U.S. Department of Labor

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

BRB No. 19-0406 BLA

PAUL G. MCKINNEY, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG TIGART VALLEY, INCORPORATED	)	DATE ISSUED: 07/23/2020
	)	
and	)	
	)	
ARCH COAL COMPANY, INCORPORATED	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2017-BLA-05966) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 2, 2014.

The administrative law judge credited Claimant with forty-six years of coal mine employment either underground or above ground at an underground mine site based on the parties' stipulation, and found he established total disability. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[1] She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in denying its post-hearing request for an extension of time to submit evidence. It also asserts the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[2]

The Benefit Review 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.[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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established forty-six years of qualifying coal mine employment; he is totally disabled; and he invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.* 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 8-18; *see* Employer's Brief at 3-4.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Evidentiary Challenge

Employer challenges the administrative law judge's December 11, 2018 Order Denying Employer's Request for Extension of Time (December 11, 2018 Order) to submit post-hearing evidence including depositions from Drs. Rosenberg and Tuteur. Employer argues it was improperly denied the opportunity to respond to Claimant's post-hearing evidence and rehabilitate its own experts' medical opinions. Employer's Brief at 4-5. Employer's allegation of error is without merit.

In denying Employer's request, the administrative law judge noted she cancelled the May 23, 2018 administrative hearing due to the parties' failure to timely develop their evidence. December 11, 2018 Order at 1 n.2; *see* May 11, 2018 Order Granting Employer's Renewed Motion to Continue or Hold Record Open. At that time, she advised the parties to complete all evidentiary development by the rescheduled October 18, 2018 hearing. *Id*. She observed that although the resulting delay provided the parties an additional five months to complete the development of their evidence, neither complied. December 11, 2018 Order at 1-2 n.2.

At the October 18, 2018 administrative hearing, the administrative law judge granted the parties' respective requests to submit all post-hearing evidence by November 30, 2018, which was subsequently extended to December 7, 2018. *See* December 11, 2018 Order at 1; November 21, 2018 Order; Hearing Transcript at 9-13. She noted although both parties' post-hearing evidence was due on the same day, only Claimant timely submitted his evidence. December 11, 2018 Order at 2. Employer waited until the deadline to file its request for an extension of time to submit its post-hearing evidence, stating it cancelled the depositions of Drs. Rosenberg and Tuteur, scheduled for October 30, 2018 and November 8, 2018 respectively, to allow time to receive and respond to Claimant's post-hearing evidence. Employer's Motion for Extension of Time at 1-2.

The administrative law judge noted Claimant objected to Employer's rescheduling of the depositions because it canceled them without providing "cause" and rescheduled them for dates in January 2019 without his consent. *See* December 11, 2018 Order at 2 n.3. The administrative law judge agreed, found Employer did not establish good cause for its failure to submit its evidence, and denied its request for extension of time. *Id.* at 2.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish her action represented an abuse of discretion. *See V.B.*

[*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). We conclude Employer has not satisfied its burden.

Employer does not assert it was unaware of the December 7, 2018 submission deadline set by the administrative law judge. Nor does Employer dispute her finding it took no action to complete its evidentiary development until it requested an extension of time on December 7, 2018 despite canceling the depositions as early as October 30, 2018, the date of Dr. Rosenberg's scheduled deposition. Under these circumstances, we discern no abuse of discretion in the administrative law judge's finding Employer did not establish good cause for its failure to comply with her filing deadline.[4] *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-152.

Moreover, we reject Employer's contention the administrative law judge acted inconsistently in admitting Claimant's post-hearing evidence. *See* Employer's Brief at 4-5. Employer does point to any ambiguity in the administrative law judge's order directing both parties to submit post-hearing evidence by the December 7, 2018 deadline. Nor did Employer request an alternate schedule to allow further evidentiary development following receipt of Claimant's evidence.[5] *See* Hearing Transcript at 11. Rather, Employer unilaterally canceled the depositions without leave, and failed to comply with the deadline.

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[4] We note employer could have requested its extension earlier or timely submitted its evidence and sought to supplement it for good cause.

[5] The Hearing Transcript includes the following exchange regarding the time for filing of post-hearing evidence:

> Ms. Glygola: I don't want the depositions postponed until after my doctor's (sic) get their reviews in, again.
>
> Judge Appetta: I don't believe that was being contemplated.
>
> Mr. Frampton: Yeah. I'm not going to ask for that.
>
> Ms. Glygola: Okay.
>
> Judge Appetta: I mean I just assumed you would have already asked, that's all.
>
> Mr. Frampton: That's correct.

Hearing Transcript at 11.

In contrast, the administrative law judge admitted Claimant's timely submitted post-hearing evidence into the record. *See* 20 C.F.R. §725.456. Consequently, we discern no basis for Employer's argument it has been unfairly denied additional time for submitting post-hearing evidence.[6] *See* Employer's Brief at 4-5. Because the administrative law judge acted consistently and did not abuse her discretion in denying Employer's request for an extension of the deadline set for submitting post-hearing evidence, we affirm her determination. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-152.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[7] or 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.

[6] We reject Employer's assertion the "timing" of the administrative law judge's decision suggests an abuse of discretion. Employer's Brief at 4-5 n.5. Employer argues because it requested the record be held open for depositions scheduled for January 8 and January 30, 2019, and the administrative law judge did not issue a decision until the end of April 2019 after denying its request, there was enough time to conduct the depositions and she therefore exceeded her authority. *Id*. Employer overlooks its unilateral cancellation of the depositions and its failure to take any action to request an extension prior to the deadline for submitting evidence. The reasonable amount of time the administrative law judge took to issue a decision under these circumstances does not excuse Employer's neglect. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

[7] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

§718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to rebut the presumption by either method.[8]

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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found Dr. Rosenberg's opinion,[9] the only opinion stating Claimant does not have legal pneumoconiosis, insufficient to establish rebuttal.[10] Decision and Order at 17-18, 27-28; Employer's Exhibit 6.

Employer argues the administrative law judge misapplied the preamble to the 2001 revised regulations in assessing Dr. Rosenberg's opinion, resulting in an irrebutable presumption that every former miner who develops obstructive lung disease and emphysema has legal pneumoconiosis. Employer's Brief at 7-9. Employer further alleges the administrative law judge errantly assumed the preamble's recognition that coal dust-induced and smoke-induced emphysema occurs through "similar mechanisms" means they are "identical." *Id*. at 7 n.6; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). These contentions lack merit.

The administrative law judge permissibly relied on the preamble as a guide in assessing the credibility of the medical opinions. *See Westmoreland Coal Co. v. Stallard*,

[8] The administrative law judge found Employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 26.

[9] Dr. Rosenberg stated "a diffuse emphysematous process based on radiographic studies, coupled with a severely reduced diffusing capacity is inconsistent with the presence of legal [coal workers' pneumoconiosis] and specifically emphysema related to past coal mine dust exposure." Employer's Exhibit 6. He also noted Claimant's treatment records needed to be reviewed to accurately understand his smoking history. *Id*.

[10] The opinions of Drs. Celko, Krefft, Sood, and Tuteur do not assist employer as they opined Claimant suffers from legal pneumoconiosis. Decision and Order at 11-17, 26-27; Director's Exhibit 12; Claimant's Exhibits 8, 8A, 10; Employer's Exhibit 5. Thus, we need not address Employer's contentions the administrative law judge erred in weighing their opinions. *See* Employer's Brief at 9-11.

876 F.3d 663, 667 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012). Contrary to Employer's contention, the administrative law judge did not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. *See Looney*, 678 F.3d at 314-16; Employer's Brief at 7-9. Rather, referencing the medical science discussed in the preamble, she permissibly determined Dr. Rosenberg failed to adequately explain why Claimant's forty-six years of coal dust exposure[11] did not significantly contribute to or substantially aggravate his chronic obstructive pulmonary disease/emphysema. Decision and Order at 21; *see* 65 Fed. Reg. at 79,940; *Looney*, 678 F.3d at 314-16. The administrative law judge's reasoning accords with the position of the Department of Labor that the effects of cigarette smoking and coal mine dust exposure can be additive. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Looney*, 678 F.3d at 314-16; Decision and Order at 27; Employer's Brief at 7 n.6.

Employer also contends Dr. Rosenberg "set out a persuasive and medically reasoned argument, and there is no contrary evidence critiquing his rationale or support."[12] Employer's Brief at 8. Employer's argument amounts to a request that the Board reweigh the credibility of evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the administrative law judge's rationale for discrediting Dr. Rosenberg's opinion, we affirm Employer failed to establish Claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 27-28. Employer's failure to disprove legal

[11] Employer also argues the administrative law judge improperly applied a presumption that a physician cannot exclude a contribution from coal mine employment if a miner works a set amount of time. Employer's Brief at 7; *see* Decision and Order at 27. Contrary to Employer's assertion, the administrative law judge did not state a physician could never find coal dust did not contribute to a miner's respiratory impairment when he had nearly fifty years of coal mine employment. *See* Decision and Order at 27-28. Rather, she found Dr. Rosenberg did not adequately explain why, given Claimant's significant coal dust exposure, he was able to conclude coal dust did not contribute to his respiratory impairment. *Id*.

[12] We reject Employer's general assertion the administrative law judge "completely ignored" the medical literature cited by Dr. Rosenberg. Employer's Brief at 8. Employer does not identify the medical literature and a review of Dr. Rosenberg's report does not indicate he relied on outside medical literature in forming his opinion. *See* Employer's Exhibit 6.

pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis.

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing "no part of the miner'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). She permissibly found the same reasons that undercut Dr. Rosenberg's opinion Claimant does not suffer from legal pneumoconiosis also undercut his opinion Claimant's disability is unrelated to it.[13] 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (physician who incorrectly fails to diagnose legal pneumoconiosis cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); Decision and Order at 28. Employer does not allege any error other than its argument the administrative law judge erred in determining Claimant suffers from legal pneumoconiosis, which we have rejected. *See* Employer's Brief at11-12. We therefore affirm the administrative law judge's finding Employer failed to rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory disability is due to legal pneumoconiosis. Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut the presumption, we affirm the award of benefits.

[13] In this regard, Dr. Rosenberg did not set forth any rationale unrelated to the absence of legal pneumoconiosis.

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