U.S. Department of Labor

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

BRB No. 19-0434 BLA

EARL NELSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, INCORPORATED, Self-insured by PEABODY ENERGY CORPORATION	)	DATE ISSUED: 08/31/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago Illinois, for Claimant.

Paul E. Frampton & Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2017-BLA-05876) rendered on a claim filed on August 3, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2018) (Act).

The administrative law judge found Claimant established twenty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in refusing to admit evidence relevant to its liability for benefits because that evidence was not submitted to the district director. On the merits, Employer contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting Employer waived the responsible carrier issue and untimely submitted liability evidence.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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). The Board reviews the administrative law judge's procedural rulings for an

[1] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in either Kentucky or Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Admissibility of Liability Evidence

The district director issued a Notice of Claim identifying Employer and its Carrier as a potentially liable operator/carrier. Director's Exhibit 18. Employer responded to the Notice of Claim by denying all aspects of potential liability. Director's Exhibit 21. The district director subsequently issued a Schedule for the Submission of Additional Evidence (SSAE) giving "any party that wishes to submit liability evidence or identify liability witnesses" until February 13, 2016 to submit evidence in support of their positions. Director's Exhibit 25. Moreover, the SSAE stated "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.*, *citing* 20 C.F.R. §725.456(b)(1). Thereafter the district director issued a Proposed Decision and Order naming Employer as the responsible operator and awarding benefits. Director's Exhibit 33.

At Employer's request, the case was forwarded to OALJ for a formal hearing that was scheduled for August 15, 2018. One day prior to hearing, Employer filed a motion to be dismissed as the responsible operator, asserting that Peabody Energy Corporation was not the liable carrier. Employer submitted liability evidence attached to that motion. In his Decision and Order, the administrative law judge denied Employer's motion as untimely filed because it violated his Notice of Hearing, which required the parties' motions be in writing and filed at least ten days before the hearing. Decision and Order at 3. He further found Employer's liability evidence inadmissible because it had not been submitted before the district director and Employer made no argument that extraordinary circumstances existed to admit the untimely evidence into the record. *Id.*, *citing* 20 C.F.R. §725.456(b)(1).

Because the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the OALJ, the regulations require that absent extraordinary circumstances, liability evidence must be timely submitted to the district director.[3] 20 C.F.R. §725.456(b)(1). Employer does not dispute

[3] A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4),

that it failed to timely submit liability evidence before the district director.[4] Nor does it assert extraordinary circumstances. Employer states only that the administrative law judge should have nonetheless considered evidence of agency actions that are a matter of public record relevant to whether Peabody Energy Corporation is liable for payment of benefits. Employer's Brief at 26. As the Director correctly notes, Employer appears to argue that because "some of the documents [Employer] submitted to the [administrative law judge] consisted of Orders of the Department of Labor demonstrating agency action, it was unnecessary to submit that evidence to the district director or the [administrative law judge] at all." Director's Brief at 7. We reject Employer's contention.

Employer, not the Director, was responsible for submitting any documentation relevant to its liability by the deadline set forth in the SSAE. 20 C.F.R. §725.456(b)(1). Further, although Employer suggests that some of the documents demonstrating agency action are a matter of "public record," it does not clarify which documents support its argument sufficient to permit Board review. Employer's Brief at 26; *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

No abuse of discretion by the administrative law judge in refusing to admit the liability evidence has been shown under the facts of this case. *See McClanahan*, 25 BLR at 1-175; *Keener*, 23 BLR at 1-236. Thus, we reject Employer's assertion of error.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to Employer to establish that Claimant has neither legal nor clinical pneumoconiosis,[6] or

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725.407(b); *see Osborne*, 895 F.2d at 952. The Board has consistently held that the rules and regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, slip op. at 4 (Sept. 19, 2012) (unpub.); *J.H.B.* [*Boyd*] *v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.).

[4] We affirm, as unchallenged, the administrative law judge's denial of Carrier's Motion to Dismiss. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] We affirm, as unchallenged, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

[6] "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). "Clinical

that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.[7]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Employer relies on Drs. Tuteur's and Rosenberg's opinions to disprove legal pneumoconiosis. They opined Claimant has chronic obstructive pulmonary disease (COPD)/emphysema due entirely to smoking with no contribution from coal mine dust exposure. The administrative law judge found neither physician's opinion credible to satisfy Employer's burden of proof.

Employer contends the administrative law judge "unfairly and improperly critiqued" Drs. Tuteur's and Rosenberg's opinions and erroneously required them to explain their conclusions on legal pneumoconiosis beyond a reasonable degree of medical certainty. Employer's Brief at 4. Employer's argument is without merit. The administrative law judge permissibly considered whether Drs. Tuteur's and Rosenberg's opinions are adequately reasoned and persuasive to disprove Claimant has legal pneumoconiosis. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

As the administrative law judge accurately described, Dr. Tuteur indicated that "there is nothing in the Claimant's histories, physical findings, or objective studies which allow him to determine a cause of the Claimant's COPD/emphysema, so he relied on a

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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).

[7] The administrative law judge found that Employer disproved clinical pneumoconiosis. Decision and Order at 16.

methodology which uses statistics to determine relative risk." Decision and Order at 17; *see* Employer's Exhibit 1 at 3. Because Dr. Tuteur believes that statistics show the risk of contracting COPD from smoking is far greater than the risk of contracting it from coal mine dust exposure, he opined that Claimant's significant smoking history was the sole cause of his COPD/emphysema.[8] Employer's Exhibit 1 at 3-5; Employer's Exhibit 4 at 63-64.

Contrary to Employer's contention, the administrative law judge permissibly found Dr. Tuteur's rationale flawed because it does not address whether Claimant is susceptible to developing COPD from coal mine dust exposure. *See Rowe*, 710 F. 2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 17-18. Additionally, the administrative law judge acted within his discretion in finding Dr. Tuteur's opinion unpersuasive because it does not account for the Department of Labor's (DOL) position that the effects of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

Regarding Dr. Rosenberg's opinion, the administrative law judge accurately noted that he excluded legal pneumoconiosis, in part, because the pulmonary function studies showed a markedly reduced FEV1/FVC ratio, which he opined is consistent with smoking and not coal mine dust exposure. Decision and Order at 19; *see* Employer's Exhibit 3 at 8. In accordance with Sixth Circuit law, the administrative law judge permissibly rejected Dr. Rosenberg's opinion as conflicting with the DOL's position in the preamble that coal mine dust exposure can cause clinically significant obstructive disease which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 19. Furthermore, the administrative law judge permissibly found as speculative Dr. Rosenberg's opinion that Claimant's non-reversible obstructive impairment was due to asthma remodeling and not coal mine dust exposure because "no objective proof was offered to support this assertion." Decision and Order at 21; *see Rowe,* 710 F.2d at 255.

[8] Dr. Tuteur specifically stated that "when one compares the 20% risk of COPD among smokers who never mined to the 1% to 2% risk of nonsmoking miners, and apply standard medical reasoning process to [Claimant], who has a [thirty] year smoking history, it is with reasonable medical certainty that his clinical picture of mild chronic obstructive pulmonary disease, is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." Employer's Exhibit 1 at 4.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge acted within his discretion in rejecting Drs. Tuteur's and Rosenberg's opinions and his findings are supported by substantial evidence, we affirm his determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Rowe*, 710 F.2d at 255; Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge found Employer did not establish that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 22. Employer raises no specific arguments on disability causation, other than to assert Claimant does not have legal pneumoconiosis. Because we have affirmed the administrative law judge's credibility findings on legal pneumoconiosis, we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22. We therefore affirm the administrative law judge's determination Claimant is entitled to benefits. 30 U.S.C. §921(c)(4) (2018).

[9] Because we affirm the administrative law judge's rejection of Drs. Tuteur's and Rosenberg's opinions, the only opinions supportive of Employer's burden of proof, we need not address its contention he erred in crediting Drs. Feicht's and Krefft's opinions that Claimant has legal pneumoconiosis. Employer's Brief at 28; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge