U.S. Department of Labor

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

BRB No. 15-0065 BLA

RAYMOND N. HINZMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DONALDSON MINE COMPANY	)	DATE ISSUED: 12/23/2015
	)	
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 Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05587) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed on February 16, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-two years of underground coal mine employment, as stipulated by the parties, and found that claimant established total disability at 20 C.F.R. §718.204(b). Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended 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 establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the weight accorded the medical opinion evidence on rebuttal and asserts that the administrative law judge's findings do not comply with the Administrative Procedure Act (APA).[2] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[3]

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,

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[1] Under Amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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.

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-two years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2) and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 12.

and in accordance with applicable law.[4] 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).

In order to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have legal[5] and clinical[6] pneumoconiosis, or that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *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.*, BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence and by the medical opinion evidence, as "all five physicians [of record] agree that [c]laimant does not have

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

[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). The regulation also provides that "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, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

clinical pneumoconiosis based on the radiographic findings." Decision and Order at 21. The administrative law judge then combined her analysis of the rebuttal issues of legal pneumoconiosis and disability causation because "the physicians largely combine their discussions of legal pneumoconiosis and the correlation between coal dust exposure and disability." *Id*. at 21-24.

The administrative law judge noted that "Drs. Rasmussen, Forehand, Splan, Rosenberg, and Zaldivar all agree that [c]laimant has a totally disabling respiratory or pulmonary impairment." Decision and Order at 12; *see* Director's Exhibit 11; Claimant's Exhibits 3, 5; Employer's Exhibits 1, 5, 8, 7, 11. The administrative law judge found that "[g]enerally, Drs. Rasmussen, Splan, and Forehand conclude that [c]laimant suffers from legal pneumoconiosis due to a combination of prolonged cigarette smoking and coal mine dust exposure[,] while Drs. Rosenberg and Zaldivar do not diagnose legal pneumoconiosis and relate the disability to [c]laimant's significant smoking history and not to coal mine dust exposure." Decision and Order at 21. The administrative law judge rejected Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, as "not well reasoned" because "he relies on presumptions that run contrary to the Department of Labor's [(DOL's)] legislative findings" in the preamble to the 2001 revised regulations. *Id*. at 22. The administrative law judge also assigned less weight to Dr. Zaldivar's opinion, concluding that "it does not comport with the regulation['s] findings, or the definition of legal pneumoconiosis." *Id*. at 23.

Employer asserts that the administrative law judge erred in relying on the preamble as a basis for discrediting Dr. Rosenberg's opinion. We disagree. The preamble sets forth how the DOL has chosen to resolve questions of scientific fact. *See Westmoreland Coal Co. v. Cochran,* 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013). The administrative law judge, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence. *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502 (4th Cir. 2015); *Cochran*, 718 F.3d at 324, 25 BLR at 2-265; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012).

Dr. Rosenberg diagnosed claimant as suffering from a severe respiratory impairment due to chronic obstructive pulmonary disease (COPD)/emphysema caused by smoking. Employer's Exhibits 5, 8. The administrative law judge observed correctly that Dr. Rosenberg excluded coal dust exposure as a significant contributing factor to claimant's disabling obstructive respiratory impairment based on the pulmonary function testing and stated:

> Dr. Rosenberg theorizes that coal dust related and smoking related obstruction can be distinguished using airflow obstruction patterns.

> Generally, he states a preserved FEV_1/FVC ratio is the "norm" in patients with coal mine dust induced obstructive lung disease, and that in a patient with smoking induced (COPD)[,] the FEV_1/FVC ratio will be decreased. Dr. Rosenberg then concludes that [c]laimant's COPD is due entirely to his smoking history because his [FEV_1/FVC] ratio is decreased.

Id. at 22-23; *see* Employer's Exhibit 5. Contrary to employer's arguments, the administrative law judge properly found that Dr. Rosenberg's views are inconsistent with the science credited by DOL in the preamble, that coal mine dust exposure may result in a decreased FEV_1/FVC ratio.[7] *See* 65 Fed. Reg. 79,930, 79,943 (Dec. 20, 2000); *Cochran,* 718 F.3d at 324, 25 BLR at 2-265; *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; Decision and Order at 22-23.[8] We therefore affirm the administrative law judge's finding that Dr. Rosenberg's opinion is insufficient to disprove the existence of legal pneumoconiosis.

In evaluating the credibility of Dr. Zaldivar's opinion, the administrative law judge noted that "the accepted scientific evidence under the regulation [at 20 C.F.R. §718.201] substantially links coal mine dust exposure to COPD, and finds that COPD includes three disease processes: asthma, chronic bronchitis, and emphysema." Decision and Order at 23, *citing* 65 Reg. 79,920, 79,939 (Dec. 20, 2000). The administrative law judge found that, while Dr. Zaldivar diagnosed claimant with emphysema and asthma,

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[7] The Department of Labor (DOL) stated the following:

> In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis], epidemiological studies have shown that *coal miners have an increased risk of developing [Chronic Obstructive Pulmonary Disease (COPD)]. COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC.* Decrements in lung function *associated with exposure to coal mine dust are severe enough to be disabling in some miners*, whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,930, 79,943 (Dec. 20 , 2000) (emphasis added).

[8] We reject employer's contention that the administrative law judge improperly discredited Dr. Rosenberg's opinion based on his statements in other cases. The administrative law judge properly evaluated Dr. Rosenberg's opinion based on the facts of this case, and we see no error in her citation to *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008) (unpub.), as support for her credibility findings.

"he fail[ed] to state how those impairments are not caused or exasperated by coal mine dust exposure." Decision and Order at 23. Additionally, the administrative law judge observed that while claimant's condition improved with the use of a bronchodilator during pulmonary function testing, Dr. Zaldivar's reliance on partial bronchodilator responsiveness as a basis for excluding a diagnosis of legal pneumoconiosis, "does not dispose of the possibility that coal mine dust exposure plays a role in the [disabling obstructive] impairment." *Id.*, *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). The administrative law judge observed that the "presence of other factors relating to the cause of claimant's impairment (i.e. smoking habit) . . . does not dispel the potential that [c]laimant's condition could be attributed to his significant coal dust exposure." Decision and Order at 23.

Employer asserts that the administrative law judge did not properly address whether Dr. Zaldivar's opinion is sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Employer asserts that the administrative law judge erred in requiring employer to "rule out any possible contribution" of coal dust exposure to claimant's respiratory impairment "rather than the lesser correct standard," which is to show that there was "no substantial relationship or aggravation by coal mine dust exposure" to claimant's COPD. Employer's Petition for Review and Brief in Support at 13. Contrary to employer's argument, however, although the administrative law judge conflated her discussion of the rebuttal elements,[9] it is not necessary to remand this case for further consideration of Dr. Zaldivar's opinion, as the administrative law judge's credibility finding was not based on the application of an erroneous legal standard. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). Rather than rejecting Dr. Zaldivar's opinion for failing to "rule out" all contribution of coal dust exposure to claimant's respiratory impairment, the administrative law judge based her credibility finding on Dr. Zaldivar's failure to adequately explain the rationale for his conclusions. The administrative law judge acted within her discretion in rejecting Dr. Zaldivar's opinion, that claimant does not have legal pneumoconiosis, on the grounds that Dr. Zaldivar did not explain why *he completely excluded* claimant's "significant" history of twenty-two years of coal mine employment as a causative factor for claimant's

[9] The administrative law judge should have first addressed whether employer disproved the existence of legal pneumoconiosis by establishing that claimant's COPD was not significantly related to, or substantially aggravated by, coal dust exposure. The administrative law judge should then have separately considered whether employer established that "no part of [claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined at 20 C.F.R. §718.201." 20 C.F.R. §718.305; *see Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

disabling COPD.[10] Decision and Order at 23; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We see no error in the administrative law judge's determination that Dr. Zaldivar's opinion's was not well-reasoned and, therefore, insufficient to satisfy employer's burden of proof. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Thus, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

Furthermore, based on the administrative law judge's permissible determinations that the opinions of Drs. Rosenberg and Zaldivar are not adequately reasoned regarding the cause of claimant's disabling respiratory impairment, we affirm the administrative law judge's determination that they are also insufficient to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii).[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131

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[10] Dr. Zaldivar examined claimant on December 29, 2010. In his initial report, Dr. Zaldivar diagnosed moderate irreversible airway obstruction and mild diffusion impairment. Employer's Exhibit 2 at 3. Dr. Zaldivar discussed medical articles indicating that "the earlier an individual begins to smoke the greater the decrease in the pulmonary function over time." *Id*. at 3. He opined that "all of claimant's impairment is fully explained" by emphysema caused by smoking, based on the "intensity and duration" of claimant's smoking history and the fact that claimant began smoking at an early age. *Id*. at 3-4. During his deposition, Dr. Zaldivar indicated that he reviewed additional pulmonary function tests showing partial reversibility in claimant's obstruction, and revised his opinion to reflect that claimant has asthma. Employer's Exhibit 7 at 35. Dr. Zaldivar attributed claimant's non-reversible COPD to either smoking-induced emphysema or asthma-related remodeling of the airways of the lungs. *Id*. at 36. Dr. Zaldivar acknowledged that coal mine dust exposure may contribute to the development of emphysema, but he did not explain why claimant's twenty-two years of underground coal mine employment did not contribute to his emphysema. *Id*. at 37. As the administrative law judge correctly noted, the DOL has recognized that the effects of smoking and coal dust exposure may be additive. Decision and Order at 21, *citing* 20 C.F.R. 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

[11] Because employer bears the burden of rebutting the Section 411(c)(4) presumption, and we affirm the administrative law judge's findings with regard to the weight accorded the opinions of employer's experts, it is not necessary that we address employer's arguments regarding the weight accorded the opinions of Drs. Forehand, Rasmussen and Splan. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 135, BLR (4th

F.3d at 441, 21 BLR at 2-275-76. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption and we affirm the award of benefits.

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

Cir. 2015); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 478, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).