U.S. Department of Labor

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

BRB No. 14-0179 BLA

RODIE GALE VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCOTTS BRANCH COAL COMPANY	)	DATE ISSUED: 03/31/2015
	)	
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 on Second Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones and E. Shane Branham (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Award of Benefits (2008-BLA-05159) of Administrative Law Judge Daniel F. Solomon, issued 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 a third time and involves claimant's request

for modification of the denial of his subsequent claim, filed on March 8, 2001. The parties have stipulated that claimant worked for eleven years in coal mine employment. We incorporate the procedural history of the case, as set forth in the

Board's prior decisions. *Varney v. Scotts Branch Coal Co.*, BRB No. 09-0629 BLA, slip op. at 1-2 n.1 (Oct. 15, 2010) (unpub.); *Varney v. Scotts Branch Coal Co.*, BRB No. 12-0363 BLA (Apr. 24, 2013) (unpub.). Most recently, the Board sustained the evidentiary rulings of Administrative Law Judge Robert B. Rae and further affirmed his finding that claimant established the existence of clinical pneumoconiosis[1] pursuant to 20 C.F.R. §718.202(a)(1). *Varney*, BRB No. 12-0363 BLA, slip op. at 5-6. However, the Board vacated the award of benefits because Judge Rae did not fully address whether the opinions of Drs. Forehand, Fannin and Baker were reasoned and documented, prior to relying on those opinions to find that claimant established the existence of legal pneumoconiosis[2] at 20 C.F.R. §718.202(a)(4). *Id*. at 8. The Board further vacated Judge Rae's findings of total disability under 20 C.F.R. §718.204(b)(2)(ii), (iii) and his determination that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 7-11.

On remand, the case was re-assigned to Judge Solomon (the administrative law judge), whose Decision and Order on Second Remand is the subject of this appeal. The administrative law judge found that claimant established total disability due to legal pneumoconiosis, a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and a basis for modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge did not provide sufficient findings of fact with regard to whether claimant established the existence of legal pneumoconiosis. Employer also challenges the administrative law judge's findings that claimant is totally disabled, and that his disability is due to legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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,

[1] 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1).

[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).

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 establish entitlement 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. Where 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 "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(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant did not establish any element of entitlement. Director's Exhibit 1 at 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3). Additionally, because claimant requested modification of the denial of his subsequent claim for failure to satisfy the requirements of 20 C.F.R. §725.309(d), the issue before the administrative law judge was whether the new evidence submitted on modification, considered along with the evidence originally submitted in the subsequent claim, established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

I. The Existence of Pneumoconiosis

The administrative law judge observed on remand that he was required to consider whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), and then weigh all types of relevant evidence together to determine if claimant satisfied his burden to establish that he has pneumoconiosis. Decision and Order on Second Remand at 3, citing *Dixie Fuel Co. v. Director, OWCP* [Hensley], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012). In addressing the medical opinion evidence, the administrative law judge observed correctly that "the Board affirmed Judge Rae's determination that Dr. Broudy's opinion on the

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

issue of legal pneumoconiosis was not well-reasoned."[4] Decision and Order on Second Remand at 7, *citing Varney*, BRB No. 12-0363 BLA at 7 n.9. The administrative law judge determined that the opinions of Drs. Forehand and Fannin were reasoned and documented, supportive of a finding of legal pneumoconiosis, and entitled to "significant weight."[5] Decision and Order on Second Remand at 7. Thus, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis, based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Id.*

Employer contends that the administrative law judge "failed to offer any explanation for the basis for his reliance on Dr. Fannin's opinion." Employer's Brief (unpaginated) at [8]. We disagree. The administrative law judge specifically stated:

> Dr. Fannin stated he was familiar with [c]laimant's work history and his medical history. He described symptoms of shortness of breath with exertion and at rest. [Claimant] also had cough with sputum production. These symptoms supported his diagnosis. Dr. Fannin reported [that] his physical examination of [Claimant] showed an increased AP diameter and expiratory wheezing. Dr. Fannin's opinion is supported by his knowledge of the results of the echocardiogram . . . The test confirmed his diagnosis of cor pulmonale. Based on this evidence Dr. Fannin found that [claimant] had legal pneumoconiosis.

Decision and Order on Second Remand at 4. Furthermore, the administrative law judge observed that employer did not challenge Judge Rae's prior findings as to the nature and quality of Dr. Fannin's treatment relationship under the factors set forth at 20 C.F.R. §718.104(d)(1)-(4). *Id*. at 4-5; *see* Director's Exhibit 33; Claimant's Exhibits 10, 12. Because the administrative law judge has explained, in accordance with the Administrative Procedure Act,[6] the basis for his crediting of Dr. Fannin's

[4] Dr. Broudy opined that claimant's respiratory symptoms and "mild impairment" were due to obesity and not coal dust exposure. *See* Director's Exhibits 35, 38, 49, 69; Employer's Exhibit 1.

[5] The administrative law judge gave "some weight" to Dr. Baker's "2004 opinion" that claimant has legal pneumoconiosis, but noted that Dr. Baker had vacillated in earlier reports regarding the etiology of claimant's respiratory condition. Decision and Order on Second Remand at 6.

[6] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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

opinion, employer's assertion of error is rejected. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We also reject employer's argument that the administrative law judge did not follow the Board's instruction to address whether Dr. Forehand's opinion regarding the existence of legal pneumoconiosis was credible, given that Judge Rae discounted Dr. Forehand's positive x-ray reading for clinical pneumoconiosis. Contrary to employer's contention, the administrative law judge specifically noted employer's argument that Dr. Forehand's opinion should be discounted based on his x-ray reading, but rationally concluded that Dr. Forehand "did not rely on the x-ray evidence to find that [claimant's] impairment was due to coal mine dust exposure."[7] Decision and Order on Second Remand at 6. The administrative law judge observed correctly that Dr. Forehand diagnosed "a respiratory impairment due to arterial hypoxemia," as demonstrated by the results of claimant's arterial blood gas testing. *Id*. Moreover, the administrative law judge found that Dr. Forehand "reasonably" attributed claimant's disabling hypoxemia to coal dust exposure since "he was able to eliminate other likely causes based on the totality of his evaluation." *Id*. at 6-7. The administrative law judge consequently did provide an explanation, which is properly grounded in the record, for why he found Dr. Forehand's opinion to be reasoned and documented and sufficient to establish that claimant has legal pneumoconiosis. *See Wojtowicz,* 12 BLR at 1-165.

Employer's arguments with regard to the existence of legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. The administrative law judge has complied with the Board's remand instructions to explain the weight accorded to the opinions of Drs. Fannin and Forehand. *See Wojtowicz,* 12 BLR 1-162 (1989). It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy claimant's burden of proof. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002);

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presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] Dr. Forehand's diagnosis of clinical pneumoconiosis is consistent with Administrative Law Judge Robert B. Rae's overall finding that claimant established the existence of clinical pneumoconiosis, based on a preponderance of the x-ray evidence, which was affirmed by the Board. *Varney v. Scotts Branch Coal Co.*, BRB No. 12-0363 BLA, slip op. 5-6 (Apr. 24, 2013) (unpub.).

Peabody Coal Co. v. Groves, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Accordingly, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and his overall determination, based on his weighing of all the relevant evidence, that claimant satisfied his burden of proof to establish that he suffers from pneumoconiosis. *See Hensley*, 700 F.3d at 881, 25 BLR at 2-218; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513.

II. Total Disability

The Board previously affirmed Judge Rae's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Varney*, BRB No. 12-0363 BLA, slip op. at 11 n.15. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that two of the five arterial blood gas studies were qualifying for total disability,[8] and gave greatest weight to the most recent study by Dr. Forehand, dated June 20, 2006, which was qualifying for total disability. Decision and Order on Second Remand at 9. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge observed that, while Dr. Fannin diagnosed cor pulmonale, none of the other physicians of record diagnosed this condition. *Id*. The administrative law judge concluded that claimant did not establish total disability under this subsection. *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited Dr. Forehand's opinion that claimant has disabling hypoxemia, based on the qualifying arterial blood gas evidence. Decision and Order on Second Remand at 7, 10. The administrative law judge concluded that claimant was unable to perform his usual coal mine work, which required heavy manual labor. *Id*.

Employer contends that the administrative law judge did not give proper weight to Dr. Broudy's qualifications and failed to properly credit Dr. Broudy's opinion that claimant is not totally disabled. We disagree. The administrative law judge acknowledged that Dr. Broudy is Board-certified in pulmonary medicine but permissibly determined that his opinion was not adequately explained. *See Clark*, 12 BLR at 1-151; Decision and Order on Second Remand at 10. As noted by the administrative law judge, Dr. Broudy "denies that claimant is totally disabled" but specifically stated that claimant has "moderately severe hypoxemia," after reviewing the results of Dr. Forehand's arterial

[8] The February 12, 2004 and June 20, 2006 blood gas studies were qualifying, while the August 10, 2001, May 24, 2001, and September 29, 2004 blood gas studies were non-qualifying. Director's Exhibits 11, 15, 43, 49; Claimant's Exhibit 8.

blood gas testing. Decision and Order on Second Remand at 10, *quoting* Director's Exhibit 69. The administrative law judge also observed that Dr. Broudy found a mild respiratory impairment but did not address whether this impairment, or claimant's use of home oxygen, had any effect on claimant's ability to perform his usual coal mine work. Decision and Order on Second Remand at 10. Thus, because the administrative law judge gave valid reasons for assigning Dr. Broudy's opinion less weight, we affirm his credibility determination. *See Napier*, 301 F.3d at 703, 22 BLR at 2-537; *Stephens*, 298 F.3d at 511, 22 BLR at 2-495; Decision and Order on Second Remand at 10.

Employer does not allege any specific error with regard to the administrative law judge's crediting of Dr. Forehand's diagnosis of total disability. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), and his overall determination that claimant established total disability, based on the qualifying arterial blood gas study evidence and Dr. Forehand's opinion pursuant to 20 C.F.R. §718.204(b)(2). *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986).

III. Disability Causation

In considering whether claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), the administrative law judge determined that Dr. Forehand's opinion, attributing claimant's disabling hypoxemia to coal workers' pneumoconiosis, is "the most rational because [Dr. Forehand] had the benefit of having the qualifying blood gas study." Decision and Order on Second Remand at 11. We reject employer's argument that the administrative law judge erred in failing to explain why claimant's blood gas studies are relevant to the issue of disability causation. Dr. Forehand diagnosed total disability based on claimant's qualifying blood gas study results, which showed severe hypoxemia. We have affirmed the administrative law judge's finding that Dr. Forehand's opinion is reasoned and documented regarding the cause of claimant's severe hypoxemia in his discussion of the evidence at 20 C.F.R. §718.202(a)(4). Slip. op. at 5. Thus, we reject employer's contention that the administrative law judge did not render the necessary findings with regard to his crediting of Dr. Forehand's opinion on the issue of disability causation.

We also reject employer's argument that the administrative law judge erred in his treatment of Dr. Broudy's opinion. We affirm the administrative law judge's decision to assign "little weight" to Dr. Broudy's opinion, relevant to the cause of claimant's respiratory disability, because Dr. Broudy did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that claimant has legal pneumoconiosis, and Judge Rae's finding that claimant established the existence of clinical pneumoconiosis. Decision and Order on Second Remand at 7, 11; *see Big Branch Res., Inc. v. Ogle*, 737

F.3d 1063, 1074 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

Thus, because the administrative law judge acted within his discretion in weighing the medical opinion evidence at 20 C.F.R. §718.204(c), we affirm his finding that claimant established total disability due to pneumoconiosis. *See Napier*, 301 F.3d at 703, 22 BLR at 2-537; *Stephens*, 298 F.3d at 511, 22 BLR at 2-495; *Clark*, 12 BLR at 1-155. We also affirm, as supported by substantial evidence, the administrative law judge's findings that claimant satisfied the requirements of 20 C.F.R. §§725.309, 725.310, and established his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order on Second Remand Award of 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