U.S. Department of Labor

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

BRB No. 16-0014 BLA

LENNIX G. CONN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL MAC, INCORPORATED	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED, c/o WELLS FARGO	)	
	)	DATE ISSUED: 08/31/2016
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.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05036) of Administrative Law Judge John P. Sellers, III, 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 claim filed on October 8, 2010.

The administrative law judge credited claimant with 33.5 years of surface coal mine employment in substantially similar dust conditions to those in an underground mine and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge accepted employer's stipulation that claimant suffers from a totally disabling respiratory or pulmonary impairment and, therefore, found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that the administrative law judge erred in relying on the preamble to the regulations in assessing the reliability of the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's reliance on the preamble in determining the credibility of the medical opinion evidence was proper.[2]

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of qualifying coal mine employment, *i.e.*, underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012).

[2] We affirm, as unchallenged on appeal, the administrative law judge's

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither clinical nor legal pneumoconiosis,[4] or by establishing that "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)(i), (ii). The administrative law judge determined that employer

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determinations that claimant established more than fifteen years of qualifying coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment, and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] After reviewing claimant's application, his current address, the Description of Coal Mine Work form, and the Social Security Administration (SSA) earnings records, the administrative law judge determined that the evidence of record was "silent as to the location of the Claimant's most recent coal mine employment." Decision and Order at 3. The administrative law judge noted, however, that claimant currently resides in Kentucky; that claimant indicated that he planned to file for State Workers' Compensation Benefits in Virginia; and that the SSA records listed an address for employer in Missouri. *Id.* Because the case law of the United States Courts of Appeals for the Fourth, Sixth, and Eighth Circuits is consistent with respect to the relevant issues in this case, the administrative law judge found that it was not necessary to identify a single circuit law to be applied. *Id.*; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[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 tissue to that deposition caused by coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

affirmatively established rebuttal of the presumed fact of clinical pneumoconiosis, but failed to rebut the presumed facts of legal pneumoconiosis and disability causation. Decision and Order at 18-25.

Employer challenges the administrative law judge's finding that the opinion of Dr. Jarboe is insufficient to establish rebuttal of the presumed fact of legal pneumoconiosis under Section 411(c)(4). In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Forehand, Baker, Splan, Jarboe and Rosenberg. Decision and Order at 8-15. Drs. Forehand, Baker and Splan diagnosed legal pneumoconiosis. Director's Exhibits 11, 25; Claimant's Exhibit 1; Employer's Exhibits 2, 7. In contrast, Dr. Jarboe diagnosed obstructive airway disease caused by cigarette smoking and bronchial asthma unrelated to coal dust exposure. Employer's Exhibits 1, 8. Dr. Rosenberg diagnosed airflow obstruction caused primarily by smoking, obesity and claimant's sternotomy. Employer's Exhibits 4, 9.

The administrative law judge discredited the opinions of Drs. Jarboe and Rosenberg because he found that each was inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 21-23. As the remaining opinions of Drs. Forehand, Baker and Splan did not assist employer in establishing rebuttal, the administrative law judge did not consider them. Decision and Order at 24.

Employer contends that the administrative law judge erred in selectively analyzing and summarily discrediting the opinion of Dr. Jarboe as contrary to the preamble. Employer's Brief at 5, 9. Employer argues that chronic obstructive pulmonary disease (COPD), asthma, bronchitis and emphysema are only included in the definition of legal pneumoconiosis to the extent that they arise out of coal mine employment, and that the administrative law judge did not apply this requirement in evaluating the opinion. *Id.* at 5-6. Employer maintains that Dr. Jarboe explained, with support from recent medical literature, that claimant does not have legal pneumoconiosis because the significant reduction in his FEV_1 and higher FVC levels show that smoking, rather than coal dust, is the cause of claimant's obstructive impairment, with some contribution from claimant's obesity and cardiac problems. *Id.* at 9, 18-19. Further, Dr. Jarboe explained that claimant's elevated residual volume and responsiveness to bronchodilation is consistent with a combination of airway disease from smoking and bronchial asthma, rather than coal dust exposure. *Id.* at 16-17. Dr. Jarboe also factored into his assessment that claimant had minimal dust exposure as an equipment operator at a surface mine in an enclosed air-conditioned cab. *Id.* at 19-20. Thus, employer asserts that Dr. Jarboe's well-reasoned opinion reflects the most complete account of the objective evidence and an accurate understanding of claimant's medical and work histories, and meets

employer's burden of proving that claimant's lung disease is not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Id.* at 5, 7, 21. Employer's arguments lack merit.

In evaluating the opinion of Dr. Jarboe, the administrative law judge reviewed the physician's narrative report dated January 19, 2012, and his deposition testimony dated April 9, 2015, and summarized the bases for his conclusion that claimant does not have legal pneumoconiosis.[5] Decision and Order at 12-14; Employer's Exhibits 1, 8. The administrative law judge acknowledged that Dr. Jarboe referenced medical literature in support of his opinion that the reduction in claimant's FEV_1/FVC ratio was typical of a smoking-related disease, whereas in cases where coal dust inhalation causes an impairment, the ratio is preserved.[6] Decision and Order at 21; Employer's Exhibit 1. Contrary to employer's contention, however, the administrative law judge permissibly discredited Dr. Jarboe's opinion as inconsistent with the preamble to the 2001 regulations, which recognizes that COPD "may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC." Decision and Order at 21, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J.,

[5] In a report dated January 19, 2012, Dr. Jarboe opined, "A diagnosis of medical or legal pneumoconiosis cannot be made in [claimant]" and that claimant's disabling obstructive ventilatory impairment is "caused by a combination of 45 pack years of smoking cigarettes and bronchial asthma." Employer's Exhibit 1. During his deposition on April 9, 2015, Dr. Jarboe reiterated his opinion. Employer's Exhibit 8.

[6] Employer additionally argues that Dr. Jarboe relied on "post-preamble scientific research" and "new developments in science [that] have invalidated the science underlying the preamble." Employer's Brief at 15. A review of Dr. Jarboe's January 19, 2012 report belies employer's argument, as the articles and studies he cited to support his opinion regarding the disproportionate reduction of FEV_1 compared to FVC were published in 1986, 1994, 1995, and 1996, all of which pre-dated the preamble to the 2001 regulations. Employer's Exhibit 1 at 6-8. Dr. Jarboe also cited to a 2004 article for the proposition that "subjects with active asthma had significantly higher hazard ratios than inactive or nonasthmatic subjects for acquiring COPD." Employer's Exhibit 1 at 8. Further, in his deposition, Dr. Jarboe referenced a "recent" article regarding the causes of fixed air flow obstruction in patients with asthma, Employer's Exhibit 8 at 29-30, and stated that "recent literature now clearly confirms that smoking is much more harmful than we previously thought it was . . . Kohansal and Viegi . . . showed that 33 to 50 percent of smokers will get significant air flow obstruction [rather than 15 percent of smokers as previously thought]." Employer's Exhibit 8 at 30-31. Employer, however, has not shown how these articles have invalidated the science underlying the preamble.

dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014).

Further, the administrative law judge correctly found that Dr. Jarboe failed to adequately explain why partial responsiveness to bronchodilation necessarily precluded a finding of legal pneumoconiosis.[7] Decision and Order at 22; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-484 (6th Cir. 2007). The administrative law judge also reasonably found that Dr. Jarboe's opinion was unpersuasive because he maintained that "coal dust inhalation has never been shown to cause asthma," contrary to the underlying premise of the regulations that asthma may constitute legal pneumoconiosis if it arises out of coal mine employment. *See* 20 C.F.R. §718.201(b); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341-42, 20 BLR 2-246, 2-255-56 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); Employer's Exhibit 8 at 29. Because Dr. Jarboe relied on a premise that is antithetical to the regulations, the administrative law judge properly found his opinion entitled to diminished weight. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2007); Decision and Order at 22.

Additionally, Dr. Jarboe's exclusion of coal dust exposure as a cause of claimant's pulmonary disease was predicated on the physician's belief that claimant's exposure to coal dust "was reduced significantly" because claimant performed his work as an equipment operator for eighteen years from the inside of enclosed, air-conditioned cabs, and as a truck driver for thirteen years with "very low levels of dust exposure." Employer's Exhibit 8 at 27. However, because the administrative law judge found that the conditions in claimant's surface mine employment were substantially similar to those in underground mines and that claimant was regularly exposed to coal mine dust throughout his coal mine employment, the administrative law judge rationally determined that Dr. Jarboe relied on a faulty understanding of claimant's dust exposure. Decision and Order at 22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge ultimately concluded that Dr. Jarboe's opinion was unpersuasive, as he found that the physician failed to adequately explain why the presence of non-occupationally-related asthma and smoking-related lung disease would

[7] The administrative law judge noted that "although a majority of the [c]laimant's pulmonary function studies of record showed improvement after bronchodilator administration, in the [three most recent] tests performed on September 17, 2011, December 29, 2011, and February 17, 2014, the [c]laimant's lung function did not improve" and, in fact, these post-bronchodilator tests yielded qualifying values. Decision and Order at 22; Claimant's Exhibit 1; Employer's Exhibits 1, 4.

necessarily eliminate claimant's 33.5 years of coal dust exposure as a significant contributing factor in his pulmonary condition, particularly since the preamble recognizes an additive risk of obstructive lung disease in miners who smoke. Decision and Order at 22-23, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see* 20 C.F.R. §718.201(a)(2), (b). As substantial evidence supports the administrative law judge's credibility determinations, we affirm the administrative law judge's determination that Dr. Jarboe's opinion is

insufficient to establish rebuttal of the presumed fact of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).[8]

Moreover, as employer makes no argument regarding the administrative law judge's finding that rebuttal of the presumed fact of disability causation was not established at 20 C.F.R. §718.305(d)(1)(ii), we affirm that finding. Finally, as claimant established invocation and employer failed to rebut the Section 411(c)(4) presumption, we affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] Employer has not challenged the administrative law judge's weighing of Dr. Rosenberg's opinion.