U.S. Department of Labor

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

BRB No. 15-0440 BLA

MARLIN E. ASHLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/22/2016
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2011-BLA-06167) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on May 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established eleven years of coal mine employment and found, based on the stipulation of

the parties, that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2).[1] The administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), and that his totally disabling respiratory impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in rejecting Dr. Wheeler's negative x-ray reading as equivocal, in failing to consider the negative CT scan evidence, and in rejecting the medical opinions of Drs. Rosenberg and Fino, relevant to the issues of the existence of pneumoconiosis and disability causation. Employer also contends that the administrative law judge improperly shifted the burden of proof in finding that claimant has legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

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.[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).

[1] Because claimant did not establish at least fifteen years of underground or substantially similar coal mine employment, the administrative law judge correctly found that claimant is not eligible to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Under Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. *Id*.

[2] 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), based on the stipulation of the parties. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 3, 5; Hearing Transcript at 12. 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).

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 total respiratory or pulmonary disability 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).

In considering whether claimant established the existence of clinical pneumoconiosis,[4] the administrative law judge first weighed eleven readings of five x-rays. Decision and Order at 3-4. A September 1, 2010 x-ray was read as negative by Dr. DePonte, dually-qualified as a Board-certified radiologist and B reader, and as negative by Dr. Fino, a B reader. Director's Exhibit 10; Employer's Exhibit 5. Dr. Alexander, also a dually-qualified radiologist, read the same x-ray as positive for pneumoconiosis. Claimant's Exhibit 8. A June 16, 2011 x-ray was read as negative by Dr. Meyer, a dually-qualified radiologist, but was read as positive by Dr. Crum, also a dually-qualified radiologist. Claimant's Exhibit 9; Employer's Exhibit 1. A June 2, 2012 x-ray was read as negative by Dr. Shipley, a dually-qualified radiologist, but was read as positive by Dr. Alexander. Claimant's Exhibit 7; Employer's Exhibit 3. An August 10, 2012 x-ray was read as negative by Dr. Wheeler, a dually-qualified radiologist, but was read as positive by Dr. Alexander. Claimant's Exhibit 6; Employer's Exhibit 2. A December 18, 2013 x-ray was read as negative by Dr. Shipley, but was read as positive by Dr. Crum. Claimant's Exhibit 11; Employer's Exhibit 4.

The administrative law judge found that the September 1, 2010, June 16, 2011, June 2, 2012 and December 18, 2013 x-rays were in equipoise, based on the equal number of positive and negative readings by the dually-qualified radiologists. Decision and Order at 10-11. However, with respect to the August 10, 2012 x-ray, the administrative law judge noted that Dr. Wheeler checked boxes on the ILO classification form, indicating that he saw radiographic abnormalities consistent with emphysema,

[4] 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

bullae, and tuberculosis, but also put question marks over the boxes. *Id.*; Employer's Exhibit 2. He further observed that, in the comments section of the ILO classification form, Dr. Wheeler wrote "lower right apex favoring emphysema, possibly bullous/check [pulmonary function studies] and smoking history . . . . Get CT scan for better evaluation and check for pulmonary hypertension." Employer's Exhibit 2. The administrative law judge determined that "Dr. Wheeler's opinion does not constitute affirmative evidence that the abnormalities seen on the x-ray were due to something other than pneumoconiosis. As a result, his opinion is equivocal." *Id., citing Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010). The administrative law judge thus found that the August 10, 2012 x-ray was positive for pneumoconiosis based on Dr. Alexander's reading, and concluded that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer asserts that the administrative law judge drew an improper assumption from Dr. Wheeler's use of question marks, arguing that the administrative law judge "simply assumed that this meant Dr. Wheeler had a question about his own opinion, rather than some other meaning." Employer's Brief at 5. Employer states, "[in] fact, Dr. Wheeler's question mark near the [tuberculosis] symbol may have meant exactly what Dr. Wheeler said elsewhere in his narrative report - that the film was questionable for tuberculosis but that a CT scan would clear that issue up." *Id.*

Contrary to employer's assertion, the administrative law judge had discretion to draw his own inferences from the evidence and find that Dr. Wheeler's x-ray interpretation was equivocal. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 11. The credibility of the evidence is within the sound discretion of the administrative law judge, and the Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As employer has not raised any other errors with respect to the administrative law judge's weighing of the x-ray evidence, we affirm his finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 11.

In weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that three of the five physicians' opinions in the record diagnosed pneumoconiosis.[5] Decision and Order at 12. The administrative law judge stated:

[5] Dr. Panchal diagnosed "clinical pneumoconiosis" based on claimant's positive x-ray findings and his eleven years of coal dust exposure. Claimant's Exhibit 11. Dr. Panchal also indicated that claimant has a pulmonary impairment caused by smoking and

> The preponderance of the x-ray evidence is positive and thus clinical pneumoconiosis is established. Both Drs. Fino and Rosenberg report that [c]laimant does not have clinical pneumoconiosis. Since their position on clinical pneumoconiosis is contrary to the record, their opinions are given less weight.

Id. at 11.[6] The administrative law judge found that "the opinion of Dr. Panchal, who most recently examined [claimant] on December 19, 2013 establishes the existence of both clinical and legal pneumoconiosis."[7] *Id*. at 12. The administrative law judge further stated, "[a]fter a review of the record I find that the [e]mployer's physicians [Drs. Fino and Rosenberg] fail to account for the [eleven] years of mining exposure. I find that this factor, standing alone, renders [their] opinions unpersuasive. . ." *Id*.; Employer's Exhibits 5-6, 11-12.

Employer contends that the administrative law judge erred in failing to consider the negative CT scan evidence, prior to concluding that claimant has clinical pneumoconiosis. We agree. The administrative law judge did not address the original readings of CT scans dated April 6, 2010[8] and June 22, 2012,[9] which are contained in the

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coal dust exposure. Claimant's Exhibit 11. Dr. Defore indicated that claimant "had no evidence of clinical pneumoconiosis" but that he suffered from legal pneumoconiosis. Director's Exhibit 10. Dr. Splan noted that clinical pneumoconiosis was present based on a positive x-ray reading by Dr. Alexander and diagnosed chronic bronchitis and chronic obstructive pulmonary disease (COPD) "related to the inhalation of coal dust and tobacco smoke." Claimant's Exhibit 7.

[6] Dr. Defore also did not diagnose clinical pneumoconiosis but the administrative law judge failed to identify the weight he accorded Dr. Defore's opinion.

[7] The administrative law judge noted specifically that Dr. Panchal "had the opportunity to examine and test [claimant], and his documentation and reasoning support his conclusions far better than those physicians finding otherwise." Decision and Order at 13. The administrative law judge also found that the opinions of Drs. Defore and Splan, who diagnosed claimant with a respiratory impairment due to coal dust exposure and cigarette smoking, supported Dr. Panchal's diagnosis of legal pneumoconiosis. Decision and Order at 12; Director's Exhibit 10; Claimant's Exhibits 7, 11.

[8] The CT scan dated April 6, 2010 was read by Dr. Saadeh, who wrote under the heading of "Indication" the following: "Former smoker; COPD; coal workers'

treatment records, and he did not consider Dr. Seaman's negative interpretation of an April 6, 2010 CT scan, submitted by employer.[10] Claimant's Exhibit 1; Employer's Exhibits 7, 9; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Because the administrative law judge failed to weigh all of the evidence relevant to whether claimant has clinical pneumoconiosis, we must vacate his determination that claimant established the existence of clinical pneumoconiosis and vacate his rejection of the opinions of Drs. Fino and Rosenberg pursuant to 20 C.F.R. §718.202(a)(4). *Sea B. Mining Co. v. Addison*, F.3d , No. 14-2324, 2016 WL 4056396 at *6 (2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand).

Employer also contends that the administrative law judge erred in giving less weight to the opinions of Drs. Fino and Rosenberg as to whether claimant suffers from

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pneumoconiosis; hilar prominence; heart failure." Claimant's Exhibit 1 at 9. Under "Findings" Dr. Saadeh reported:

> Moderately hyper-expanded lungs. Moderate centrilobular emphysematous changes. Biapical mildy asymmetric pleuroparenchymal opacity, probably benign, . . . A region of band-like linear opacities in the right upper lobe with nodularity and tiny calcifications, . . . This is most likely inflammatory in nature, possibl[y] related to remote granulomatous disease . . . No calcified granulomata in the left lung.
>
> Bilateral lower lobe linear opacities, probably related to scarring from an old infection . . . Pleural based nodule in the right lower lobe . . . likely benign.

Id. Under "Impression," Dr. Saadeh further reported "Probably Benign Abnormalities in the Upper Lobes." *Id*.

[9] The CT scan dated June 22, 2012 was read by Dr. McMurray for "follow-up right upper lobe opacity." Employer's Exhibit 9. The findings included: "moderate diffuse emphysema especially in the upper lobes. There is a stable linear opacity in the right upper lobe extending to the pleura . . . This has not shown a significant change and is most likely an area of linear fibrosis or scarring." *Id.*

[10] Dr. Seaman read a CT scan dated April 6, 2010 as showing "no CT findings consistent with coal workers' pneumoconiosis." Employer's Exhibit 7. He noted that an irregular nodular/linear opacity may represent scarring." *Id*.

legal pneumoconiosis. Employer specifically contends that the administrative law judge improperly shifted the burden of proof and did not rationally explain the bases for his credibility determinations. Employer's arguments have merit, in part.

We disagree with employer that the administrative law judge erroneously shifted the burden to employer to disprove that claimant has legal pneumoconiosis simply because he required employer's physicians to explain their opinions that coal dust exposure did not contribute to claimant's respiratory impairment. *Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638 (4th Cir. 2008) (unpub).[11] However, employer is correct that the administrative law judge failed to properly consider and evaluate the rationales given by Drs. Fino and Rosenberg for concluding that claimant does not have legal pneumoconiosis. Rather, the administrative law judge stated only that: "[a]fter a review of the record I find that the [e]mployer's physicians [Drs. Fino and Rosenberg] fail to account for the [eleven] years of mining exposure. I find that this factor, standing alone, renders [their] opinions unpersuasive. . ." Decision and Order at 13; Employer's Exhibits 5-6, 11-12. This cursory statement by the administrative law judge, without any further analysis of evidence, does not satisfy the Administrative Procedure Act (APA).[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985); Employer's Exhibit 6.

Moreover, to the extent that the administrative law judge suggests that neither Dr. Fino nor Dr. Rosenberg discussed claimant's coal mine employment in rendering his opinion, the administrative law judge's finding is incorrect.[13] Each doctor discussed

[11] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[12] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[13] For example, Dr. Fino opined that claimant's emphysema was due solely to smoking based on the FEV1 ratio, and discussed studies showing that "only 6-8% of miners exposed to coal mine dust at the present dust standards for 35 years will develop clinically important losses in FEV1." Employer's Exhibit 5 at 9. He opined that claimant's emphysema was due to smoking, based on the significant reduction in claimant's diffusion capacity, and the length of claimant's coal mine employment history. Employer's Exhibit 11 at 21-23. He stated that "[t]en and 3/4 years is not enough to even

claimant's eleven years of coal mine employment in concluding that he does not have legal pneumoconiosis. Employer's Exhibits 5, 6 11, 12. What remains is for the administrative law judge to properly consider and evaluate the rationales given by Drs. Fino and Rosenberg, setting forth his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Thus, because the administrative law judge did not properly consider the opinions of Drs. Fino and Rosenberg and adequately explain why he discredited their opinions on the issue of whether claimant has legal pneumoconiosis, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4).[14] On remand, we instruct the administrative law judge to re-evaluate the medical opinions of Drs. Fino and Rosenberg, considering the totality of their opinions, and reweigh the medical opinion evidence as to the existence of legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Wojtowicz*, 12 BLR at 1-165.

In summary, we vacate the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration of the CT scan and medical opinion evidence. Because the administrative law judge's findings on clinical and legal pneumoconiosis also influenced his decision to give less weight to the opinions of Drs. Fino and Rosenberg on the issue of disability causation, we also vacate the

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be a contributing participating factor in [claimant's] disability." *Id*. at 23. Similarly, Dr. Rosenberg relied on the marked reduction of the FEV1/FVC ratio and claimant's low diffusion capacity as support for his opinion that claimant's eleven years of coal mine employment did not contribute to his respiratory or pulmonary impairment. Employer's Exhibit 20. Dr. Rosenberg also indicated that claimant "has significantly reduced diffusing capacities consistent with a diffuse emphysematous pattern on [x]-ray" and "this type of emphysema is consistent with one related to smoking." *Id*. Dr. Rosenberg also discussed whether claimant's eleven years coal mine employment had an additive effect. Employer's Exhibit 12.

[14] The administrative law judge credited the opinions of Drs. Panchal, Splan, and Defore as establishing that claimant has legal pneumoconiosis. Because employer does not specifically challenge the weight accorded those opinions, the administrative law judge's findings as to those opinions, except with respect to the weighing of those opinions relative to those of Drs. Fino and Rosenberg, are affirmed. *See Skrack*, 6 BLR at 1-711.

administrative law judge's determination that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).[15] Thus, we vacate the award of benefits and remand this case for further consideration.

On remand, the administrative law judge must consider whether the party submitting the CT scan evidence has demonstrated that it is medically acceptable and relevant to establishing or refuting entitlement to benefits, pursuant to 20 C.F.R. §718.107. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc). If so, the administrative law judge must determine whether the CT scans in the treatment record are positive, negative, or inconclusive for the existence of pneumoconiosis and then determine the weight to accord the CT scan evidence overall. *See Marra*, 7 BLR at 1-218-219. The administrative law judge must then reconsider the medical opinions and render findings as to whether claimant has established either clinical or legal pneumoconiosis, or both diseases, pursuant to 20 C.F.R. §718.202(a)(4). Thereafter, the administrative law judge must consider whether claimant has established the existence of clinical and legal pneumoconiosis, or both diseases, based on his consideration of all of the relevant evidence, as a whole, under 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 213, 22 BLR 2-162, 2-174 (4th Cir. 2000). As necessary, the administrative law judge must then reweigh the medical opinions to determine whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In evaluating and weighing the medical opinion evidence on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *See Hicks*, 138 F.3d at 533,

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[15] In considering the issue of disability causation under 20 C.F.R. §718.204(c), the administrative law judge concluded:

> Employer's doctors failed to diagnose coal workers' pneumoconiosis and their medical opinions failed to account for Claimant's exposure to coal mine dust. Therefore, their opinions have been accorded less weight. The well-reasoned and well[-]documented medical opinions of Drs. De[f]ore, Splan, and Panchal attribute [c]laimant's totally disabling respiratory impairment to his coal mine dust exposure and smoking history. Therefore, I find the [c]laimant has established the existence of a total respiratory or pulmonary disability due to coal workers' pneumoconiosis.

Decision and Order at 17.

21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. In addition, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge