U.S. Department of Labor

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

BRB No. 14-0196 BLA

EUGENE PRESCOTT Claimant-Petitioner v. CLIFTY MINING COMPANY, INCORPORATED and CAPITAL FIRE & MARINE INSURANCE CORPORATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2015 DECISION and ORDER

Appeal of the Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Eugene Prescott, Winfield, Alabama, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rae Ellen James (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (2010-BLA-05820) of Administrative Law Judge Adele H. Odegard, rendered on a claim filed on September 21, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). This case is before the Board for the second time. In her initial Decision and Order issued on February 29, 2012, the administrative law judge denied benefits because she found that claimant did not establish any of the requisite elements of entitlement. Claimant appealed and the Board affirmed the administrative law judge's finding that claimant established 11.38 years of coal mine employment.[1] *See Prescott v. Clifty Mining Co.*, BRB No. 12-0345 BLA, slip op. at 5 (Feb. 13, 2013) (unpub.). The Board, however, granted a motion filed by the Director, Office of Workers' Compensation Programs (the Director), to vacate the denial and remand the case in order for the Director to satisfy its statutory obligation pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. *Id.* at 4. The Board remanded the case to the administrative law judge for further evidentiary proceedings.

On May 31, 2013, claimant submitted a letter from his treating physician, Dr. Hatfield, stating that claimant had "multiple medical problems including prostate cancer" and was unable to travel more than thirty miles for any additional medical testing. Director's Exhibit 87. By Order dated June 18, 2013, the administrative law judge returned the case to the district director with instructions that he accommodate claimant's request to have a new pulmonary function study conducted within thirty miles of his residence. Director's Exhibit 89. As discussed infra, the district director informed claimant that that the nearest physician authorized to perform a pulmonary function test on behalf of the Department of Labor (DOL) was eighty miles from claimant's house. Director's Exhibit 91. Claimant insisted he could not travel that distance due to his treatment for prostate cancer. *Id.* He later informed the district director that he was unable to undergo any medical testing and also declined to submit additional medical evidence from his treating physician, in lieu of a new pulmonary function test. *Id.* Claimant requested a decision on the record and the case was returned to the administrative law judge, who issued her Decision and Order on Remand on February 25, 2014. Director's Exhibits 91, 92. The administrative law judge first determined that the evidence was insufficient to establish that claimant is totally disabled. However, she also

[1] The Board also affirmed the administrative law judge's finding that because claimant established fewer than fifteen years of coal mine employment, he was not eligible for the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. *See Prescott v. Clifty Mining Co.*, BRB No. 12-0345 BLA, slip op. at 5 (Feb. 13, 2013) (unpub.).

found that, even if claimant were presumed to be totally disabled, the evidence failed to establish that he suffers from pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that he worked twenty years in coal mine employment. In addition, claimant contends that he was not given "a fair and honest evaluation" by Dr. Hasson, the physician who performed the October 15, 2009 DOL-sponsored examination, because Dr. Hasson "was not Board-certified" at the time of the evaluation. Claimant's Letter to the Board dated May 12, 2014 at [1] (unpaginated). Claimant also contends that he did what was asked of him during the examination and, thus, should not be denied benefits because Dr. Hasson was unable to obtain a pulmonary function test. *Id*. at [1-2]. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, and states that "[a]lthough the [administrative law judge] made no specific findings regarding the district director's inability to comply with the Board's remand order . . . the record clearly establishes the district director's good-faith efforts on [claimant's] behalf." Director's Letter Brief at 3. The Director requests that the Board hold that the Director has discharged his obligation under Section 413(b) of the Act, 30 U.S.C. 923(b) to provide claimant with "an *opportunity* to substantiate his claim with a medical exam." *Id*. (emphasis added).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 (1965).

I. LENGTH OF COAL MINE EMPLOYMENT

Claimant maintains that the administrative law judge erred in calculating the length of his coal mine employment. Claimant asserts that he worked twenty years in the coal mines, as demonstrated by pay stubs and sworn affidavits of persons familiar with his work history. The Board addressed claimant's identical arguments in the prior appeal and explained that the administrative law judge acted within her discretion in calculating

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's coal mine employment was in Alabama. *See Slatick v. Director, OWCP*, 698 F.2d 433, 5 BLR 2-49 (11th Cir. 1983); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 6.

claimant's coal mine employment and determining the credibility of the evidence. *See Prescott*, BRB No. 12-0345 BLA at 4-5; February 29 2012 Decision and Order at 7-10. Specifically, the administrative law judge relied on claimant's Social Security earnings records, the formula set forth at 20 C.F.R. §725.101(a)(32)(i), claimant's testimony, and a mine "training certificate" to find that claimant worked 11.38 years from 1974 to 1984. Although claimant asserted that he should be credited with additional coal mine employment from 1953 to 1960 and from 1986 to 1990, the administrative law judge observed that there were no Social Security earnings records for those periods and none of the pay stubs submitted by claimant pertained to those years. Although the administrative law judge acknowledged that claimant submitted affidavits from coworkers, stating generally that he worked twenty years in the coal mines, she found that none of the affidavits specified whether claimant had been employed before 1974 or after 1985. Because the administrative law judge provided a reasonable method for her calculation, and the Board is not empowered to reweigh the evidence, the Board affirmed the administrative law judge's finding of 11.38 years of coal mine employment. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27) (2011); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We decline to disturb that prior holding. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990);

II. COMPLETE PULMONARY EVALUATION

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). When an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). Furthermore, "[w]here the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." *Id*.

In this case, Dr. Hasson examined claimant for the DOL on October 15, 2009, and indicated that claimant was a non-smoker with a history of thirty years of coal mine employment, with twenty-five years of surface mining, ending in 1990. Director's Exhibit 11. Dr. Hasson reported claimant's symptoms of shortness of breath, occasional cough and occasional sputum production, and dyspnea after two to three blocks. On physical examination, Dr. Hasson noted that the chest was resonant to percussion and that, upon auscultation of the lungs, there were rales in the left base of the lung. *Id*. He obtained a chest x-ray, which he read as negative for pneumoconiosis. *Id*. He conducted a resting arterial blood gas study, which was interpreted as "normal" and noted that an

exercise arterial blood gas study was medically contraindicated. *Id*. Dr. Hasson reported that he was unable to obtain any data from the pulmonary function test due to "Absolutely no effort by patient." *Id*. On the Form CM-988, under "Cardiopulmonary Diagnosis," Dr. Hasson indicated that claimant had "no evidence of pneumoconiosis," based on history, physical examination, laboratory tests and chest x-ray. He diagnosed "HCVD (hypertensive cardiovascular disease)," based on history, physical examination, laboratory tests and chest x-ray, and further noted that claimant suffered from arrhythmia by history with cardiomegaly. *Id*. Dr. Hasson opined that the cause of claimant's hypertensive cardiovascular disease was "idiopathic" and the cause of his arrhythmia was "multifactorial." *Id*. Dr. Hasson described claimant's degree of impairment from his hypertensive cardiovascular disease as "moderate – severe" and from his arrhythymia as "unknown." *Id*.

Claimant asserts that the evidence obtained by Dr. Hasson is "false" because Dr. Hasson "was not Board-certified" to evaluate claimant at the time of his evaluation. Claimant's Letter to the Board dated May 12, 2014 at 1. The record, however, reflects that Dr. Hasson has been Board-certified in Internal Medicine since 1975 and Board-certified in Pulmonary Disease since 1978. Furthermore, although Dr. Hasson read the October 15, 2009 x-ray as negative for pneumoconiosis, and he is not a Board-certified radiologist, the DOL had the October 15, 2009 x-ray re-read by Dr. Barnett, who is dually qualified as a Board-certified radiologist and B reader. *See* February 29, 2012 Decision and Order on Remand at 12; Director's Exhibit 11. Dr. Barnett also found that the October 15, 2009 x-ray was negative for pneumoconiosis. Director's Exhibit 11. We therefore conclude that there has been no prejudice to claimant, resulting from Dr. Hasson's lack of radiological qualifications.[3]

With regard to the lack of pulmonary function study evidence in the record, the district director attempted to schedule a second pulmonary function test, in accordance with the Board's remand order, but claimant was unable to undergo any additional medical testing due to his health. The efforts of the district director are set forth in a series of memoranda dated June 28, 2013 through July 29, 2013.[4] Director's Exhibit 91.

[3] It appears that Dr. Hasson's certification as a B reader was expired at the time of his evaluation of claimant. Director's Exhibit 24.

[4] On June 28, 2013, a claims examiner advised claimant that the closest authorized physician to conduct the pulmonary function test was eighty miles from claimant's home. Director's Exhibit 91. During a July 2, 2013 telephone conversation, the claims examiner described claimant as "adamant" that he could not travel eighty miles. *Id*. The claims examiner offered to authorize an overnight stay in a hotel, but claimant indicated he was not willing to spend the night in a hotel. *Id*. On July 8, 2013, the claims examiner suggested that claimant obtain any objective tests from his treating physician, Dr.

