U.S. Department of Labor

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

BRB No. 14-0187 BLA

EVERETT GALUSKY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED	)	DATE ISSUED: 01/30/2015
	)	
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.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5535) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[2] The administrative law judge accepted the stipulation of the parties that claimant had twenty-six years of underground coal mine employment and a totally disabling respiratory impairment, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, the

[1] Claimant's initial claim for benefits, filed on February 5, 1997, was finally denied by the district director on April 29, 1997, because the evidence was insufficient to establish pneumoconiosis arising out of coal mine employment or that claimant's disability was due to pneumoconiosis. Director's Exhibit 1.

Claimant's current claim for benefits was filed on May 12, 2010. The district director awarded benefits, and employer requested a hearing, which was held on June 27, 2013. Director's Exhibits 31, 32.

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309. Because the district director determined in the prior claim that claimant was totally disabled, the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by

administrative law judge found that the new evidence outweighed the earlier evidence, and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge did not apply the appropriate standard in rendering his findings on rebuttal, and that he erred in weighing the relevant evidence. Employer also contends that the 2014 regulatory amendments do not apply to this claim.[4] Claimant responds in support of the award of benefits. The Director has filed a limited response, asserting that the administrative law judge applied the proper rebuttal standard.[5]

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establishing that he is totally disabled. Director's Exhibit 1; Decision and Order at 34. This error is harmless, however, insofar as claimant successfully invoked the amended Section 411(c)(4) presumption that he has pneumoconiosis and is totally disabled by it, thereby satisfying the requisite change in an applicable condition of entitlement. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] Subsequent to the administrative law judge's Decision and Order in this case, the Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725, effective May 19, 2014, to update the Department's existing conventional x-ray standards and to provide parallel standards for digital x-rays. 79 Fed. Reg. 21,606 (April 17, 2014)(to be codified at 20 C.F.R. Parts 718 and 725). Subsequent to the effective date, chest x-rays, either produced by film or digital radiography systems, may form the basis for a finding of the existence of pneumoconiosis under 20 C.F.R. §718.202 if the chest x-ray is conducted and classified in accordance with the revised quality standards set forth in 20 C.F.R. §718.102. In the instant case, the three digital x-rays admitted into evidence, dated December 15, 2010, June 8, 2011, and May 6, 2011, were all taken prior to May 19, 2014, the effective date of the revisions. Consequently, the revised regulations are not applicable to this case.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established greater than fifteen years of underground coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the presumption of total disability due to pneumoconiosis at amended 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 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.[6] 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).

Employer initially contends that the administrative law judge improperly restricted employer to the two rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013)(Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. Employer also argues that the administrative law judge erred in applying the "rule out" standard on rebuttal when addressing whether employer established that claimant is not totally disabled due to pneumoconiosis. Employer maintains that operators must be able to establish rebuttal with proof that claimant's pneumoconiosis is mild and that his totally disabling respiratory impairment was the product of another disease. Employer's Brief at 27-43. Contrary to employer's argument, since the medical opinions supportive of employer's burden did not diagnose pneumoconiosis as defined at 20 C.F.R. §718.201, employer could not establish rebuttal with proof that "claimant's pneumoconiosis is mild and that the totally disabling respiratory impairment was the product of another disease." Employer's Exhibits 1, 2, 4, 9, 18; *see Owens*, 724 F.3d 550, 25 BLR 2-339. The administrative law judge stated that the amended Section 411(c)(4) presumption may be rebutted with proof that the miner does not have pneumoconiosis or that the respiratory or pulmonary impairment did not arise out of coal mine employment, noting that the United States Court of Appeals for the Fourth Circuit has held under 20 C.F.R. §718.305 (2001) that an employer must "effectively. . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. Decision and Order at 28-29; *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-4 (4th Cir. 1980). Similarly, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment took place in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1; Hearing Transcript at 15.

C.F.R.] §718.201." 20 C.F.R. §718.305(d)(ii).[7] The Department of Labor has also explained that the "no part" standard recognizes that the courts have interpreted amended Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013)(no meaningful difference exists between the "played no part" standard and the "rule-out" standard); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

Turning to the merits, employer contends that the administrative law judge erred in finding that employer failed to prove that claimant does not have legal pneumoconiosis and that his disabling respiratory impairment was not due to pneumoconiosis. Specifically, employer argues that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Basheda and Renn. Employer's Brief at 6-27. We disagree.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After finding that employer successfully rebutted the presumption of clinical pneumoconiosis,[8] the administrative law judge accurately summarized the conflicting medical opinions of record and determined that the opinions of Drs. Basheda[9] and Renn,[10] that there was no evidence of legal

[7] We find no merit to employer's argument that 20 C.F.R. §718.305 is invalid, as the statutory interpretation of the Director, Office of Workers' Compensation Programs, is consistent with Congressional intent and entitled to deference. *See* 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013); *Spese v. Peabody Coal Co*., 19 BLR 1-47, 1-53 (1995).

[8] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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).

[9] Dr. Basheda examined claimant on June 8, 2011, provided a deposition on June 24, 2013, and reviewed other medical evidence of record. He found no evidence of clinical or legal pneumoconiosis and opined that claimant's severe respiratory disability is due to tobacco-induced chronic obstructive pulmonary disease (COPD) with an asthmatic component. Employer's Exhibits 4, 18.

pneumoconiosis and that no part of claimant's disabling respiratory impairment is due to coal dust exposure, were entitled to little weight. Decision and Order at 11-13; 22-24; Employer's Exhibits 1, 2, 4, 9, 18. The administrative law judge determined that Drs. Basheda and Renn both diagnosed severe chronic obstructive pulmonary disease (COPD)/emphysema due to smoking with an asthmatic component. Decision and Order at 22. The administrative law judge observed that Dr. Basheda relied on a coal mine employment history of twenty-seven years, and a smoking history of twenty-five pack years ending in 1981, and that Dr. Renn relied on a coal mine employment history of twenty-six years, and a smoking history of up to a pack per day for twenty-six years ending in 1982. Decision and Order at 11-13; Employer's Exhibits 1, 2, 4, 9, 18. While both doctors opined that coal dust exposure did not cause or contribute to claimant's COPD or asthma, the administrative law judge found that they failed to consider or persuasively explain why claimant's exposure to coal mine dust could not worsen his COPD and/or his asthma. The administrative law judge noted that in reaching his conclusion that claimant's impairment was not due to coal dust exposure, Dr. Basheda relied on reports supporting the view that miners with severe airway obstruction are usually young miners, initially exposed to coal dust, who do not reach retirement age, a view that cannot be reconciled with the principle expressed in the preamble to the regulations, that pneumoconiosis is a progressive and irreversible disease that may first become detectable only after the cessation of coal dust exposure. 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); 20 C.F.R. §718.201(c); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 256-7, 24 BLR 2-369, 2-383 (3rd Cir. 2011); *Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22, 1-34-35 (2004), *citing National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); Decision and Order at 24; Employer's Exhibit 4; Employer's Exhibit 18 at 29. The administrative law judge further correctly observed that Dr. Basheda's suggestion, that claimant's respiratory impairment is not due to coal dust since most of claimant's work occurred after dust regulation measures were imposed at coal mines, is factually unsupported by any evidence in the record regarding dust regulation in the mines where claimant worked or that the amount of coal dust that claimant experienced was somehow reduced to the extent that it could not contribute to, or cause, COPD/emphysema. Employer's Exhibits 4, 18. Thus, the administrative law judge rationally determined that Dr. Basheda's opinion was insufficiently reasoned and was entitled to less weight, due to views that were not in accordance with the Act and/or the view of the Department of Labor, as expressed in the

[10] Dr. Renn examined claimant on December 15, 2010, and provided a deposition on April 19, 2012. He found no clinical or legal pneumoconiosis and diagnosed a very severe obstructive ventilatory defect owing to pulmonary emphysema from tobacco smoking and asthma. Employer's Exhibits 1, 2, 9.

preamble to the regulations. Decision and Order at 33; *see* 65 Fed. Reg. at 79,939-43; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Similarly, the administrative law judge rationally concluded that the opinion of Dr. Renn, that claimant's obstructive impairment is due to tobacco smoking and asthma, was not well reasoned and entitled to little weight. Decision and Order at 22, 33; Employer's Exhibits 1, 2, 9. Specifically, the administrative law judge noted that Dr. Renn eliminated coal dust exposure as a source of claimant's obstructive impairment because he opined that emphysema associated with coal dust exposure can progress up to ten years after exposure ceases, and not thereafter. Decision and Order at 22; Employer's Exhibit 9 at 57-58. Because Dr. Renn's position, that any progression is limited to ten years, is inconsistent with the preamble, which recognizes the progressive nature of respiratory impairments due to coal dust inhalation, but does not state a time limit on any possible progression, the administrative law judge permissibly accorded Dr. Renn's opinion little weight. *See* 20 C.F.R. §718.201; 65 Fed. Reg. at 79,937, 79,971; *Clark*, 12 BLR at 1-155. Thus, the administrative law judge acted within his discretion in concluding that Drs. Basheda and Renn failed to adequately or persuasively explain why claimant's lengthy coal dust exposure was not a contributing or aggravating cause of his COPD or asthma. Decision and Order at 22, 33; *see Cochran*, 718 F.3d at 326, 25 BLR at 2-266-67; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

The evaluation of medical evidence and the determination of whether a physician's report is adequately reasoned and documented is properly a credibility matter for the finder-of-fact. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As the administrative law judge provided multiple valid reasons for discounting the opinions of Drs. Basheda and Renn, we need not address employer's remaining arguments regarding the administrative law judge's weighing of their opinions. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d at 478, 25 BLR 2-1 (6th Cir. 2010); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-4; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Lastly, employer contends that the administrative law judge erred in relying on the presumption of legal pneumoconiosis to reject the disability causation opinions of Drs. Basheda and Renn. Employer argues that because the existence of legal pneumoconiosis was established by presumption, the opinions of Drs. Basheda and Renn are not contrary to any affirmative findings made by the administrative law judge. Employer's Brief at

22-27. Contrary to employer's assertions, the administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Basheda and Renn on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074 (rejecting the employer's contention that an administrative law judge may not discredit a disability causation opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found); Decision and Order at 33. Therefore, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

_____
REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with my colleagues that the administrative law judge permissibly determined that employer had not rebutted the Section 411(c)(4) presumption because he found that employer's physicians, Drs. Basheda and Renn, did not adequately address whether coal mine dust exposure contributed to or aggravated the miner's COPD or asthma. *See* 20 C.F.R. §718.201(b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013)(Niemeyer, J., concurring). Thus, regardless of the rebuttal standard, the administrative law judge permissibly found that the opinions of employer's physicians as to the etiology of claimant's COPD were not credible. *Id*. Consequently, I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge