further action until he filed the current subsequent claim. Director's Exhibit 3.

² The administrative law judge correctly observed that because claimant established less than fifteen years of coal mine employment, claimant is not eligible to 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 18.

³ When 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 at least "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). 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, the administrative law judge concluded that claimant satisfied the requirements of 20 C.F.R. §725.309 because the evidence submitted with the subsequent claim established that claimant is totally disabled. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 19.

pneumoconiosis and disability causation. Employer responds, urging affirmance of the denial of benefits. Claimant has not filed a response brief in this appeal.⁴

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.⁵ 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, 362 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of 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).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. The administrative law judge noted that Drs. Vuskovich and Gaziano did not offer an opinion as to whether claimant has legal pneumoconiosis. Decision and Order at 30; Claimant's Exhibit 5; Employer's Exhibits 3, 4. Although Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, the administrative law judge found that Dr. Zaldivar's opinion was "unpersuasive" because Dr. Zaldivar did not adequately explain why claimant's interstitial fibrosis was due solely to smoking or an "unknown cause" and not coal dust exposure. Decision and Order at 29; see Director's Exhibit 33.

With regard to Dr. Rasmussen's opinion, the administrative law judge stated:

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: twelve years of underground coal mine employment; the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), (4); a totally disabling respiratory or pulmonary impairment 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); Decision and Order at 19, 23, 30.

⁵ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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).

Dr. Rasmussen diagnosed legal pneumoconiosis. He attributed the claimant's gas exchange impairment to coal mine dust exposure. Dr. Rasmussen also diagnosed pulmonary fibrosis, but did not adequately discuss its etiology. He opined that coal mine dust exposure is a major factor in the claimant's totally disabling pulmonary impairment, explaining that coal mine dust is known to cause impairment in oxygen transfer absent ventilatory impairment and the claimant's pattern of impairment is typical of many impaired miners. He also attributed [claimant's] impaired function to his history of cigarette smoking and possible other solvent exposures, but noted that smoking often causes obstruction before it causes gas exchange impairment. Dr. Rasmussen considered examination, testing and the [claimant's] work and smoking histories and he adequately explained how the [claimant's] symptoms and exposures led him to his conclusion of legal pneumoconiosis. His opinion on legal pneumoconiosis is therefore adequately reasoned and documented.

Decision and Order at 29 (footnote omitted); *see* Director's Exhibit 12; Employer's Exhibit 2.

Despite his determination that Dr. Rasmussen provided a reasoned and documented opinion, the administrative law judge summarily concluded that, "[w]eighing the medical opinions of record, . . . Dr. Rasmussen's opinion, the only opinion diagnosing legal pneumoconiosis, is insufficient to support a finding of the existence of legal pneumoconiosis" pursuant to 20 C.F.R. 718.202(a)(4). Decision and Order at 30.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge observed that Dr. Rasmussen did not diagnose clinical pneumoconiosis. Decision and Order at 33. Although Dr. Rasmussen attributed claimant's respiratory disability to legal pneumoconiosis, the administrative law judge gave less weight to Dr. Rasmussen's opinion because he had found that claimant failed to establish the existence of legal pneumoconiosis by a preponderance of the evidence. *Id.* Because neither Dr. Zaldivar nor Dr. Vuskovich diagnosed total disability or clinical or legal pneumoconiosis, the administrative law judge found that their opinions were not probative as to whether claimant's pneumoconiosis contributed to his respiratory disability. *Id.* The administrative law judge also found that Dr. Gaziano did not address the issue of disability causation. *Id.* Thus, the administrative law judge concluded that claimant failed to establish that he is totally disabled due to either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

The Director contends that the Board should reverse the administrative law judge's findings and hold that claimant established the existence of legal pneumoconiosis and disability causation, as a matter of law, based on Dr. Rasmussen's opinion. Employer maintains that the administrative law judge could permissibly conclude that Dr. Rasmussen's opinion, while reasoned and documented, did not outweigh Dr. Zaldivar's contrary opinion that claimant does not have legal pneumoconiosis. Employer points out that the administrative law judge did not state that Dr. Zaldivar's opinion was unreasoned, only "unpersuasive." Decision and Order at 30.

We are unable to discern the basis for the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis by a preponderance of the evidence. The administrative law judge offered no explanation for why he rejected Dr. Rasmussen's opinion that claimant has legal pneumoconiosis, or how he resolved the conflict in the medical opinion evidence. As such, the administrative law judge has failed to satisfy the Administrative Procedure Act (APA),⁶ and the proper course is to remand this case to the administrative law judge for further explanation. See *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We thus vacate the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Furthermore, as the administrative law judge's findings on legal pneumoconiosis also influenced his findings on disability causation, we vacate the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, we instruct the administrative law judge to address whether Dr. Zaldivar's opinion is reasoned and documented, and specifically explain the weight he accords the opinions of Drs. Zaldivar and Rasmussen on the issue of whether claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge should bear in mind that claimant may establish the existence of legal pneumoconiosis based on Dr. Rasmussen's opinion, if the administrative law judge determines that Dr. Zaldivar's opinion is not credible and that Dr. Rasmussen's opinion is persuasive to establish the existence of the disease. The administrative law judge must also reconsider, as necessary, whether Dr. Rasmussen's opinion is sufficient to establish that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R.

⁶ The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), 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).

§718.204(c). In rendering his findings on remand, the administrative law judge must comply with the APA.

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge