U.S. Department of Labor

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

BRB No. 16-0675 BLA

ROBERT HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE DIAMOND COAL COMPANY	)	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 William Dorsey, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05521) of Administrative Law Judge William Dorsey, rendered on a claim filed on February 17, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the parties' stipulation, the administrative law judge found that claimant established at least 23.5 years of underground coal mine employment. Because the administrative law judge also determined that the evidence established a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked 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) (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 erred in finding that claimant established total disability and invocation of the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in weighing evidence relevant to rebuttal of the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption

We first address employer's assertion that the administrative law judge erred in finding that claimant is totally disabled by a respiratory or pulmonary impairment. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies performed on February 15, 2012, May 31, 2012, December 12, 2012, April 11, 2013, and March 18, 2014. Director's Exhibit 12; Claimant's Exhibit 5-6; Employer's Exhibits 8, 9. Of the five studies administered without a bronchodilator, four produced qualifying values and one study conducted by

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding regarding the length of claimant's qualifying coal mine employment. *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. Decision and Order at 3; Director's Exhibit 4. 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).

Dr. Rosenberg on December 12, 2012 was non-qualifying.[4] *Id*. The May 31, 2012 study performed by Dr. Habre was conducted after a bronchodilator was administered and was non-qualifying for total disability.[5] Director's Exhibit 12.

The administrative law judge noted that Drs. Dahhan and Rosenberg opined that Dr. Habre's qualifying May 31, 2012 study was invalid due to poor effort, and that Dr. Rosenberg opined that his December 12, 2012 study, although non-qualifying, was performed with incomplete effort. Decision and Order at 23. The administrative law judge observed that the report of the April 11, 2013 study indicated that "none of the trials were acceptable or reproducible" for that study. *Id*. However, the administrative law judge found the report of the March 18, 2014 study stated that it was "valid, with one acceptable trial and three reproducible ones." *Id*. Observing that the qualifying March 18, 2014 study postdates Dr. Rosenberg's non-qualifying December 12, 2012 study "by more than a year," and is "more probative of [c]laimant's current condition," the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer contends that the administrative law judge erred in determining that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Employer generally asserts that it is unfair to rely on the more recent pulmonary function study, as "[e]mployer is permitted only two examinations and once performed [employer] has no ability to update the testing." Employer's Brief at 16. Employer maintains that the administrative law judge should not have accorded additional weight to the later qualifying study "without justification that something had changed." *Id*.

Employer's arguments are without merit. The administrative law judge permissibly determined that the March 18, 2014 study is "more probative of claimant's current condition" because it is the most recent. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The administrative law judge excluded from consideration a qualifying pulmonary function study dated March 8, 2012, obtained in conjunction with the examination sponsored by the Department of Labor (DOL), as the study had been invalidated by Dr. Mettu. Director's Exhibit 12. Claimant underwent a second study at the request of DOL on May 31, 2012 with Dr. Habre. *Id*. The May 31, 2012 study was validated by Dr. Gaziano. *Id*.

(1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Decision and Order at 23. Furthermore, even if employer was unable to obtain additional pulmonary function studies, it had the opportunity to have Drs. Rosenberg and Dahhan review the more recent study, but it did not do so. 20 C.F.R. §725.414(a)(3)(ii). The administrative law judge specifically observed that neither Dr. Rosenberg nor Dr. Dahhan "impeached the validity" of the qualifying May 31, 2012 and April 11, 2013 studies. Decision and Order at 23. Thus, we affirm the administrative law judge's finding that the pulmonary function study evidence supports total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[6]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Habre, Rosenberg and Dahhan. The administrative law judge found that Dr. Habre's opinion diagnosing total disability was most consistent with the record as a whole.[7] Decision and Order at 12-14, 24; Director's Exhibit 12. The administrative law judge accorded less weight to the contrary opinions of Drs. Rosenberg and Dahhan because they "did not have the opportunity to review the most recent qualifying [pulmonary function study], which show[s] substantially worse results more than a year after Dr. Rosenberg's examination." Decision and Order at 24. The administrative law judge therefore concluded that claimant established total respiratory disability by medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. The administrative law judge then weighed all of the relevant evidence together and determined that the recent qualifying pulmonary function study evidence, along with the opinion of Dr. Habre, warranted greater weight than the contrary evidence. *Id*. at 25. Accordingly, the administrative law judge found total respiratory disability established pursuant to 20 C.F.R. §718.204(b) overall. *Id*.

Employer contends that the administrative law judge improperly credited Dr. Habre's opinion because it is "based upon sub-optimal objective testing." Employer's Brief at 18. We disagree. In his supplemental report dated July 20, 2012, Dr. Habre opined that claimant was disabled based on the May 31, 2012 qualifying pulmonary

[6] The administrative law judge found that because none of the blood gas study evidence was qualifying, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 23. Additionally, the administrative law judge found that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 22.

[7] Dr. Habre opined that claimant suffers from a totally disabling respiratory impairment that would prevent him from performing his previous coal mine duties. Director's Exhibit 12.

function study that was validated by Dr. Gaziano.[8] The administrative law judge acknowledged the criticisms of Dr. Habre's May 31, 2012 study by Drs. Rosenberg and Dahhan. The administrative law judge also noted "that Dr. Habre did not have the benefit of reviewing the subsequent non-qualifying [pulmonary function study] taken by Dr. Rosenberg" on December 12, 2012. Decision and Order at 24. However, the administrative law judge noted that Dr. Habre's questionable pulmonary function study was corroborated by the valid and qualifying March 18, 2014 study. *Id*.

The weight to accord the evidence is within the discretion of the administrative law judge and the Board is not empowered to reweigh the evidence or substitute our inferences for those of the administrative law judge. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

We also affirm the administrative law judge's determination that based on all the evidence, weighed together, claimant has established he is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). We therefore affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

Once 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,[9] or by establishing that "no

[8] Dr. Habre reported that claimant worked on the belt line and operated a loader, miner, shuttle car and bolt machine underground, and aboveground, claimant operated a dozer and cleared and cleaned the preparation plant. Director's Exhibit 12. The administrative law judge considered claimant's description of his coal mine employment, noting it involved heavy manual labor. Decision and Order at 3-4, 24.

[9] 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). 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

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 generally contends that the administrative law judge erred in rejecting the opinions of Drs. Rosenberg[10] and Dahhan[11] that claimant does not have legal pneumoconiosis. We see no error in the administrative law judge's finding that the opinions of Drs. Rosenberg and Dahhan are insufficient to disprove legal pneumoconiosis, however, because neither physician diagnosed claimant with a respiratory or pulmonary impairment, contrary to the administrative law judge's finding.[12] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-

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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).

[10] In a report dated January 9, 2013, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis because the pulmonary function studies showed no evidence of obstruction or restriction, and the blood gas studies showed that claimant's oxygenation was preserved. Employer's Exhibit 9. In addition, Dr. Rosenberg opined that claimant's chronic bronchitis was not related to coal mine dust exposure, as the "chronic inflammation related to coal mine dust exposure causing acute bronchitis would dissipate within months of the time that coal mine dust exposure ceased." *Id*.

[11] In a report dated October 11, 2012, Dr. Dahhan diagnosed an obstructive pulmonary impairment and stated that claimant's "obstructive ventilatory defect appears to be severe to render him disabled to return to his previous coal mining work." Director's Exhibit 12A. In a supplemental report dated November 7, 2012, Dr. Dahhan opined that claimant has a moderate obstructive ventilatory defect and that claimant's smoking history was sufficient to cause significant loss in pulmonary capacity. Director's Exhibit 12B. In a report dated June 24, 2013, Dr. Dahhan opined that claimant has "no evidence of significant pulmonary impairment and/or disability" and that the low values on claimant's pulmonary function studies were due to suboptimal effort. Director's Exhibit 10.

[12] Legal pneumoconiosis encompasses a respiratory impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). As the administrative law judge specifically determined that claimant has a disabling respiratory or pulmonary impairment, Drs. Dahhan and Rosenberg had to provide a reasoned explanation as to why that impairment was not

553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 30-31. The administrative law judge observed correctly that Drs. Rosenberg and Dahhan failed to provide an explanation for claimant's respiratory symptoms, even though the treatment records diagnosed chronic bronchitis and claimant's "respiratory symptoms were extensively documented over many years."[13] Decision and Order at 31. We therefore affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A),[14] and his conclusion that employer was unable to establish the first method of rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i).[15]

Employer also asserts that the administrative law judge erred in finding that it failed to establish the second method of rebuttal by disproving the presumed fact of disability causation. We disagree. The administrative law judge properly accorded little weight to the opinions of Drs. Rosenberg and Dahhan because, contrary to his own

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment in order for employer to satisfy its burden to disprove legal pneumoconiosis.

[13] Additionally, the administrative law judge permissibly rejected Dr. Rosenberg's explanation that claimant's chronic bronchitis would have dissipated within months of leaving his coal mine employment, as it was contradicted by Dr. Habre's explanation that claimant's coal-dust related bronchitis may have caused permanent airways remodeling. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

[14] Because it is employer's burden to rebut the Section 411(c)(4) presumption, it is not necessary that we address employer's assertion that Dr. Habre's opinion is not credible because Dr. Habre relied on an inaccurate smoking history. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984); Decision and Order at 30.

[15] As employer must disprove both legal and clinical pneumoconiosis to rebut the presumed fact of pneumoconiosis, rebuttal under this first method is precluded, based on our affirmance of the administrative law judge's finding that employer failed to disprove that claimant has legal pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Moreover, as we affirm the administrative law judge's finding on legal pneumoconiosis we decline to address employer's arguments as they pertain to clinical pneumoconiosis. *Larioni*, 6 BLR at 1-1278.

findings, they found that claimant "had no respiratory disability at all."[16] Decision and Order at 32; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 25 BLR 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); Employer's Exhibits 11 at 12, 12 at 9.

The administrative law judge also permissibly rejected Dr. Dahhan's opinion to the extent that Dr. Dahhan opined claimant's smoking history was sufficient to cause a significant impairment, but did not explain why claimant's coal dust exposure "could not also have played a role." Decision and Order at 33; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; Director's Exhibit 12B. Consequently, we affirm the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii) by establishing that no part of claimant's respiratory disability was caused by pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-154-56.

[16] The administrative law judge also correctly noted that Dr. Rosenberg did not address the issue of disability causation because he did not believe that claimant had any obstruction, restriction, or impairment in oxygenation. Employer's Exhibits 9, 12.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge