U.S. Department of Labor

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

BRB No. 17-0169 BLA

WILLIAM C. HYDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED	)	DATE ISSUED: 12/13/2017
	)	
and	)	
	)	
PITTSTON 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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-6048) of Administrative Law Judge Steven D. Bell 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 involves a subsequent claim filed on July 30, 2012.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with at least twenty-seven years of qualifying coal mine employment,[3] as stipulated by the parties. The administrative law judge also accepted employer's concession that the new evidence establishes that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption that his total disability is due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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[1] Claimant's prior claim, filed on June 8, 2001, was denied by Administrative Law Judge Daniel F. Solomon, on February 8, 2005, because claimant did not establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1 at 4. No further action was taken on that claim.

[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.

[3] With the exception of six to nine months when claimant worked above-ground at the site of an underground mine, all of claimant's coal mine employment took place underground. Decision and Order at 10; Hearing Tr. at 14; Director's Exhibit 5.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and established 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).

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.[5] 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).

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

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,[6] or by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

Relevant to the existence of legal pneumoconiosis,[7] the administrative law judge considered the new medical opinions of Drs. Rosenberg and Broudy.[8] The administrative

[5] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 5; Hearing Transcript at 11, 14. 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).

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[7] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 13.

[8] The administrative law judge also considered Dr. Rasmussen's new medical opinion. Decision and Order at 14; Director's Exhibit 17. Because Dr. Rasmussen opined that claimant has legal pneumoconiosis, the administrative law judge properly found that his opinion does not assist employer in rebutting the Section 411(c)(4) presumption. *Id*.

law judge also considered Dr. Rosenberg's 2002 and 2004 opinions, submitted in the prior claim.[9] Drs. Rosenberg and Broudy opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) due to smoking and not coal mine dust exposure. Decision and Order at 6-9, 14-16; Employer's Exhibits 4, 5, 6. The administrative law judge discredited both opinions as inadequately explained and unreasoned. Decision and Order at 14-16. Additionally, the administrative law judge found that aspects of Dr. Rosenberg's opinion are inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. *Id*. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer challenges the administrative law judge's weighing of the medical opinion evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 10-11. Employer contends that the administrative law judge erred by automatically rejecting the opinions of Drs. Rosenberg and Broudy simply because they concluded that claimant's obstructive impairment is due solely to smoking. *Id*. Contrary to employer's contention, the administrative law judge permissibly assessed the credibility of the physicians' opinions in light of their reasoning and documentation, and in conjunction with the principles and medical studies referenced in the preamble to the revised regulations and accepted by the DOL. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 14-16.

We further reject employer's contention that the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Rosenberg and Broudy as to the cause of claimant's obstructive airways disease and emphysema. Employer's Exhibit 7 at 9. Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's obstructive impairment based, in part, on his opinion that claimant's reduced FEV1/FVC ratio is a pattern of impairment that is uncharacteristic of coal mine dust-induced lung

[9] The administrative law judge also considered the medical opinions of Drs. Hussain and Vuskovich, submitted in the prior claim. Decision and Order at 16; Director's Exhibit 1. The administrative law judge found that Dr. Hussain diagnosed a moderate obstructive impairment due to claimant's coal dust exposure and that Dr. Vuskovich's opinions were silent regarding legal pneumoconiosis. *Id*. Thus the administrative law judge properly found that these opinions do not assist employer in rebutting the Section 411(c)(4) presumption. *Id*.

disease. Employer's Exhibits 4, 5, 6. The administrative law judge permissibly discredited his opinion because it conflicts with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Sterling*, 762 F.3d at 491-92, 25 BLR at 2-644-45; *Adams*, 694 F.3d at 801-02, 25 BLR at 210-11; Decision and Order at 14-15. Additionally, the administrative law judge noted that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive. Decision and Order at 15-16, *citing* 65 Fed. Reg. at 79,940; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). In light of this accepted principle, the administrative law judge permissibly found that Dr. Rosenberg's opinion that claimant's obstructive impairment is unrelated to coal mine dust exposure is not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 15-16.

Regarding Dr. Broudy's opinion, the administrative law judge correctly found that beyond his "conclusory deferral" to Dr. Rosenberg's opinion that claimant's pattern of impairment is typical of a smoking-related disease, Dr. Broudy did not explain why he concluded that claimant does not suffer from legal pneumoconiosis.[10] Decision and Order at 16; Employer's Exhibit 6. Therefore, the administrative law judge permissibly found that Dr. Broudy's opinion is unpersuasive, unreasoned, and entitled to diminished weight. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 16. The administrative law judge thus concluded that the new medical opinions of Drs. Rosenberg and Broudy fail to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 16.

Turning to the prior claim evidence, the administrative law judge noted that in his 2004 report,[11] Dr. Rosenberg opined that claimant probably had a degree of emphysema

[10] Dr. Broudy reviewed the medical opinions of Drs. Rosenberg and Rasmussen and stated that Dr. Rosenberg gave a very detailed explanation of why he felt that claimant's impairment was not related to coal dust exposure. Dr. Broudy then stated that he agreed with Dr. Rosenberg's conclusion that claimant does not have clinical or legal pneumoconiosis but has an impairment typical of smoking. Employer's Exhibit 6.

[11] The administrative law judge also considered Dr. Broudy's 2002 report, in which he opined that claimant did not have any obstructive or restrictive impairment, but suffered from a cough that was unrelated to coal mine dust exposure. Director's Exhibit 1.

that was due to his long and continued smoking history but not caused or related to his past coal dust exposure. Director's Exhibit 1. The administrative law judge correctly noted that Dr. Rosenberg emphasized the appearance of claimant's lungs on x-ray to support his conclusion that only claimant's cigarette smoking, and not his coal mine dust exposure, contributed to his emphysema. Decision and Order at 17; Director's Exhibit 1. The administrative law judge permissibly concluded that to the extent that Dr. Rosenberg relied on the absence of x-ray evidence of dust deposition in the lungs, his opinion was inconsistent with the DOL's recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of a positive x-ray. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 313-16, 25 BLR at 2-127-30; Decision and Order at 17. Consequently, the administrative law judge accorded Dr. Rosenberg's 2004 opinion no weight.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Broudy, the only opinions supportive of employer's burden, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[12] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*.

The administrative law judge next addressed whether employer rebutted the presumed fact of disability causation by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 18-19. The administrative law judge rationally found that the same reasons for which he discredited the opinions of Drs. Rosenberg and Broudy on the issue of legal pneumoconiosis also undercut their opinions that no part of claimant's disabling impairment was caused by pneumoconiosis. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-

[12] We therefore we need not address employer's contentions of error regarding the administrative law judge's consideration of Dr. Rasmussen's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 14.

452; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 18-19. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 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