

U.S. Department of Labor

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



BRB No. 18-0348 BLA

AUDREY V. DRENNEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
AMVEST WEST VIRGINIA COAL, LLC)	DATE ISSUED: 02/15/2019
)	
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 Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2015-BLA-05177) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012) (the Act). This case involves a subsequent claim filed on August 29, 2013, and is before the Board for the second time.¹

In a Decision and Order issued July 14, 2016, the administrative law judge denied benefits. Pursuant to an appeal by the Director, Office of Workers' Compensation Programs (the Director), the Board affirmed the administrative law judge's findings that claimant established: twelve years of coal mine employment;² the existence of clinical pneumoconiosis;³ total disability; and a change in an applicable condition of entitlement. The Board vacated the administrative law judge's findings that claimant did not establish the existence of legal pneumoconiosis,⁴ and total disability due to pneumoconiosis. The Board held that the administrative law judge failed to comply with the Administrative Procedure Act,⁵ by providing no explanation for why he rejected Dr. Rasmussen's opinion that claimant has legal pneumoconiosis, or how he resolved the conflict in the medical opinion evidence. Thus, the Board vacated the denial of benefits and remanded the case for further consideration. The Board instructed the administrative law judge on remand to

¹ We incorporate the procedural history of the case as set forth in *Drennen v. Amvest W. Va. Coal, LLC*, BRB No. 16-0596 BLA, slip op. at 1 n.1 (July 18, 2017) (unpub.).

² The Board noted that because claimant established fewer than fifteen years of coal mine employment, he cannot 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) (2012). *Drennen*, BRB No. 16-0596 BLA, slip op. at 2 n.2.

³ 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." 20 C.F.R. §718.201(a)(1).

⁴ Legal pneumoconiosis is "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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

reconsider the opinions of Drs. Rasmussen and Zaldivar regarding legal pneumoconiosis and disability causation. *See Drennen v. Amvest W. Va. Coal, LLC*, BRB No. 16-0596 BLA (July 18, 2017) (unpub.).

On remand, the administrative law judge found that claimant established total disability due to legal pneumoconiosis and awarded benefits.

Employer contends in the present appeal that the administrative law judge did not properly weigh the medical opinions regarding legal pneumoconiosis and total disability due to pneumoconiosis. Neither claimant nor the Director filed a response brief.

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.⁶ 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 he has pneumoconiosis, the pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and the totally disabling respiratory or pulmonary impairment 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).

Legal Pneumoconiosis

To establish the existence of legal pneumoconiosis, claimant must prove that he has a chronic pulmonary disease, or respiratory or pulmonary impairment, that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b). On remand, the administrative law judge reconsidered the opinions of Drs. Zaldivar and Rasmussen to determine whether claimant satisfied his burden. Decision and Order on Remand at 3-9; Director's Exhibits 12, 33; Employer's Exhibits 2, 5. Dr. Zaldivar opined that claimant has mild irreversible obstruction with a moderate diffusion impairment and non-disabling hypoxemia due to his interstitial lung disease. Dr. Zaldivar ruled out legal pneumoconiosis because claimant has a gas exchange lung problem rather than a ventilatory impairment. Director's Exhibit 33; Employer's Exhibit 5 at 12. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of an oxygen

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

exchange impairment, due in significant part to coal dust exposure and cigarette smoking. Director's Exhibit 12; Employer's Exhibit 2.

The administrative law judge discredited Dr. Zaldivar's opinion because he did not adequately explain why the presence of a gas exchange impairment in the absence of a ventilatory impairment excluded coal dust as a causal factor. Decision and Order on Remand at 9. In contrast, after reviewing Dr. Rasmussen's report and testimony, the administrative law judge found his opinion well-documented and reasoned. *Id.* at 8. In particular, he determined that Dr. Rasmussen clearly explained his opinion that coal dust is a major factor in claimant's disabling respiratory impairment. *Id.* at 9. Accordingly, the administrative law judge found Dr. Rasmussen's diagnosis entitled to greater weight than Dr. Zaldivar's contrary diagnosis and sufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.202(a). *Id.*

Employer challenges the administrative law judge's finding, arguing that Dr. Rasmussen's opinion is not well-reasoned or documented because he did not consider Dr. Zaldivar's more recent 2014 pulmonary function and blood gas studies. Employer's Brief at 6. Employer's contention is without merit as Dr. Rasmussen was supplied with a copy of Dr. Zaldivar's testing prior to his deposition. Employer's Exhibit 2 at 6. Dr. Rasmussen testified that although Dr. Zaldivar's blood gas study results were non-qualifying, the study was nonetheless "quite an abnormal test" and did not establish that claimant does not have a totally disabling impairment. *Id.* at 7-8. He further explained the study showed a marked abnormality in claimant's gas exchange and if claimant had been exercised for a period greater than four minutes he "absolutely" would have shown greater abnormality. *Id.* at 10-11, 17.

Dr. Rasmussen further testified that coal dust is known to cause impairment in oxygen transfer absent ventilatory impairment, and that claimant's impairment pattern is typical of that experienced by many miners. *Id.* at 13-14. The administrative law judge therefore permissibly credited Dr. Rasmussen's diagnosis of legal pneumoconiosis as well-documented and well-reasoned. 20 C.F.R. §718.201(a)(2), (b); *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 8-9. As employer raises no further challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm his finding that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Disability Causation

To establish that he is totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis was a “substantially contributing cause” of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Employer generally contends the administrative law judge committed the same errors weighing Dr. Rasmussen’s opinion on disability causation as he did when finding claimant established legal pneumoconiosis. Employer’s Brief at 7. Employer’s contentions are without merit.

The administrative law judge rationally credited Dr. Rasmussen’s opinion as well-reasoned and documented, because he reviewed claimant’s occupational and medical histories, obtained the results of objective testing, reviewed the objective test results obtained by Dr. Zaldivar, and explained how the data supported his conclusion that legal pneumoconiosis is a substantially contributing cause of claimant’s disability. *See 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 on Remand at 11. With respect to Dr. Zaldivar’s opinion that claimant’s impairment is unrelated to pneumoconiosis, we affirm the administrative law judge’s finding that it is entitled to little weight as unchallenged on appeal.⁷ 20 C.F.R. §802.211(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1984); Decision and Order on Remand at 11. We therefore further affirm the administrative law judge’s determination that Dr. Rasmussen’s opinion outweighs Dr. Zaldivar’s contrary opinion and is sufficient to satisfy claimant’s burden of proof at 20 C.F.R. §718.204(c). *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Remand at 11.

⁷ In discrediting Dr. Zaldivar’s opinion on disability causation, the administrative law judge correctly observed that “[w]here an Administrative Law Judge determines that a miner suffers from pneumoconiosis, a medical opinion finding the miner does not suffer from the disease ‘can carry little weight’ in assessing the etiology of the miner’s total disability.” Decision and Order on Remand at 11, *quoting Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge