U.S. Department of Labor

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

BRB No. 15-0047 BLA

KENNETH R. ARDUINI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	DATE ISSUED: 12/09/2015
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-5466) of Administrative Law Judge Drew A. Swank (the administrative law judge), 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 is before the Board for the second time.

In his initial decision dated January 28, 2013, the administrative law judge credited claimant with 20.6 years of underground coal mine employment, and adjudicated this claim, filed on October 1, 2010, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the weight of the evidence sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer successfully established rebuttal of the presumption. Accordingly, benefits were denied.

Following claimant's appeal, the Board vacated the administrative law judge's findings on rebuttal, as the administrative law judge utilized erroneous pulmonary function study values to support the conclusion that claimant's pulmonary function improved over time. Because the administrative law judge relied on his mischaracterization of the pulmonary function study evidence to resolve the conflicts in the medical opinion evidence, the Board also vacated the administrative law judge's weighing of the medical opinion evidence relevant to rebuttal. The Board remanded the case for the administrative law judge to reassess and weigh the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) and, in light of his findings, to reconsider and weigh the medical opinion evidence to determine whether employer established rebuttal of the Section 411(c)(4) presumption. *Arduini v. Helvetia Coal Co*., BRB No. 13-0225 BLA (Feb. 26, 2014)(unpub.).

On remand, in a Decision and Order dated October 17, 2014, the administrative law judge found that all of the pulmonary function studies in evidence produced

[1] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Once the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

qualifying values under the regulations,[2] and that a total respiratory or pulmonary disability was demonstrated by a preponderance of the evidence pursuant to 20 C.F.R. §718.204(b)(2)(i).[3] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

In the present appeal, employer asserts that the 2013 regulations should not have been applied in this case, and contends that the Board's directives to the administrative law judge on remand were outside the scope of its statutory powers, were irrational, and were not in accordance with law. Employer also challenges the administrative law judge's determination that all the pulmonary function study evidence was qualifying, and challenges the administrative law judge's weighing of the medical opinion evidence in finding that rebuttal was not established. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that: revised 20 C.F.R. §718.305(d)(1) does not constitute a change in law;[4] the Board properly vacated the administrative law judge's erroneous analysis of the pulmonary function study and medical opinion evidence; the Board correctly instructed the administrative law judge on remand; it was unnecessary for the administrative law judge to separately analyze disease and disability causation, as all physicians agree that claimant's emphysema is disabling; and employer's argument with

[2] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718 for an individual of the miner's gender, age, and height. Specifically, the FEV_1 and either the MVV, FVC or the FEV_1/FVC values must qualify. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

[3] The administrative law judge previously determined that claimant also established total respiratory disability by medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 15.

[4] Section 718.305(d)(1) provides, in pertinent part, that the party opposing entitlement may rebut the presumption in a miner's claim by

> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.

respect to Dr. Rasmussen's opinion is without merit. Employer has filed a combined reply brief in support of its position.[5]

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.[6] 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).

Initially, employer objects to the use of the amended regulations, effective October 25, 2013, arguing that they: constitute a change in the law since the claim was filed; contain rebuttal standards at 20 C.F.R. §718.305 that are inconsistent with the statute at 30 U.S.C. §921(c)(4) and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); and are contrary to law. Employer's Brief at 5. We disagree. The revised regulation at Section 718.305, does not change the law as it existed at the time the claim was filed, but merely codifies existing law and clarifies how rebuttal of the presumption may be proved. The Board has held that the regulation is a rational means of assigning rebuttal burdens and that it is not inconsistent with the statutory language or the Act. *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015).

Employer next challenges the Board's directives to the administrative law judge on remand, asserting that they were outside the scope of the Board's statutory powers, irrational, and not in accordance with law. In this regard, employer contends that the Board exceeded its authority by directing the administrative law judge to use the Director's Procedure Manual to re-evaluate the pulmonary function study evidence, and by requiring the administrative law judge to consider the extent to which the medical opinions of record are consistent with the preamble to the regulations. Employer argues that the Board's instructions attempted to sway the administrative law judge's opinion on remand and created bias against employer. Employer's Brief at 5-13. We disagree.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established greater than fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

The Board's authorizing statute at 33 U.S.C. §921(b)(4) provides that the Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The Board is not permitted to supplement an administrative law judge's findings with its own on review. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Because the administrative law judge relied on incorrect pulmonary function data to analyze the pulmonary function study and medical opinion evidence in determining whether employer established rebuttal, the administrative law judge was required to make new factual findings on these issues on remand. Contrary to employer's argument, the administrative law judge was not directed to use the Director's Procedure Manual to evaluate the pulmonary function study evidence. Rather, the administrative law judge was instructed to "render[] a finding as to claimant's height" and then "identify the table height that he uses" from the table contained in Appendix B to 20 C.F.R. Part 718, and "set forth the reason for his choice." *See Arduini*, slip op. at 7. Additionally, while employer correctly notes that an administrative law judge is not required to rely on the preamble to the regulations when making credibility determinations, the administrative law judge was not deprived of his discretionary authority on remand. Our instructions, that "the administrative law judge should also consider" the extent to which the physicians' opinions are consistent with the scientific views endorsed by the Department of Labor (DOL) in the preamble, were merely a reflection of claimant's arguments in his brief to the administrative law judge, which the judge failed to address in his original decision and order. *Arduini*, slip op. at 8; Claimant's Post-Hearing Brief at 17-19.

Turning to the merits, employer contends that the administrative law judge erred in finding that all of the pulmonary function study evidence resulted in qualifying values. Employer's Brief at 13-16. We disagree. In his review of the pulmonary function study evidence, the administrative law judge initially rendered a finding as to claimant's height and, using the values for claimant's age and height found in Appendix B to 20 C.F.R. Part 718, determined that all of the pre-bronchodilator and post-bronchodilator studies were qualifying. Decision and Order on Remand at 4-6. Contrary to employer's argument, the administrative law judge acted within his discretion in referencing the Director's Procedure Manual and the holding of the United States Court of Appeals for the Fourth Circuit in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) in finding that the relevant test values were qualifying. Consequently, we affirm the administrative law judge's finding that total respiratory disability has been established pursuant to Section 718.204(b)(2)(i), (iv). Decision and Order at 15; Decision and Order on Remand at 6. Because employer does not challenge the administrative law judge's finding of a totally disabling respiratory impairment, we affirm the administrative law judge's determination that claimant established total disability at Section 718.204(b) and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that the administrative law judge erred in crediting the opinion of Dr. Rasmussen over those of Drs. Fino and Zaldivar.[7] Employer also asserts that the administrative law judge did not specify whether employer failed to rebut the presumed fact of legal pneumoconiosis or whether employer failed to rule out pneumoconiosis as a cause of claimant's disabling respiratory impairment. Employer's Brief at 16-26. Employer's arguments are without merit.

In evaluating the evidence relevant to rebuttal, the administrative law judge accurately summarized the conflicting medical opinions of record and the underlying documentation and explanations for the physicians' conclusions. The administrative law judge determined that Dr. Rasmussen diagnosed legal pneumoconiosis,[8] finding that claimant's disabling pulmonary impairment is due to both smoking and coal dust inhalation, whereas Drs. Fino and Zaldivar opined that claimant does not have pneumoconiosis and that his respiratory disability was caused by emphysema due solely to cigarette smoking.[9] Decision and Order at 16-19; Decision and Order on Remand at 7-9; Claimant's Exhibit 3; Employer's Exhibits 6, 7, 8, 9, 10, 20, 21, 23, 24. The administrative law judge found that Drs. Fino and Zaldivar failed to provide creditable bases for their opinions that coal dust exposure did not contribute to claimant's disabling lung impairment. Decision and Order on Remand at 9.

Specifically, although Dr. Fino stated that one can have emphysema or legal pneumoconiosis notwithstanding a normal chest x-ray, the administrative law judge

[7] The administrative law judge found the opinions of Drs. Celko and Houser to be unpersuasive, and no party challenges this finding. Decision and Order on Remand at 7.

[8] Legal pneumoconiosis is defined as "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).

[9] Drs. Rasmussen, Fino, and Zaldivar all concluded that claimant does not have clinical pneumoconiosis, which is defined as "those diseases recognized by the medical community as pneumoconiosis, *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); Claimant's Exhibit 3; Employer's Exhibits 6, 7, 8, 9, 10, 20, 21, 23, 24.

determined that the physician relied on the absence of radiographic changes consistent with pneumoconiosis in opining[10] that claimant does not have pneumoconiosis and that his disabling impairment is due to his lengthy smoking habit. Decision and Order on Remand at 8. Consequently, the administrative law judge found that Dr. Fino's opinion was contrary to the findings of scientific studies found credible by the DOL in the preamble to the 2001 regulations, and was entitled to little weight. Decision and Order on Remand at 8, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Similarly, the administrative law judge was not persuaded by Dr. Zaldivar's opinion,[11] that claimant does not have legal pneumoconiosis, but has smoking-related panlobular emphysema[12] complicated by bronchospasm, as the physician's analysis was premised on scientific studies that conflicted with the "preamble statement that medical literature 'supports the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms."' Decision and Order on Remand at 8, *citing* 65 Fed. Reg. at 79,943; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

The administrative law judge permissibly found that the reasons given by Drs. Fino and Zaldivar for finding that claimant's disabling respiratory impairment was due solely to smoking were inconsistent with scientific studies found credible by the DOL in the preamble to the 2001 regulations. Decision and Order on Remand at 8-9; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP*

[10] Dr. Fino examined claimant on July 21, 2011, and diagnosed severe pulmonary emphysema that precluded claimant from performing his usual coal mine employment. He found insufficient evidence to diagnose clinical or legal pneumoconiosis but, rather, determined that claimant's impairment is secondary to cigarette smoking. Dr. Fino explained that he used claimant's negative x-ray and CT scan evidence as a marker of the amount of emphysema due to coal mine dust inhalation that would be causing a reduction in FEV_1, and then correlated that with the number of years that claimant worked. Employer's Exhibits 6, 8, 9, 21, 24.

[11] Dr. Zaldivar performed a records review and found no evidence of clinical or legal pneumoconiosis. He opined that claimant is totally disabled from a respiratory standpoint due to emphysema complicated by bronchospasm. He stated that claimant's pulmonary impairment is unrelated to his coal dust exposure, but is entirely the result of smoking, which has caused the emphysema and bronchiectasis. Employer's Exhibit 7 at 6-7.

[12] In his medical report, Dr. Zaldivar identified claimant's emphysema as bullous emphysema. Employer's Exhibit 7.

[*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Thus, the administrative law judge acted within his discretion in finding that the opinions of Drs. Fino and Zaldivar were not credible or well-reasoned, and were entitled to little weight. Decision and Order at 9; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

As the Director correctly notes, this finding precludes rebuttal under either of the two methods, *i.e.*, disease or disability causation, because all physicians agree that claimant suffers from totally disabling emphysema, and employer has not disproven the link between claimant's emphysema and his coal mine employment, or between claimant's totally disabling respiratory impairment and his pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *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, 25 BLR 2-453 (6th Cir. 2013); *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). We need not, therefore, address employer's allegation that the administrative law judge erred in crediting the contrary opinion of Dr. Rasmussen. Because employer bears the burden of rebutting the Section 411(c)(4) presumption, error, if any, in the administrative law judge's weighing of Dr. Rasmussen's opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii). Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge