U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0139 BLA

JOHN L. BADO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	
	)	DATE ISSUED: 03/08/2021
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-05480) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on March 21, 2017.

The administrative law judge credited Claimant with at least eleven but fewer than fifteen years of coal mine employment, and thus found 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)(2018).[1] Considering entitlement under 20 C.F.R. Part 718, she found Claimant established legal pneumoconiosis in the form of chronic obstructive lung disease significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.202(a). She further found Claimant totally disabled due to the disease. 20 C.F.R. §718.204(b)(2), (c). Thus, she awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding legal pneumoconiosis and total disability due to pneumoconiosis.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated 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 disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm as unchallenged on appeal the administrative law judge's findings that Claimant established at least eleven years of coal mine employment and total disability. 20 C.F.R. §718.204(b); *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 Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 37.

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).

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding legal pneumoconiosis.[4] To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge considered the opinions of Drs. Green, Jaworski, Raj, Fino, and Basheda. Drs. Green, Jaworski, and Raj diagnosed legal pneumoconiosis in the form of disabling chronic lung obstruction caused by a combination of coal mine dust exposure, cigarette smoking, and asthma. Director's Exhibit 12; Claimant's Exhibits 4, 5. Drs. Fino and Basheda also diagnosed a disabling obstructive impairment, but opined it is due to cigarette smoking and untreated asthma, and is unrelated to coal mine dust exposure. Director's Exhibit 17; Employer's Exhibits 8, 20, 21.

The administrative law judge found Dr. Green's opinion reasoned and documented. Decision and Order at 20. She further found the opinions of Drs. Jaworski and Raj supported Dr. Green's opinion. *Id.* She discredited the opinions of Drs. Fino and Basheda as inadequately explained and inconsistent with the regulations implementing the Act. *Id.*

Employer argues Dr. Green's opinion is insufficient to meet the definition of legal pneumoconiosis. Employer's Brief at 4-5, 11, *citing* 20 C.F.R. §718.201. Contrary to Employer's argument, Dr. Green opined that while cigarette smoking was "a significant factor" in causing Claimant's chronic lung impairment, his "[twelve] year occupational history of exposure to respirable coal and rock dust cannot be eliminated as an additional *significant contributing and aggravating factor* that contributes at least in part" to Claimant's "airways disease and chronic airflow obstruction with chronic obstructive pulmonary disease." Claimant's Exhibit 5 at 5 (emphasis added). Thus his opinion satisfies the regulatory definition of legal pneumoconiosis.

Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary

[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). The definition 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).

impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment."). Thus there is no merit to Employer's argument that the administrative law judge applied an incorrect standard in evaluating whether Dr. Green's opinion established legal pneumoconiosis. Employer's Brief at 4-5, 11.

Further, in weighing Dr. Green's opinion, the administrative law judge found the doctor "explained in detail why he concluded that [Claimant's] obstructive impairment was due at least in part to his history of coal mine dust exposure."[5] Decision and Order at 8-9, 18. She also found his opinion supported by the clinical and objective test findings and consistent with the premises underlying the Act. *Id.* Thus, contrary to Employer's argument, she permissibly found Dr. Green's opinion well-reasoned and documented. *See Looney*, 678 F.3d at 311-12; *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 18, 20; Claimant's Exhibit 5.

We also reject Employer's argument the administrative law judge should have discredited Dr. Green's opinion because he did not review all of the evidence of record. Employer's Brief at 12. An administrative law judge is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[5] Employer argues Dr. Green opined that if a miner has an obstructive impairment, he would presume it was due to coal mine dust exposure. Employer's Brief at 17. Thus it argues his opinion is contrary to law. Employer mischaracterizes Dr. Green's opinion. In addressing whether Claimant's nearly twelve years of coal mine employment contributed to his obstructive impairment, Dr. Green stated "[t]here is no lower limit threshold of cumulative dust exposure below which one can confidently exclude the legal diagnosis of coal workers' pneumoconiosis." Claimant's Exhibit 5 at 5. Thus he declined to base his diagnosis solely on the length of Claimant's coal mine employment. As discussed above, the administrative law judge permissibly credited his opinion that Claimant's disabling obstruction is significantly related to coal mine dust exposure because it is well-reasoned and based on Claimant's symptoms and objective testing.

Employer next argues the administrative law judge erred in discrediting the opinions of Drs. Fino and Basheda. Employer's Brief at 13-24. We disagree. Dr. Fino and Dr. Basheda excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's impairment in response to bronchodilators seen on his pulmonary function testing. Director's Exhibit 17; Employer's Exhibits 17 at 14-15. The administrative law judge permissibly found their reasoning unpersuasive because they failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 19-20.

Drs. Fino and Basheda also excluded legal pneumoconiosis because Claimant first developed respiratory symptoms after leaving coal mine employment. Dr. Fino stated that "if obstruction is related to coal mine dust, one would expect the obstruction to be present and causing symptoms at the time a miner leaves the mines." Employer's Exhibit 8 at 8. He explained he would not expect "a miner would develop obstruction due to coal mine dust *after* that individual leaves the mines." *Id*. Dr. Basheda opined Claimant does not have legal pneumoconiosis because he "developed respiratory symptoms long after leaving the coal mines." Director's Exhibit 17 at 10. He stated "coal dust-induced pulmonary disease can be latent, [but] the logical explanation for [Claimant's] obstructive lung disease is his continued tobacco abuse." *Id*. Contrary to Employer's contention, the administrative law judge permissibly found this reasoning unpersuasive in light of the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 18-20.

We also reject Employer's argument that the administrative law judge applied an "increased burden of proof" to the opinions of Drs. Fino and Basheda by requiring them to explain why coal mine dust played no role in Claimant's fixed obstruction. Employer's Brief at 19, 22. The administrative law judge did not shift the burden of proof to Employer or apply a heightened standard to its doctors; as is her duty, she considered whether they credibly explained their opinions that Claimant does not have legal pneumoconiosis and permissibly found they failed to do so.[6] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 18-20.

[6] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Basheda, any error in discrediting their opinions for other reasons

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Claimant established legal pneumoconiosis based on Dr. Green's opinion.[7] 20 C.F.R. §718.202(a); Decision and Order at 20.

Disability Causation

Employer argues the administrative law judge erred in finding Claimant's total disability was due to legal pneumoconiosis. Employer's Brief at 25. We disagree. To establish disability causation, Claimant must prove that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment 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." 20 C.F.R. §718.204(c)(1)(i), (ii).

Dr. Green opined Claimant is totally disabled by a moderate to severe chronic airflow obstruction. Claimant's Exhibit 5. As discussed above, the administrative law judge permissibly relied on Dr. Green's opinion to find this disabling impairment is legal pneumoconiosis. Decision and Order at 18, 20; Claimant's Exhibit 5. We therefore see no error in her finding Claimant established legal pneumoconiosis was a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 23.

Similarly, having already rejected the opinions of Drs. Fino and Basheda on whether Claimant's totally disabling impairment constitutes legal pneumoconiosis, the administrative law judge did not err in rejecting their opinions that legal pneumoconiosis did not cause the disability. Decision and Order at 20, 23. Further, both opined Claimant's disability is unrelated to legal pneumoconiosis because Claimant does not have the disease, rendering their opinions not credible on causation. *Hobet Mining, LLC v. Epling*, 783 F.3d

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is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. Employer's Brief at 13-24.

[7] Employer argues the administrative law judge did not adequately address whether the opinions of Drs. Jaworski and Raj are reasoned and documented. Employer's Brief at 7-9. Because we affirm the administrative law judge's finding that Dr. Green's opinion establishes legal pneumoconiosis, we need not address Employers arguments regarding the opinions of Drs. Jaworski and Raj. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Decision and Order at 20; Employer's Brief at 7-9.

498, 504-05 (4th Cir. 2015), *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (Where a physician erroneously fails to diagnose pneumoconiosis, his opinion on causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief the miner did not have the disease.); Director's Exhibit 17; Employer's Exhibits 8, 20, 21.

As substantial evidence supports the administrative law judge's finding that Dr. Green's opinion is well-reasoned, and because it establishes legal pneumoconiosis substantially contributes to Claimant's disability, we affirm her finding of disability causation pursuant to 20 C.F.R. §718.204(c). We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge