U.S. Department of Labor

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

BRB No. 16-0674 BLA

RAY CAMPBELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY, LLC	)	DATE ISSUED: 08/30/2017
	)	
Employer-Petitioner	)	
	)	
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 Jennifer Gee, Administrative Law Judge, United States Department of Labor.

W. Gerald Vanover (Morgan Collins & Yeast), London, Kentucky, for claimant.

Tighe Estes and Kyle Johnson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05402) of Administrative Law Judge Jennifer Gee, rendered on a claim filed on March 5, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established at least thirty-four years of surface coal mine employment, working in conditions

substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge did not give valid reasons for rejecting the opinions of Drs. Rosenberg and Dahhan relevant to whether employer established rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

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 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 nor clinical pneumoconiosis,[4] or by

[1] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis, if the miner establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty-four years of qualifying surface coal mine employment, a totally disabling respiratory or pulmonary impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. 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).

[4] 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

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); *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Rosenberg and Dahhan were not credible to disprove the existence of legal pneumoconiosis. Employer maintains that the administrative law judge did not give valid reasons for rejecting the opinions of Drs. Rosenberg and Dahhan that claimant's chronic obstructive pulmonary disease (COPD)/emphysema is related solely to smoking. Director's Exhibit 12; Employer's Exhibits 1, 4, 5. We disagree.

Contrary to employer's argument, the administrative law judge noted correctly that Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because claimant's pulmonary function study results showed a markedly reduced FEV1/FVC ratio.[5] Employer's Exhibit 1. However, the administrative law judge properly found that Dr. Rosenberg's rationale is inconsistent with the medical science accepted by the Department of Labor in the preamble to the 2001 revised regulations, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, as demonstrated by reductions in the FEV1 and FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000)*; Central 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 19.

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to, any chronic restrictive or obstructive pulmonary disease 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).

[5] Dr. Rosenberg reported that claimant's "FEV1 was significantly reduced to 39% predicted with a marked reduction of his FEV1/FVC ratio down to around 50% (preserved ratio 70% or higher)." Employer's Exhibit 1. He explained that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1 with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved." *Id*. Thus, Dr. Rosenberg concluded that claimant's "pattern of impairment . . . is inconsistent with one related to past coal mine dust exposure." *Id*.

Furthermore, as noted by the administrative law judge, Drs. Rosenberg and Dahhan supported their opinions with statistics regarding the annual loss of FEV1 caused by smoking in comparison to coal dust exposure. Decision and Order at 20-21; Director's Exhibit 12; Employer's Exhibit 1. Dr. Rosenberg indicated that data shows that "cigarette smoking causes a 100% greater decrease in airflow in relationship to coal dust exposure . . . (2-3 cc/year vs. 5 cc/year)." Employer's Exhibit 1 at 7. Dr. Dahhan explained that "a susceptible smoker will lose up to 9 cc of his FEV1 per pack year" while there is only a "5-6 cc loss in the FEV1 per year of coal dust exposure." Director's Exhibit 12. Dr. Dahhan characterized the loss of claimant's FEV1 from coal dust exposure as a "trivial amount," considering the overall loss of FEV1 caused by his smoking. *Id*.

In rejecting the opinions of Drs. Rosenberg and Dahhan, the administrative law judge rationally found that "[c]laimant is not a statistic, and the fact that, from a statistical standpoint his smoking may put him at greater risk for developing [COPD] . . . does not explain why, in his particular circumstance, his coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 20, 21; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002). Additionally, we see no error in the administrative law judge's finding that Dr. Dahhan failed to adequately explain his opinion that claimant's x-rays were consistent with emphysema from smoking and not coal dust exposure.[6] Decision and Order at 21; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Consequently, because the administrative law judge gave valid reasons for his credibility determinations, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[7] *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511,

[6] Dr. Dahhan testified that smoking causes centriacinar emphysema and that claimant's radiographic presentation was consistent with this type of emphysema. Decision and Order at 9; Employer's Exhibit 4 at 11-12. However, the preamble to the 2001 regulatory revisions identifies centriacinar emphysema as a type of emphysema that may be caused by coal dust exposure. *See* 65 Fed. Reg. 79,920, 79,942 (Dec. 20, 2000).

[7] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Rosenberg and Dahhan, it is not necessary that we address employer's remaining assertions of error as to the administrative law judge's weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

522, 22 BLR 2-494, 2-512 (6th Cir. 2002). We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8]

Employer raises no separate allegations of error with respect to the administrative law judge's finding that employer failed to disprove the presumed causal relationship between claimant's total disability and legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Dahhan on the issue of causation was based on her permissible credibility findings on the issue of legal pneumoconiosis, we affirm the administrative law judge's determination that employer failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); Decision and Order at 22. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).

[8] The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 17. However, employer's failure to disprove *both* clinical and legal pneumoconiosis precludes employer from establishing rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

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

RYAN GILLIGAN
Administrative Appeals Judge