U.S. Department of Labor

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

BRB No. 16-0056 BLA

MICHAEL E. DYE Claimant-Respondent v. EAST STAR MINING INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., 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.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Tennessee, for employer.

Barry H. Joyner (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 appeals the Decision and Order Awarding Benefits (2013-BLA-05062) of Administrative Law Judge Paul C. Johnson, Jr., issued pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed his claim for benefits on May 25, 2010, which was denied by the district director on March 26, 2011. Claimant filed a timely request for modification and the district director issued a Proposed Decision and Order awarding benefits. Employer requested a hearing and the case was forwarded to the Office of Administrative Law Judges.

In his Decision and Order Awarding Benefits, which is the subject of this appeal, the administrative law judge credited claimant with 19.51 years of coal mine employment, of which at least fifteen years was underground, and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on these findings and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Additionally, the administrative law judge found that employer failed to rebut the presumption. Further, the administrative law judge concluded that claimant was entitled to modification pursuant to 20 C.F.R. §725.310.[2] Accordingly, benefits were awarded.

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge was not required to make a preliminary determination regarding whether claimant established a basis for modification of the district director's denial of benefits, prior to reaching the merits of entitlement, as that determination is subsumed into the administrative law judge's decision on the merits. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14, 1-17 (1992).

On appeal, employer argues that the administrative law judge erred in finding that it did not establish rebuttal of the Section 411(c)(4) presumption.[3] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked 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 legal[5] nor clinical[6] pneumoconiosis, or by

[3] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant established 19.51 years of qualifying coal mine employment, that claimant suffers from a totally disabling respiratory or pulmonary impairment, and that he therefore is entitled to the presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19-20.

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease "arising out of coal mine employment 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) (emphasis added).

[6] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis,

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, based on his weighing of the x-ray and medical opinion evidence. Decision and Order at 34. The administrative law judge, however, rejected the opinions of employer's physicians, Drs. Fino, Rosenberg, and Castle, that claimant does not have legal pneumoconiosis,[7] and found that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *Id*. at 35-39.

On appeal, employer argues that the administrative law judge "improperly gave the preamble to the revised regulations the force of law" in discrediting the opinions of Drs. Fino, Rosenberg, and Castle. Employer's Brief at 4. Employer acknowledges that the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction for this case lies, held in *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012), that it is permissible for an administrative law judge to consult the preamble to the regulations in assessing the credibility of the medical opinions. *Id*. However, employer states, without further elaboration, that *Looney* is "incorrect." *Id*. Employer further contends that the present case is distinguished from *Looney* because the administrative law judge in this case "based his rejection of the employer's physicians' opinions almost entirely upon the preamble." *Id.* at 4-5. Employer's arguments are rejected as without merit.

> massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] Dr. Fino examined claimant on December 16, 2010, and diagnosed severe chronic obstructive pulmonary disease (COPD) consistent with pulmonary emphysema due to smoking. Director's Exhibit 10. Dr. Rosenberg examined claimant on May 15, 2012, and diagnosed COPD due to smoking. Director's Exhibit 52. Dr. Castle examined claimant on June 12, 2013, and diagnosed "very severe airway obstruction without restriction with reduction in the diffusing capacity due to tobacco smoke induced pulmonary emphysema." Employer's Exhibit 2.

We agree with the Director that "to the extent that the [administrative law judge] did consult the preamble in evaluating the credibility of employer's medical evidence . . . he was clearly permitted to do so." Director's Brief at 3. The Fourth Circuit, along with several other federal courts of appeals, has held that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the Department of Labor's (DOL's) resolution of questions of scientific fact relevant to the elements of entitlement. *See Looney*, 678 F.3d at 313, 25 BLR at 2-129-30; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Contrary to employer's argument, the administrative law judge did not give the preamble the force of law; rather, in assessing the credibility of the medical opinions, he permissibly consulted the preamble's explanation of the medical studies found credible, and relied upon, by the DOL as the bases for its regulations. *See Looney*, 678 F.3d at 313, 25 BLR at 2-139-40; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); Decision and Order at 35-38. Furthermore, the Director correctly states that while the administrative law judge had discretion to rely on the preamble, he "discounted employer's experts, in major part, because their opinions conflicted *with the regulations, not the preamble*." Director's Brief at 2 (emphasis in the original).

With regard to the opinions of Drs. Fino,[8] Rosenberg,[9] and Castle,[10] the administrative law judge correctly noted that each doctor cited to claimant's significantly

[8] Dr. Fino stated "[w]e all agree that coal dust can cause obstruction, but the articles have not shown a reduction in the FEV1/FVC. Certainly, reductions in the FEV1/FVC are more consistent with smoking." Director's Exhibit 10 at 9.

[9] Dr. Rosenberg opined:

> One way to distinguish between the effects of coal dust and cigarette smoking is to examine the FEV1/FVC ratio. Epidemiological studies relied on by [the Department of Labor] establish that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio is generally preserved. In contrast, with smoking-related forms of COPD, the FEV1/FVC ratio is generally reduced.

Director's Exhibit 52 at 4 (internal citations omitted).

[10] Dr. Castle stated:

reduced FEV1/FVC ratio as a basis for eliminating coal dust exposure as a causative factor in claimant's obstructive impairment. Decision and Order at 36-37; *see* Director's Exhibits 10, 52; Employer's Exhibit 12. We see no error in the administrative law judge's finding that their opinions are inconsistent with the DOL's recognition that "coal mine dust exposure may cause chronic obstructive pulmonary disease with decrements in 'certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC.'" Decision and Order at 36, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 316, 25 BLR at 2-132; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Furthermore, the administrative law judge rationally found that, even if a significant reduction in the FEV1/FVC ratio is more consistent with impairment related to smoking and not coal dust exposure, neither Dr. Fino, Rosenberg, nor Castle explained why claimant could not be a "rare" case where the significant reduction in his FEV1/FVC ratio is attributable to the additive effects of smoking and coal dust exposure.[11] Decision and Order at 36-38; *see Looney*, 678 F.3d at 315-16, 25 BLR at 2-130; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

> Attfield and Hodous in 1992 found an exposure related loss of the FEV1/FVC ratio that was statistically significant but small in magnitude. These data indicate that the FEV1/FVC ratio (FEV1 %) may be reduced but only to a small amount. These findings are in contrast to the marked reduction in the FEV1/FVC ratio (FEV1 %) brought about by the airway obstruction associated with the inhalation of tobacco products.

Employer's Exhibit 12 at 22.

[11] The Director, Office of Workers' Compensation Programs, states that while the administrative law judge "inaccurately cited the preamble in discounting employer's reports because the physicians relied on low diffusi[ion] capacity results in determining the origin of claimant's lung disease," he properly concluded that they did not adequately explain the bases for their assumption that a low diffusion capacity "is indicative of a non-dust origin for obstructive lung disease." Director's Brief at 3. We consider the administrative law judge's error, if any, to be harmless, as he provided other valid reasons for the weight accorded the opinions of Drs. Fino, Castle, and Rosenberg. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983).

The administrative law judge also correctly noted that Drs. Fino and Castle relied upon the absence of radiographic evidence for clinical pneumoconiosis as support for their conclusion that claimant does not have legal pneumoconiosis.[12] Decision and Order at 35-37; Director's Exhibit 10; Employer's Exhibit 2. The administrative law judge permissibly found that their opinions are inconsistent with the regulation at 20 C.F.R. §718.202(a)(4), which states that "[a] determination of the existence of pneumoconiosis may . . . be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in [20 C.F.R.] § 718.201." *See generally Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

In addition, the administrative law judge noted correctly that Dr. Castle opined that claimant does not have legal pneumoconiosis, in part, because claimant's pulmonary function studies did not show a restrictive impairment. Dr. Castle explained that "[w]hen coal workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect. That was not the finding in this case." Employer's Exhibit 2 at 12. The administrative law judge rationally concluded that Dr. Castle's opinion was not persuasive because he expressed views that are contrary to the regulatory definition of legal pneumoconiosis, which includes "any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment." Decision and Order at 37 (emphasis added), *quoting* 20 C.F.R. §718.201(a)(2); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-260 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Lastly, we reject employer's contention that the administrative law judge erred in giving little weight to Dr. Rosenberg's opinion regarding the etiology of claimant's chronic bronchitis. Dr. Rosenberg opined that coal dust exposure did not contribute to claimant's chronic bronchitis because claimant stopped working in the mines in 2009 and chronic bronchitis "dissipates within months of the time that inhalational factors causing its presence cease to occur." Decision and Order at 17, *quoting* Employer's Exhibit 11 at 12. The administrative law judge permissibly found that Dr. Rosenberg's views are contrary to the regulation at 20 C.F.R. §718.201(c), which provides that legal

[12] Dr. Fino stated that "it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation. . . . Radiographic studies . . . correlate well with the amount of pathologic pneumoconiosis that is present." Director's Exhibit 10 at 11. Dr. Castle similarly stated that "coal workers' pneumoconiosis does not typically cause a reduction in the diffusing capacity. If this does occur, it occurs in the presence of a high degree of profusion of either p or r type opacities." Employer's Exhibit 2 at 12.

pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after [the] cessation of coal mine dust exposure." Decision and Order at 37; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-257-58; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the opinions of Drs. Fino, Rosenberg, and Castle are "not well-reasoned" to satisfy employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 39; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Bender*, 782 F.3d at 137; *Minich*, *2*5 BLR at 154-56.

In considering whether employer disproved the presumed fact of disability causation under the second method of rebuttal, the administrative law judge permissibly found that the opinions of Drs. Fino, Rosenberg, and Castle are not credible to establish that no part of the miner's total respiratory or pulmonary disability is due to legal pneumoconiosis, as they did not diagnose the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498 (4th Cir. 2015); *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 at 40. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(ii). *See Bender*, 782 F.3d at 137; *Minich*, *2*5 BLR at 154-56.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge