U.S. Department of Labor

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

BRB No. 19-0452 BLA

CARL L. GRIFFITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 03/26/2021
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Jeannie B. Waltson and Philip G. Piggott (Starnes Davis Florie LLP), Birmingham, Alabama, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge Patrick M. Rosenow's Decision and Order Denying Benefits (2018-BLA-05804) rendered on a claim filed on January 13, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with twenty-two years of underground coal mine employment and found he has 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 to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He also found Employer did not rebut the presumption by disproving pneumoconiosis, but did rebut it by establishing no part of Claimant's total disability was caused by pneumoconiosis, and thus denied benefits.

On appeal, Claimant argues the administrative law judge erred in finding Employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so.

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).

We initially affirm, as unchallenged on appeal, 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); 30 U.S.C. §921(c)(4) (2018); Decision and Order at 13-14. Because Claimant invoked the presumption, the burden shifted to Employer to establish he has neither legal[3] nor clinical pneumoconiosis,[4] or that "no part

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[3] "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).

[4] "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

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 the evidence insufficient to rebut the presumption of clinical pneumoconiosis, Decision and Order at 14-16, which precludes a rebuttal finding that Claimant does not have pneumoconiosis.[5] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established "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); Decision and Order at 17-19. He found the opinions of Drs. Goldstein and Rosenberg that no part of Claimant's disability was caused by pneumoconiosis reasoned and documented, and thus adequate to rebut the presumption.[6] Decision and Order at 18-19.

We agree with Claimant's argument that the administrative law judge erred in finding the opinions of Drs. Goldstein and Rosenberg sufficient to disprove disability causation. Claimant's Brief at 3-10. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has held that where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not worthy of much, if any, weight." *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1289 (11th Cir. 2019), *quoting Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). This opinion "may not be credited at all" on disability causation absent "specific

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

[5] In its response brief, Employer does not specifically challenge the administrative law judge's finding the evidence insufficient to rebut the presumption of clinical pneumoconiosis. Thus this finding is affirmed. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §802.211(b).

[6] Dr. O'Reilly initially opined Claimant is totally disabled due to pneumoconiosis. Director's Exhibit 10. In his supplemental report, he opined Claimant's restrictive impairment is eighty-percent due to obesity. Director's Exhibit 21. He testified the impairment could be due entirely to obesity if Claimant does not have clinical pneumoconiosis. Claimant's Exhibit 8 at 5-19, 39-44. He opined if there was additional x-ray evidence consistent with clinical pneumoconiosis, he would be more confident in his diagnosis. *Id*. The administrative law judge found "Dr. O'Reilly's opinion is too equivocal to assist Employer in establishing rebuttal." Decision and Order at 16. As no party challenges that finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

and persuasive reasons" for concluding it is independent of the mistaken belief that the miner does not have the disease.[7] *Ferguson*, 920 F.3d at 1289. This is so regardless of whether Claimant establishes pneumoconiosis by affirmative evidence or by operation of the Section 411(c)(4) presumption. *Id.* Thus, the administrative law judge's conclusion that Drs. Goldstein's and Rosenberg's disability causation opinions "cannot be discounted based on the x-ray evidence as it is essentially in equipoise" is fundamentally incorrect.[8] Decision and Order at 18.

Notwithstanding this error, remand for further consideration of this issue is unnecessary as Employer cannot establish the opinions of Drs. Goldstein and Rosenberg that no part of Claimant's total disability is due to clinical pneumoconiosis can be separated from their view that Claimant does not suffer from the disease. Therefore, as a matter of law, their opinions cannot rebut the presumption. *Ferguson*, 920 F.3d at 1289; *Epling*, 783 F.3d at 504-05.

In three separate reports, Dr. Goldstein opined Claimant does not have clinical pneumoconiosis but has a restrictive lung defect caused by obesity and CO2 retention due to Pickwickian Syndrome. Employer's Exhibit 6 at 118, 142-144. Dr. Rosenberg opined Claimant does not have clinical pneumoconiosis but is totally disabled by a respiratory impairment from obesity and other extrinsic factors. Employer's Exhibit 7 at 6-7.

Neither Dr. Goldstein nor Dr. Rosenberg offered any explanation or support for their exclusion of clinical pneumoconiosis as a cause of or factor in Claimant's disability other than their erroneous belief that Claimant does not suffer from the disease.[9] Employer's

[7] The Unites States Court of Appeals for the Fourth Circuit explained that even if there are "specific and persuasive reasons" for concluding an opinion is independent of the mistaken belief that the miner does not have pneumoconiosis, the opinion can only be assigned, at most, "little weight" on disability causation. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015).

[8] In weighing the evidence on rebuttal of clinical pneumoconiosis, the administrative law judge concluded Employer failed to disprove the disease because the x-rays are in equipoise and the opinions of Drs. Goldstein and Rosenberg that Claimant does not have the disease "cannot outweigh the finding[s] of the dually qualified B-readers and board-certified radiologists" who are more qualified to read x-rays. Decision and Order at 16.

[9] As to whether Claimant's total disability is due to clinical pneumoconiosis, Dr. Goldstein's analysis is limited to attributing Claimant's disability to obesity hypoventilation syndrome and disputing that there is any evidence Claimant has clinical pneumoconiosis. Employer's Exhibit 6 at 118, 142-144. Dr. Rosenberg's causation

Exhibits 6 at 118, 142-144, 7 at 6-7. Thus substantial evidence does not exist to find the doctors provided specific and persuasive reasons to credit their opinions. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is such evidence "that a reasonable mind would accept to support a conclusion"); *Ferguson*, 920 F.3d at 1289; *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004).

While factual determinations are within the province of the administrative law judge, reversal is warranted where no factual issues remain to be determined. *See Collins v. Pond Creek Mining Co*., 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, as no factual issue remained as to cause of death, with directions to award benefits without further administrative proceedings); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same). As there is no other evidence in the record that could support Employer's burden, Employer has failed to establish rebuttal by proving no part of Claimant's total disability was caused by clinical pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(2)(ii).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and Employer did not rebut the presumption, Claimant is entitled to benefits.

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analysis similarly relies on his incorrect diagnosis of no clinical pneumoconiosis. He excluded a clinical pneumoconiosis diagnosis because Claimant's "alveolar capillary bed within his lungs is intact and not scarred from interstitial lung disease" and thus concluded Claimant's impairment is "'extrinsic' in etiology related to obesity." Employer's Exhibit 7 at 6-7

[10] Even if we did not reverse the administrative law judge's rebuttal finding that Claimant's disabling impairment was not due to clinical pneumoconiosis, his cursory review of the medical opinions on rebuttal of legal pneumoconiosis and disability causation due to clinical and legal pneumoconiosis would require remand. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). He offered only a summary of Drs. Goldstein's and Rosenberg's opinions followed by a conclusory statement that they are reasoned and documented. Decision and Order at 18. He also failed to explain his crediting of Dr. Goldstein in light of his other finding that the physician's rationale is "contrary to pneumoconiosis being a progressive disease that can advance after a miner leaves the mines." Decision and Order at 18; *see Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1288 (11th Cir. 2019); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is reversed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge