U.S. Department of Labor

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

BRB No. 16-0644 BLA

WILLIE A. SOWARDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING, INCORPORATED d/b/a SUN GLO COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 08/30/2017
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-5611) of Administrative Law Judge Larry A. Temin awarding benefits on a claim filed pursuant to 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 June 17, 2010.

The administrative law judge credited claimant with "almost 17 years" of underground coal mine employment,[1] and found that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[2] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Employer further challenges the administrative law judge's determination regarding the commencement date for benefits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has also filed a response in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.[3]

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 15. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer established that claimant does not have clinical pneumoconiosis, the administrative law judge addressed whether employer established that claimant does not have legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Jarboe and Rosenberg. Drs. Jarboe and Rosenberg opined that claimant suffers from chronic obstructive pulmonary disease (COPD) due to cigarette smoking and not coal mine dust exposure. Director's Exhibit 14; Employer's Exhibits 5, 6, 10. The administrative law judge discredited both of these opinions because he found them inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 21-26. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012).

[4] "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 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).

We further reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Rosenberg. The administrative law judge correctly noted that Drs. Jarboe and Rosenberg eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because they found a reduction in claimant's FEV1/FVC ratio which, in their opinions, was inconsistent with obstruction due to coal mine dust exposure.[5] Decision and Order at 22, 23; Director's Exhibit 14; Employer's Exhibits 5, 6, 10. The administrative law judge permissibly discredited the opinions of Drs. Jarboe and Rosenberg because their reasoning for eliminating coal mine dust exposure as a source of claimant's obstructive pulmonary disease is in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[6] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 22- 23. Because the administrative law judge permissibly discounted the opinions of Drs. Jarboe and

[5] Dr. Jarboe attributed claimant's pulmonary abnormality to smoking and not coal mine dust exposure because claimant "has a relatively preserved forced vital capacity (74%) and a disproportionately reduced FEV1 (52%)." Director's Exhibit 14 at 6. Dr. Jarboe reasoned that, "[a] disproportionate reduction of FEV1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." *Id*. Dr. Rosenberg also attributed claimant's pulmonary abnormality to smoking and not coal mine dust exposure because claimant has a reduced FEV1/FVC ratio and "[e]pidemiological studies . . . establish that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio generally is preserved," and "[i]n contrast, with smoking-related forms of COPD, the FEV1/FVC ratio is generally reduced." Employer's Exhibits 5 at 4, 6 at 5.

[6] Employer notes that Dr. Rosenberg explained that the "more recent medical literature substantiated the fact that the loss of function due to cigarette smoking is far greater than previously assumed, and thus challenged the notion that the effects of cigarette smoking and coal dust were equal." Employer's Brief at 19. Employer, however, does not challenge the Department of Labor's (DOL's) position, as articulated in the regulation's preamble, that coal mine dust exposure can also cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit "the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

Rosenberg,[7] we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i)(A).

The administrative law judge next addressed whether employer established rebuttal by proving 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)(ii). The administrative law judge rationally discounted the opinions of Drs. Rosenberg and Jarboe that the miner's total disability was not due to pneumoconiosis because Drs. Rosenberg and Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Commencement of Benefits

Once entitlement to benefits is established, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v.*

[7] Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Jarboe and Rosenberg, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Jarboe and Rosenberg.

[8] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[9] Drs. Rosenberg and Jarboe attributed claimant's total disability to chronic obstructive pulmonary disease (COPD). Employer's Exhibits 1 at 6, 3 at 19. The administrative law judge previously found that employer failed to establish that claimant's COPD did not constitute legal pneumoconiosis.

Krecota, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). As the administrative law judge rationally determined that there was no evidence in the record indicating the exact date that claimant became totally disabled due to pneumoconiosis, he awarded benefits commencing June 2010, the month in which the claim was filed. 20 C.F.R. §725.503(b).

Employer, however, contends that the administrative law judge's finding is erroneous, as he did not address the fact that claimant worked as a federal mine inspector after he left coal mine employment.[10] Employer observes that, pursuant to 20 C.F.R. §725.504(c), if a claimant returns to coal mine employment or "comparable and gainful work," benefits are not payable. Therefore, employer asserts that the administrative law judge was required to consider whether claimant's employment as a federal mine inspector constituted "comparable and gainful work." Employer's Brief at 23-24.

Employer is correct that, pursuant to 20 C.F.R. §725.504(c), the administrative law judge should have considered whether claimant's work as a federal mine inspector was comparable to his previous coal mine employment[11] such that payments should have been suspended during the time that he held that position.[12] See *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 892, 22 BLR 2-514, 2-531 (7th Cir. 2002); *Green v. Director, OWCP*, 790 F.2d 1118, 1120, 9 BLR 2-32, 2-36-37 (4th Cir. 1986). This is a question of fact for the administrative law judge to resolve. Consequently, we

[10] Claimant worked as a federal mine inspector from August 25, 1991 to October 31, 2011. Hearing Transcript at 17-18. The administrative law judge accurately noted that work as a federal mine inspector does not constitute coal mine employment. *Navistar, Inc. v. Forester*, 767 F.3d 638, 647, 25 BLR 2-659, 2-673 (6th Cir. 2014); Decision and Order at 4.

[11] At the hearing, claimant testified regarding his coal mine work, noting that he initially worked as a continuous miner operator before working as "a section repairman or electrician." Hearing Transcript at 18-20.

[12] Pursuant to 20 C.F.R. §725.504(c), "where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable . . . for the period during which the miner continues to work."

vacate the administrative law judge's finding that benefits are payable from June 2010, and remand the case to the administrative law judge for him to compare claimant's work as a federal mine inspector with his previous coal mine employment. On remand, the administrative law judge must determine whether benefits should be suspended from June 2010, when claimant filed his claim, to October 2011, when claimant ended his employment as a federal mine inspector.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge