U.S. Department of Labor

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

BRB No. 16-0112 BLA

EDDIE A. STILTNER Claimant-Respondent v. ESTEP COAL COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/29/2016 DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, 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.

Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05709) of Administrative Law Judge Paul R. Almanza (the administrative law judge) awarding benefits on a miner's claim filed on May 9, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 11.67 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found that claimant established the existence of legal pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b).[3] The administrative law judge also found that claimant established total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's crediting of Dr. Baker's opinion in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant responds, urging affirmance

[1] Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, he found that claimant was not entitled to invocation of the Section 411(c)(4) rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

[2] "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).

[3] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error.

In addressing the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the reports of Drs. Baker, Klayton, Habre, Fino, and Rosenberg. The administrative law judge noted that "Drs. Baker, Klayton, and Habre concluded that [c]laimant has legal pneumoconiosis,[6] while Drs. Fino and Rosenberg stated that [c]laimant does not suffer from legal pneumoconiosis."[7] Decision

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and his finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 3, 10.

[6] Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease and hypoxemia related to coal dust exposure and cigarette smoking. Director's Exhibit 17. Dr. Klayton diagnosed legal pneumoconiosis, in the form of a severe partially reversible obstructive lung disease related to coal dust exposure and smoking. Claimant's Exhibit 3. Dr. Habre diagnosed legal pneumoconiosis, in the form of chronic bronchitis related to coal dust exposure and smoking. Claimant's Exhibit 4.

[7] Dr. Fino diagnosed chronic obstructive airway disease related to smoking, and opined that claimant does not have legal pneumoconiosis. Director's Exhibit 18. Similarly, Dr. Rosenberg diagnosed an obstructive lung disease with an asthmatic component related to smoking. Employer's Exhibit 2. Dr. Rosenberg further opined that claimant does not have legal pneumoconiosis. *Id*.

and Order at 18. The administrative law judge gave great weight to Dr. Baker's opinion because he found that it is well-documented and well-reasoned. By contrast, the administrative law judge gave little weight to Dr. Klayton's opinion, because he relied on Dr. Alexander's positive x-ray interpretation, which the administrative law judge found to be "inconsistent with the other readings of record." *Id*. The administrative law judge also gave little weight to Dr. Habre's opinion because he found that it is poorly reasoned. Further, the administrative law judge gave little weight to Dr. Fino's opinion because he found that it is based on general statistics rather than specific facts about claimant, and it is hostile to the Act and regulations. In addition, the administrative law judge gave little weight to Dr. Rosenberg's opinion because he found that it is inconsistent with the regulations. Having given greatest weight to Dr. Baker's opinion, and little weight to the other medical opinions, the administrative law judge found that claimant established the existence of legal pneumoconiosis.

Employer initially asserts that the administrative law judge erred in crediting Dr. Baker's diagnosis of legal pneumoconiosis because it is based on an inaccurate coal mine employment history. Employer's Brief at 3-4. In his report, Dr. Baker noted that claimant reported that he worked 20 to 25 years in the mining industry, with "5 years underground & rest was surface," whereas the administrative law judge credited claimant with 11.67 years of coal mine employment. Decision and Order at 8; Director's Exhibit 17. The administrative law judge acknowledged that Dr. Baker recorded an employment history that was longer than his own determination, but declined to discount Dr. Baker's opinion on this basis.[8] Decision and Order at 19. The administrative law judge noted that "because of [claimant's] own lapses in memory" and possibly "because of employers' failure to pay taxes," claimant's employment history is not sufficiently complete to establish more than 11.67 years of qualifying coal mine employment.[9]

[8] The other medical opinions of record similarly report employment histories greater than that credited by the administrative law judge. Dr. Klayton stated that claimant has "a total of 19 years of coal mine employment." Claimant's Exhibit 3 at 1. Dr. Habre reported that claimant "has an 18-year history of surface mining." Claimant's Exhibit 4 at 1. Dr. Fino reported that claimant "worked in the coal mining industry for approximately 28 years" and that claimant "estimates that 23 years were above ground and 5 years were spent below ground." Director's Exhibit 18 at 1. Dr. Rosenberg stated that "[t]wenty to 25 years of coal mine employment were reported predominantly on the surface." Employer's Exhibit 2 at 5.

[9] Specifically, because claimant was a poor historian, the administrative law judge did not credit him with coal mine employment for his childhood work, or for various years where his testimony was insufficient to establish the specific duties of his job, or

Decision and Order at 19. The administrative law judge further found, however, that the record nonetheless offers some support for a longer coal mine dust exposure history than his own finding, in that "[e]mployer would have stipulated to fourteen years . . . , and the Director found more than sixteen years." *Id*., *citing* Hearing Tr. at 7-8 and Director's Exhibit 43.

Moreover, the administrative law judge found that, while Dr. Baker recorded a lengthier employment history, "Dr. Baker based his diagnosis of legal pneumoconiosis on objective data, specifically the qualifying pulmonary function tests and [claimant's] other symptoms." Decision and Order at 19. Further, the administrative law judge determined that "Dr. Baker argued convincingly that coal dust and cigarette smoke had a 'synergistic' effect, and that coal dust exposure had substantially aggravated [claimant's] pulmonary condition." *Id*. Thus, the administrative law judge permissibly concluded that the discrepancy between his own length of coal mine employment determination, and the employment history recorded by Dr. Baker, did not undermine the credibility of the physician's opinion. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-309 (1985); Decision and Order at 19.

Employer next asserts that the administrative law judge erred in failing to consider that Dr. Baker relied on an inaccurate smoking history. In assessing the credibility of a medical opinion, an administrative law judge may take into account the fact that a physician has relied upon an inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). The significance of the discrepancy, and the effect, if any, that it has on the credibility of a physician's opinion, however, is left to the discretion of the administrative law judge.

In this case, the administrative law judge determined that the period that claimant smoked "is equal to a roughly 30 pack-year smoking history, which accords with the smoking history recorded by the medical experts who opined on [claimant's] pulmonary condition." Decision and Order at 8. In considering Dr. Baker's opinion, the administrative law judge noted that "Dr. Baker reported an 18-27 pack-year smoking history."[10] Decision and Order at 13. The administrative law judge also noted that Dr.

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even for work at companies that are listed in claimant's Social Security Administration earnings records, but that claimant does not remember. Decision and Order at 4-6.

[10] In his report, Dr. Baker noted that claimant smoked one to one and one-half packs of cigarettes per day from age 23 to age 41. Director's Exhibit 17.

Baker stated that "[t]he combination of coal dust exposure and cigarette smoking may be either synergistic or additive in terms of their effects on the lungs" and "their condition would be worse when one has both exposures rather than one or the other." Decision and Order at 14, *citing* Director's Exhibit 17. On this basis, Dr. Baker opined that claimant's chronic obstructive pulmonary disease and hypoxemia are related to coal dust exposure and cigarette smoking. Director's Exhibit 17. As employer has not shown that the difference between the 30 pack-year smoking history found by the administrative law judge and the 18-27 pack-year smoking history recorded by Dr. Baker represented a discrepancy material to the credibility of Dr. Baker's opinion, employer's argument is rejected.

Employer finally asserts that the administrative law judge erred in crediting Dr. Baker's diagnosis of legal pneumoconiosis, based on the doctor's surrender of his license to prescribe controlled substances. The administrative law judge noted that "[e]mployer has submitted evidence that shows Dr. Baker failed to keep adequate records of his care and surrendered to [the Drug Enforcement Administration] his permit to prescribe medications." Decision and Order at 19, *citing* Employer's Exhibit 9. In considering the effect of the disciplinary action taken by the Kentucky Board of Medical Licensure on the credibility of Dr. Baker's opinion, the administrative law judge stated that he did not condone Dr. Baker's admitted misconduct. Nevertheless, the administrative law judge declined to find that "[Dr. Baker's] misconduct affected his ability to diagnose pneumoconiosis." *Id.* We hold that the administrative law judge permissibly exercised his discretion in finding that the surrender of Dr. Baker's license to prescribe controlled substances did not affect the credibility of his opinion in this case. *See Brown v. Director*, OWCP, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977). Thus, contrary to employer's assertion, the administrative law judge permissibly found that Dr. Baker's opinion is well-documented and well-reasoned, and therefore entitled to great weight. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

As employer raises no further challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Additionally, as employer raises no other arguments that impact the administrative law judge's finding that disability causation was established at 20 C.F.R. §718.204(c), that finding is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge