U.S. Department of Labor

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

BRB No. 17-0234 BLA

EARL J. DUNCAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE	)	DATE ISSUED: 12/28/2017
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Earl J. Duncan, Prestonsburg, Kentucky.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2013-BLA-5883) of Administrative Law Judge Joseph E. Kane (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 involves a miner's claim filed on September 7, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with twenty-seven years of qualifying coal mine employment, based on the parties' stipulation. The administrative law judge also accepted employer's concession that claimant is totally disabled and, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge further found that employer rebutted the presumption by disproving the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[3]

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm

[1] Claimant was represented by counsel at the hearing before Administrative Law Judge Joseph E. Kane (the administrative law judge). Hearing Transcript at 4.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b); 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 (1983).

the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and in accordance with 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).

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,[5] or by establishing that "no part of the miner'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)(i), (ii). The administrative law judge found that employer established rebuttal by establishing that claimant does not have clinical or legal pneumoconiosis.

A. Clinical Pneumoconiosis

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered interpretations of x-rays dated October 18, 2012, January 3, 2013, June 25, 2013, and January 6, 2016. The administrative law judge noted that Dr. Sikder was a B reader[6] who interpreted the

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3.

[5] Clinical pneumoconiosis is defined as "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. 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). Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[6] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988);

October 18, 2012 x-ray as positive for pneumoconiosis, while Dr. Kendall was also a B reader who interpreted the same x-ray as negative. Director's Exhibit 13; Employer's Exhibit 2. Because equally qualified physicians disagreed as to whether the October 18, 2012 x-ray established the existence of pneumoconiosis, the administrative law judge found that it was inconclusive for pneumoconiosis.[7] Decision and Order at 7. The administrative law judge found that the January 3, 2013 x-ray was negative for pneumoconiosis, as Dr. Jarboe, a B reader, interpreted it as negative, without contradiction. Decision and Order at 7; Director's Exhibit 15. The administrative law judge found that the June 25, 2013 x-ray was positive for pneumoconiosis, as Dr. Vuskovich, a B reader, interpreted it as positive, without contradiction. Decision and Order at 7; Claimant's Exhibit 1. The administrative law judge found that the January 6, 2016 x-ray was negative for pneumoconiosis, as Dr. Crum, a B reader and Board-certified radiologist, interpreted it as negative, without contradiction. Decision and Order at 7; Employer's Exhibit 3.

Considering the quality and quantity of the x-ray evidence as a whole, the administrative law judge permissibly concluded that the weight of the x-ray evidence was negative for pneumoconiosis, based on a numerical preponderance of negative interpretations by physicians with superior qualifications. Decision and Order at 8; *see* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 58-60, 19 BLR 2-271, 2-278-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Because it is based on substantial evidence, we affirm the administrative law judge's determination that the x-ray evidence supports a finding that claimant does not suffer from clinical pneumoconiosis.

Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[7] Contrary to the administrative law judge's determination, the record reflects that Dr. Sikder has no particular radiological qualifications, Director's Exhibit 13-10, and that Dr. Kendall is dually-qualified as a B reader and Board-certified radiologist. Employer's Exhibit 2-6. While the administrative law judge mistakenly credited both doctors as B readers, any error is harmless, as he chose to accord the greatest weight to x-ray interpretations read by dually-qualified radiologists based on their "superior qualifications." Decision and Order at 8. Thus, as Dr. Kendall, a dually-qualified radiologist, read the October 18, 2012 x-ray as negative, his interpretation is supportive of the administrative law judge's finding that the weight of the x-ray evidence rebutted the presumed fact of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The administrative law judge next considered the medical opinions of Drs. Sikder, Westerfield, and Jarboe. Dr. Sikder diagnosed clinical pneumoconiosis, based on radiographic changes consistent with pneumoconiosis.[8] Director's Exhibit 13. In contrast, Drs. Westerfield and Jarboe opined that claimant does not have clinical pneumoconiosis. Employer's Exhibit 1; Director's Exhibits 15, 16. The administrative law judge permissibly found that because the physicians based their opinions solely on the x-ray evidence, which he had already found to be negative for pneumoconiosis, employer successfully rebutted the presumed fact of clinical pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003) (merely restating an x-ray does not qualify as a "reasoned medical judgment"); Decision and Order at 8. As substantial evidence supports the administrative law judge's findings, they are affirmed.

B. Legal Pneumoconiosis

Lastly, the administrative law judge considered the medical opinions of Drs. Bailey, Sikder, Westerfield, and Jarboe in determining whether employer disproved the existence of legal pneumoconiosis. Although Dr. Bailey opined that claimant's work environment contributed to his lung and breathing condition, he did not diagnose legal pneumoconiosis or state that coal mine dust exposure significantly contributed to or substantially aggravated claimant's respiratory impairment.[9] Director's Exhibit 14. Dr. Sikder diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due entirely to coal mine dust exposure, based on claimant's FEV_1 that was 48 percent of the predicted value.[10] Director's Exhibit 13. In contrast, Drs.

[8] Dr. Sikder stated that "[t]he chest x-ray findings are however subtle and small (p/q grade 1/0 left lung only)." Director's Exhibit 13-1.

[9] Dr. Bailey from Hometown Family Care submitted a letter dated October 22, 2012, stating that claimant worked 27 years in coal mine employment and was exposed to chemicals, coal dust, and carcinogens. Dr. Bailey opined that claimant's "work environment would drastically help contribute to his lung and breathing condition." Director's Exhibit 14. The administrative law judge accorded the opinion little weight because he found that it was conclusory in nature and that Dr. Bailey did not diagnose legal pneumoconiosis. Decision and Order at 10.

[10] Dr. Sikder performed the Department of Labor examination on October 18, 2012. Because the pulmonary function study was determined to be invalid, a new study was performed on December 13, 2012. Dr. Sikder provided a supplemental opinion on January 17, 2013, diagnosing chronic obstructive pulmonary disease (COPD) based on the Global Initiative for Chronic Obstructive Lung Disease (GOLD) criteria. Referencing

Westerfield and Jarboe opined that claimant does not have any chronic coal mine dust-related disease, and that coal mine dust exposure did not contribute to claimant's respiratory impairment. Dr. Westerfield provided a records review dated March 18, 2013, and diagnosed a restrictive impairment due to lung cancer and related lung surgery, the aggressive treatment for cancer, and obesity.[11] Director's Exhibit 16; Employer's Exhibits 1, 5. Dr. Jarboe examined claimant on January 3, 2013, and diagnosed a restrictive ventilatory defect due to claimant's right upper and middle lobectomy, obesity, and treatment by radiation and chemotherapy.[12] Director's Exhibit 15; Employer's Exhibit 4. Dr. Jarboe explained that claimant's impairment is restrictive in nature, rather than obstructive, as the Global Initiative for Chronic Obstructive Lung Disease (GOLD) standard for diagnosing airflow obstruction is an FEV_1/FVC ratio of less than 70 percent, and claimant's ratio has been normal.[13] Director's Exhibit 15-45-47.

Weighing the medical opinion evidence, the administrative law judge determined that the opinions of Drs. Westerfield and Jarboe were well-reasoned in light of their diagnoses of a restrictive impairment and credible testimony that the GOLD standard requires that the FEV_1/FVC ratio be taken into consideration, rather than the FEV_1 value alone. Conversely, because Dr. Sikder did not provide any explanation for her diagnosis of COPD other than a reduced FEV_1 value, and did not discuss what effect, if any, claimant's cancer, surgery, and treatment had on his respiratory impairment, the administrative law judge permissibly found Dr. Sikder's opinion to be conclusory and not well-reasoned.[14] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-

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claimant's FEV_1 of 48 percent of predicted, Dr. Sikder opined that claimant's disabling COPD is due solely to his coal mine employment. Director's Exhibit 13.

[11] Dr. Westerfield provided a records review dated March 18, 2013 and a supplemental opinion dated February 26, 2016. He also provided deposition testimony on April 12, 2013. Director's Exhibit 16; Employer's Exhibits 1, 5.

[12] Dr. Jarboe examined claimant on January 3, 2013 and provided a supplemental opinion dated February 23, 2016. He also provided deposition testimony on March 7, 2013. Director's Exhibit 15; Employer's Exhibit 4.

[13] The pulmonary function study conducted by Dr. Sikder on December 13, 2012 yielded a ratio of 73 percent; Dr. Jarboe's study conducted on January 3, 2013 yielded a ratio of 71 percent; Dr. Broudy's study conducted on October 24, 2013 yielded a ratio of 71 percent; and Dr. Sikder's study conducted on January 6, 2016 yielded a ratio of 74 percent. Director's Exhibits 13-17, 15-12, 16-4; Claimant's Exhibits 2, 3.

[14] The administrative law judge failed to discuss the January 6, 2016 pulmonary function study conducted by Dr. Sikder, in which she diagnosed a non-reversible

431, 2-446-47 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Lastly, noting that the record contains no other evidence that claimant was diagnosed with COPD or any other chronic dust-related condition,[15] the administrative law judge permissibly accorded the opinions of Drs. Westerfield and Jarboe controlling weight because he found that they were well-reasoned and supported by the objective testing. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the opinions of Drs. Westerfield and Jarboe were well-reasoned and sufficient to carry employer's burden to demonstrate that claimant does not have legal pneumoconiosis.

In light of our affirmance of the administrative law judge's finding that employer disproved the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (B), we affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption.

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moderate restrictive airway disease. The administrative law judge's error is harmless, however, in light of his determination that the record does not support a finding that claimant suffers from COPD. *See Larioni*, 6 BLR at 1-1278. Moreover, Dr. Sikder did not address the cause of claimant's restrictive impairment. Claimant's Exhibit 3.

[15] Dr. Broudy performed a pulmonary function study on October 24, 2013, but he did not provide an opinion regarding the nature of claimant's impairment. Claimant's Exhibit 2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge