U.S. Department of Labor

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

BRB No. 17-0147 BLA

ALVES E. CANTRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING, INCORPORATED d/b/a SUN GLO COAL	)	DATE ISSUED: 12/04/2017
	)	
and	)	
	)	
TRAVELERS INDEMNITY 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 Awarding Benefits of John P. Sellers III, Administrative Law Judge, United States Department of Labor.

Clayton Daniel Scott (Porter, Banks, Baldwin and Shaw), Paintsville, Kentucky, for employer/carrier.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. 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 Awarding Benefits (2014-BLA-05584) of Administrative Law Judge John P. Sellers III, rendered on a subsequent claim[1] filed on April 9, 2013, 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 approximately twenty-one years of coal mine employment, with eighteen to nineteen years at underground mines and two to three years at surface mines. The administrative law judge also determined that the medical evidence developed since the denial of claimant's prior claim is sufficient to prove that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Based on these findings, the administrative law judge concluded that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4),[2] 30 U.S.C. §921(c)(4) (2012), and demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in considering rebuttal of the existence of clinical pneumoconiosis prior to considering rebuttal of the existence of legal pneumoconiosis. Employer also contends that the administrative law judge erred in finding that the evidence was insufficient to rebut the presumed fact of total disability causation. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge is not

[1] Claimant filed his initial claim for benefits on November 22, 2004, which was finally denied by the district director on September 20, 2005, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

required to consider whether employer has disproven the existence of clinical pneumoconiosis and legal pneumoconiosis in any particular order.[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, 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).

Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[5] or by proving that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge determined that employer rebutted the existence of legal pneumoconiosis but did not rebut the existence of clinical pneumoconiosis or the presumed fact that claimant is totally disabled due to clinical pneumoconiosis. Decision and Order at 15-23.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: more than fifteen years of qualifying coal mine employment; total respiratory or pulmonary disability; invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because claimant's last coal mine employment was in Kentucky, 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); Director's Exhibit 4.

[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). 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).

I. Rebutting the Existence of Pneumoconiosis

Employer initially contends that the administrative law judge erred by failing to address rebuttal of the existence of pneumoconiosis in the order prescribed in 20 C.F.R. §718.305(d)(1)(i), which sets out consideration of legal pneumoconiosis before clinical pneumoconiosis. Employer's Brief at 12, *citing* 20 C.F.R. §718.305(d)(1)(i)(A), (B). Employer maintains that the administrative law judge's error conflicted with "the statutory mandate to consider all relevant evidence" and failed to "provide[] a framework for the analysis of the medical opinions" relevant to rebuttal of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). *Id*. at 13, *citing Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). Employer's contentions are without merit.

As noted by the Director, "employer must disprove the existence of both forms of [pneumoconiosis], and nothing in the language of the regulation (or in relevant statutes or decisional authority) requires the administrative law judge to consider rebuttal of the two forms of the disease in any particular order."[6] Director's Letter Brief at 2. Moreover, in light of the administrative law judge's permissible findings that employer failed to rebut both the existence of clinical pneumoconiosis and total disability due to clinical pneumoconiosis, *see infra*, there is no merit to employer's allegations that the administrative law judge did not consider all relevant evidence or provide a framework for his weighing of the evidence relevant to disability causation.

In determining that employer did not rebut the existence of clinical pneumoconiosis, the administrative law judge found that the x-ray evidence was inconclusive and that the opinions of Drs. Jarboe and Dahhan ruling out clinical pneumoconiosis were unreliable, as they believed that the x-ray evidence was negative. Decision and Order at 4-5, 15-18. Employer argues that because the administrative law judge found that the x-ray Dr. Dahhan relied on was negative for clinical

[6] Employer's reliance on the Board's decision in *Minich* is misplaced. Although the Board indicated that the analysis of rebuttal of the existence of pneumoconiosis should begin with legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), the key point in *Minich* was the importance of considering rebuttal of both forms of pneumoconiosis, rather than the order in which such consideration should occur. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). In the present case, the administrative law judge addressed rebuttal of both clinical and legal pneumoconiosis. Decision and Order at 15-22.

pneumoconiosis, the administrative law judge erred in discrediting his medical opinion.[7] We disagree.

In considering the x-ray evidence, the administrative law judge reviewed ten readings of five x-rays dated December 28, 2012, July 25, 2013, August 21, 2013, March 2, 2016 and March 26, 2016. Decision and Order at 17. He found that the films obtained on December 28, 2012 and March 26, 2016, are in equipoise, based on conflicting readings by physicians who are dually-qualified as Board-certified radiologists and B readers. *Id*.; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5. Regarding the July 25, 2013 and August 21, 2013 x-rays, the administrative law judge determined that they are positive for clinical pneumoconiosis, based on the preponderance of positive readings by dually-qualified radiologists. Decision and Order at 17; Director's Exhibits 12 at 7, 13 at 24; Claimant's Exhibits 3, 5; Employer's Exhibit 1. The administrative law judge found that the March 2, 2016 x-ray is negative as the negative reading by Dr. Shipley, a dually-qualified radiologist, is uncontradicted. Decision and Order at 17; Employer's Exhibit 6. Upon weighing the newly submitted x-ray evidence as a whole, the administrative law judge found that it was inconclusive based on the presence of two positive films, one negative film, and two films in equipoise.[8] Decision and Order at 17-18.

[7] Employer also asserts that the administrative law judge erred by omitting a finding as to whether claimant's clinical pneumoconiosis arose out of coal mine employment or whether employer "successfully rebutted the presumed causal relation under 20 C.F.R. §718.203(b)." Employer's Brief at 16. The regulation at 20 C.F.R. §718.203(b) is incorporated by reference into 20 C.F.R. §718.305, and provides a presumption that a miner's pneumoconiosis arose out of coal mine employment when he or she establishes at least ten years of coal mine employment. *See* 20 C.F.R. §718.305 (d)(1)(i)(B). Accordingly, by invoking the Section 411(c)(4) presumption, claimant invoked the presumption at 20 C.F.R. §718.203(b) and the burden shifted to employer to rebut both presumptions. Because employer identifies no relevant evidence and makes no arguments as to how it has established that claimant's clinical pneumoconiosis did not arise out of coal mine employment, we reject its allegations of error. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987)

[8] The administrative law judge also noted that the x-rays obtained in 2016 "tilt slightly negative," while the x-rays obtained in 2012 and 2013 "tilt" positive and are older but "offer a wider sampling – five readings as compared to three." Decision and Order at 17-18.

We affirm the administrative law judge's finding that the x-ray evidence as a whole is inconclusive, as it is unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-18. Accordingly, we see no error in the administrative law judge's discrediting of Dr. Dahhan's opinion on the ground that the physician's belief that the x-ray evidence is negative for clinical pneumoconiosis conflicts with the administrative law judge's finding that this evidence is inconclusive.[9] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 18. We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i)(B) by establishing that claimant does not have clinical pneumoconiosis. Decision and Order at 18. As employer must disprove both legal and clinical pneumoconiosis to rebut the presumed existence of pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) is precluded. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

II. Rebutting Total Disability Causation

The administrative law judge further found that the medical opinions of Drs. Jarboe and Dahhan are insufficient to establish that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Specifically, the administrative law judge noted that Drs. Jarboe and Dahhan ruled out any causal connection because "in order for coal dust to cause a restrictive impairment, there must be scarring in the lungs, i.e., clinical pneumoconiosis." Decision and Order at 22-23; *see* Director's Exhibit 13; Employer's Exhibits 2, 3. The administrative law judge then discounted their opinions because, in contrast to the administrative law judge's finding that the x-ray evidence was inconclusive, "[b]oth physicians relied on negative x-ray evidence to conclude that the [c]aimant did not have clinical pneumoconiosis and therefore his restrictive impairment could not be due to pneumoconiosis." Decision and Order at 23.

Employer argues that the administrative law judge erred by failing to acknowledge that Drs. Jarboe and Dahhan identified "a likely paralyzed right diaphragm, obesity and

[9] Dr. Dahhan opined that claimant does not have clinical pneumoconiosis based on Dr. Shipley's uncontradicted negative reading of the March 2, 2016 x-ray and Dr. Meyer's negative reading of the August 21, 2013 x-ray. Employer's Exhibits 2, 3 (at 20 and 23), 6. As previously indicated, the administrative law judge found that the August 21, 2013 x-ray is positive, as the preponderance of readings by dually-qualified radiologists is positive. Decision and Order at 17.

asthma," as the causes of claimant's disabling respiratory or pulmonary impairment and cited objective evidence in support of their findings. Employer's Brief at 25. Employer's argument lacks merit.

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), employer is required to prove that "no part" of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. Drs. Jarboe and Dahhan did not address clinical pneumoconiosis as a possible causal factor based on their assumption that claimant does not have the disease. Director's Exhibit 13; Employer's Exhibits 2, 3. Because the physicians' view conflicts with the administrative law judge's finding that employer did not rebut the presumed existence of clinical pneumoconiosis, the administrative law judge permissibly determined that the physicians' opinions did not satisfy employer's burden. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 23. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

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