At claimant's request, the administrative law judge issued her Decision and Order on Remand, based on all of the evidence in the record. She again concluded that Dr. Hasson's opinion was insufficient to establish that claimant has pneumoconiosis and is totally disabled. We must conclude, under the facts of this case, that the Director has discharged his obligation to afford claimant an "additional opportunity to produce a satisfactory result" on his pulmonary function test. *See* 20 C.F.R. §725.406(c). Therefore, we reject claimant's assertion that he did not receive a "fair and honest evaluation" sponsored by the DOL, as required by law. Claimant's Letter to the Board dated May 12, 2014 at [1] (unpaginated).

III. Merits of Entitlement- The Existence of Pneumoconiosis

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly noted that the record contains no x-ray evidence that is positive for pneumoconiosis. Decision and Order on Remand at 6. Because there are no positive x-ray interpretations, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because there is no biopsy evidence, the administrative law judge correctly found that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order on Remand at 6. The administrative law judge also properly found that none of the presumptions set forth at 20 C.F.R. §718.202(a)(3) is applicable in this case. *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered treatment records, dated December 2002 to October 2009, and two letters submitted by

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Hatfield, in lieu of undergoing a pulmonary function test. *Id*. By letter dated July 10, 2013, claimant advised that his age and deteriorating health prevented him from undergoing any additional testing. *Id*. On July 23, 2013, claimant's daughter advised that he was being treated for cancer and was not able to complete a pulmonary function test. *Id*. On July 29, 2013, the claims examiner indicated that claimant asked for a decision on the record. Thereafter, the case was returned to the administrative law judge.

Dr. Hatfield, claimant's treating physician.[5] In a March 16, 2010 letter, Dr. Hatfield reported that claimant has cough and dyspnea upon exertion, but stated that he was "unsure whether or not [claimant's symptoms were] coming from his Black Lung" because he was "not privy to [claimant's] pulmonary evaluation." Director's Exhibit 13. In his letter dated May 31, 2013, Dr. Hatfield stated that claimant had "multiple medical problems" and was unable to travel more than thirty miles for further medical testing at the request of DOL. Director's Exhibit 87.

The administrative law judge permissibly determined that Dr. Hatfield's reference to "Black Lung" is insufficient to establish that claimant has pneumoconiosis, since Dr. Hatfield "does not indicate what, if any, objective medical data led him to this conclusion" and "the medical treatment records from Dr. Hatfield reflect that his treatment of [claimant], for a period of approximately seven years focused on [claimant's] high blood pressure and generally did not involve [his] respiratory concerns." February 29, 2012 Decision and Order at 16; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also rationally found that "Dr. Hatfield's medical treatment records are not helpful in determining what, if any, basis Dr. Hatfield may have had for any opinion regarding pneumoconiosis in [c]laimant." Decision and Order on Remand at 7; *Jones*, 386 F.3d at 992, 23 BLR at 2-238; *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).

Further, the administrative law judge observed correctly that Dr. Tuteur's opinion does not aid claimant because the doctor opined that claimant has neither clinical nor legal pneumoconiosis.[6] Director's Exhibit 41. Dr. Tuteur attributed claimant's

[5] The administrative law judge incorporated her discussion of the medical evidence from her initial decision, wherein she noted that Dr. Hatfield treated claimant "several times a year, primarily for issues relating to high blood pressure." February 29, 2012 Decision and Order at 15. She noted that Dr. Hatfield described claimant as having a "mild productive cough" on November 13, 2006, but also reported that his lungs were clear. *Id*. at 15 n.29; *see* Director's Exhibit 14. The administrative law judge also noted that treatment records from 2006 to 2009 from the Northwest Regional Cancer Center, did not contain any opinions addressing whether claimant has pneumoconiosis. February 29, 2012 Decision and Order at 15.

[6] 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

respiratory symptoms to allergies. *Id*. The administrative law judge also observed correctly that Dr. Hasson specifically opined that claimant does not have pneumoconiosis, based on the parameters of the DOL-sponsored examination he conducted, which included claimant's history, physical examination, laboratory results, and chest x-ray. Director's Exhibit 11. As noted previously, the x-ray obtained during Dr. Hasson's examination was read by a Board-certified radiologist and B reader as negative for clinical pneumoconiosis. *Id*. Because it is supported by substantial evidence, we also affirm the administrative law judge's finding that "Dr. Hasson's opinion does not indicate, or even imply, that [claimant] has legal pneumoconiosis." Decision and Order on Remand at 7; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson*, 12 BLR at 1-113 (1989); We therefore affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(4).

The administrative law judge weighed all of the evidence in the record and acted within her discretion in finding that claimant did not establish the existence of pneumoconiosis. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge