U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0250 BLA

LARRY K. BROWNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 02/27/2018
	)	
and	)	
	)	
ARCH COAL 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

Scott A. White (White & Risse LLP), Arnold, Missouri, for employer.

Barry H. Joyner (Kate S. O'Scannlain, 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 appeals the Decision and Order Awarding Benefits (2014-BLA-05909) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on April 2, 2013,[1] 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 found that claimant established at least twenty-eight years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled and thus established invocation of the Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in relying on the preamble to the revised 2001 regulations to evaluate the credibility of the medical opinions and erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited brief, urging the Board to reject employer's arguments regarding the preamble as without merit. Employer has also filed a reply brief, reiterating its arguments.

[1] Claimant filed three prior claims, each of which was denied. Director's Exhibits 1-3. The last claim was denied by the district director on December 20, 2010, because the evidence was insufficient to establish total disability. Director's Exhibit 3.

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

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

In the absence of contrary probative evidence, a miner's respiratory or pulmonary disability is established by: 1) pulmonary function studies; 2) arterial blood gas studies; 3) medical evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). Employer asserts that the administrative law judge erred in finding that claimant established total disability based on Dr. Rasmussen's arterial blood gas study and the medical opinion evidence.[4] We disagree.

The administrative law judge considered two arterial blood gas studies. The administrative law judge correctly found that Dr. Rasmussen's May 16, 2013 study had non-qualifying[5] values at rest and qualifying values for total disability with exercise, while Dr. Rosenberg's December 10, 2013 study had non-qualifying values at rest and with exercise. Decision and Order at 12; Director's Exhibits 24, 48. Contrary to

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, the Board will apply the law 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).

[4] The administrative law judge found that claimant was unable to establish total disability at C.F.R. §718.204(b)(2)(i), as none of the pulmonary function studies was qualifying. Decision and Order at 28. Because there was no evidence in the record that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables found in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

employer's contention, the administrative law judge permissibly gave less weight to Dr. Rosenberg's non-qualifying study because it was not conducted in accordance with the regulations. *See 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); Decision and Order at 29. The administrative law judge noted correctly that Dr. Rosenberg "used the single stick method of measuring blood oxygen post[-]exercise which does not measure the blood oxygen while exercise is performed, as is required by the technical standards established by the [Department of Labor] regulations pertaining to exercise blood gas [studies]." Decision and Order at 31, *citing* 20 C.F.R. 20 C.F.R. §718.105(b) ("If an exercise blood gas [study] is administered, blood shall be drawn during exercise.").

In contrast, the administrative law judge correctly found that Dr. Rasmussen's study used an indwelling catheter and that it complied with the quality standards. Decision and Order at 30; Director's Exhibit 24. The administrative law judge also rationally found Dr. Rasmussen's *exercise* study to be more probative of whether claimant is capable of performing coal mine work in comparison to the *resting* blood gas studies.[6] *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We therefore affirm the administrative law judge's finding that claimant established total disability based on Dr. Rasmussen's qualifying exercise blood gas study pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge observed that claimant's last coal mine job was operating a continuous miner, which involved heavy manual labor. The administrative law judge credited the opinions of Drs. Rasmussen, Cohen and Sood that claimant is totally disabled from performing his usual coal mine employment, based on Dr. Rasmussen's qualifying exercise blood gas study. Decision and Order at 29. Although employer generally states that claimant's work did not involve heavy manual labor, it does not identify specific error with the administrative law judge's determination or the weight accorded the medical opinions. *See Sarf v. Director, OWCP*, 10 BLR 1-

[6] Contrary to employer's contention, the administrative law judge permissibly rejected Dr. Rosenberg's criticism that Dr. Rasmussen's blood gas study was affected by the altitude in Beckley, West Virginia, noting correctly that "the regulations take into account altitude in the blood gas tables, when determining values." Decision and Order at 32, *see* 718.204(b)(2)(ii); Appendix C of 20 C.F.R. Part 718; Employer's Reply Brief at 6.

119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's determination, after weighing the evidence as a whole, that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). We therefore affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

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

Once claimant established invocation of the Section 411(c)(4) presumption, the burden shifted to employer to affirmatively establish that claimant has neither legal nor clinical pneumoconiosis,[7] or 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge noted that Drs. Rosenberg and Dahhan opined that any respiratory or pulmonary impairment suffered by claimant was the result of usual interstitial pneumonia (UIP) or idiopathic pulmonary fibrosis (IPF) and not coal dust exposure.[8] Decision and Order at 40-41; Director's Exhibit 48; Employer's Exhibits 17, 24, 25. In contrast, Drs. Cohen, Rasmussen and Sood opined that claimant's respiratory condition was caused by smoking and coal dust exposure. Claimant's Exhibits 2, 3.

[7] 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). 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." 20 C.F.R. §718.201(a)(1).

[8] Drs. Rosenberg and Dahhan maintain that the radiographic pattern of linear or irregular opacities is consistent with a diagnosis of usual interstitial pneumonia (UIP) or idiopathic pulmonary fibrosis (IPF). Employer's Exhibits 24 at 18, 25 at 15-16.

The administrative law judge found the opinions of Drs. Rosenberg and Dahhan were not persuasive in light of Dr. Cohen's explanation as to why a diagnosis of UIP or IPF was not warranted in this case.[9] The administrative law judge also found that Drs. Cohen, Sood and Rasmussen "reviewed and integrated a plethora of evidence, and their documentation and reasoning support their conclusions far better than those of Dr. Rosenberg and Dr. Dahhan." Decision and Order at 41.

Employer contends that the administrative law judge erred in relying on the preamble to the revised 2001 regulations to resolve the conflict in the medical opinions. But, as the Director notes, the administrative law judge did not mention the preamble in finding that employer failed to disprove the existence of legal pneumoconiosis. Director's Brief at 1. Furthermore, we reject employer's assertion that the administrative law judge improperly substituted his opinion for that of Drs. Dahhan and Rosenberg, as it is not explained. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

Because it is supported by substantial evidence, we affirm the administrative law judge's rational finding that Drs. Rosenberg and Dahhan failed to adequately explain "why claimant's twenty-eight years of coal mine employment did not contribute to either his pulmonary fibrosis or his oxygen transfer abnormality." Decision and Order at 41; s*ee Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law judge's conclusion 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).[10] *See Bender*, 782 F.3d at 137, 25 BLR at 2-698; Decision and Order at 42.

[9] Dr. Cohen disputed the conclusions of Drs. Rosenberg and Dahhan because "the American Thoracic Society would recommend ruling out environmental or occupational causes before a diagnosis of UIP or [IPF] can be made." Claimant's Exhibit 3 at 8-9. Dr. Cohen cited medical studies indicating that coal dust exposure may cause irregular or linear opacities. *Id*. at 10-11. He noted that UIP is considered a rapidly progressing restrictive lung disease with a mortality rate within five years of diagnosis. *Id*. at 18-20. Dr. Cohen maintained that claimant's disease, unlike UIP, has progressed slowly, with evidence of restrictive impairment on a diffusion capacity test as early as 1998, and radiographic findings of interstitial lung disease in 2004. *Id*. at 18-20, 22-23.

[10] As employer is required to disprove both clinical and legal pneumoconiosis, employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding under 20 C.F.R. §718.305(d)(1)(i), and therefore it is not necessary that we address employer's arguments regarding clinical pneumoconiosis.

The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. The administrative law judge discredited the opinions of Drs. Dahhan and Rosenberg on the issue of disability causation because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove the disease. Decision and Order at 27; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013). As employer does not identify specific error with the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii), it is affirmed. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

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