U.S. Department of Labor

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

BRB No. 14-0190 BLA

BILLY G. SPIRES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 01/27/2015
	)	
Employer-Petitioner	)	
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco LLP), Birmingham, Alabama, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06316) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim[1] filed

[1] Claimant's initial claim, filed on March 21, 1985, was denied by the district director on June 11, 1985, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to coal workers' pneumoconiosis. Director's Exhibit 1. Claimant requested a hearing before the Office of Administrative Law Judges, but Administrative Law Judge W. Ralph Musgrove ultimately dismissed the case on January 13, 1987, as claimant did not respond to an Order to Show Cause. *Id.*

on May 25, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge noted that employer stipulated that claimant had at least fifteen years of underground coal mine employment and suffered from a totally disabling respiratory impairment. The administrative law judge further found, therefore, that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Based on the administrative law judge's determination that employer did not rebut the presumption, he awarded benefits.

On appeal, employer argues that, in considering rebuttal of the presumed existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, the administrative law judge erred in discrediting all of the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to affirmatively establish that claimant does not have clinical or legal pneumoconiosis,[4] or

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[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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), as implemented by 20 C.F.R. §718.305(a).

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 15. Therefore, 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 (1989)(en banc).

[4] 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). 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).

establish that claimant's disability did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305; 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305; *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

I. Rebuttal of the Presumed Existence of Pneumoconiosis

A. Clinical Pneumoconiosis

The administrative law judge indicated that the analog x-ray evidence consisted of one reading of an x-ray dated April 25, 1985, eight readings of an x-ray dated August 2, 2010, and one reading of an x-ray dated November 3, 2010. Decision and Order at 3, 9-10; Director's Exhibits 10, 11; Claimant's Exhibits 1-4; Employer's Exhibits 8, 17. The administrative law judge gave little weight to the negative reading of the April 25, 1985 x-ray by Dr. Shipley, who is a B reader and a Board-certified radiologist, because it is twenty-five years older than the more recent x-rays. Decision and Order at 9, 10. The administrative law judge found that the August 2, 2010 film was negative for pneumoconiosis, based on the preponderance of negative readings by physicians who were dually qualified as B readers and Board-certified radiologists.[5] *Id*. at 9; Director's Exhibits 10, 11; Claimant's Exhibits 1-4; Employer's Exhibits 4, 8, 17. The administrative law judge determined that the November 3, 2010 x-ray was positive, based on the unchallenged interpretation of Dr. Ahmed, who is a B reader and a Board-certified radiologist. Decision and Order at 3, 9-10; Claimant's Exhibit 2. In light of his findings with respect to the three x-rays submitted by the parties, the administrative law judge concluded that the analog evidence was in equipoise and, therefore, insufficient to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 10.

The administrative law judge also considered the digital x-ray evidence, which he characterized as consisting of Dr. Seaman's negative reading of an x-ray dated November 3, 2010 and Dr. Meyer's negative reading of an x-ray dated January 6, 2012. Decision and Order at 17-18; Employer's Exhibits 11, 13. The administrative law judge found that the digital x-ray readings, "tip the balance and help [e]mployer establish . . . that [c]laimant does not have clinical pneumoconiosis." Decision and Order at 18.

[5] The August 2, 2010 x-ray was interpreted as negative for pneumoconiosis by Drs. Meyer, Seaman, Shipley and Wiot, all of whom are dually qualified. Director's Exhibit 11; Employer's Exhibits 4, 8, 17. Drs. Rao, Ahmed, Groten and Miller read the film as positive. Director's Exhibit 10; Claimant's Exhibits 1, 3, 4. Dr. Rao is a B reader, while Drs. Ahmed, Groten and Miller are dually qualified. *Id*.

Employer argues that the administrative law judge should have considered Dr. Ahmed's positive interpretation of the November 3, 2010 x-ray at 20 C.F.R. §718.107, rather than at 20 C.F.R. §718.202(a)(1), as it is a digital x-ray. In support of this argument, employer asserts that Dr. Ahmed did not indicate whether the x-ray that he reviewed was digital or analog, while Dr. Vuskovich, who obtained the x-ray, and Dr. Seaman, who read the x-ray as negative for pneumoconiosis, reported that the x-ray was digital.[6] *See* Claimant's Exhibit 2; Employer's Exhibits 11, 13. However, employer further maintains that the administrative law judge's error was harmless, in light of his permissible finding that the x-ray evidence, considered as a whole, was sufficient to rebut the presumed existence of clinical pneumoconiosis.

We hold that the administrative law judge rationally determined that the x-ray evidence, when weighed in its entirety, is negative for clinical pneumoconiosis, based on the preponderance of negative readings by dually qualified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We affirm, therefore, the administrative law judge's finding that employer rebutted the presumed existence of clinical pneumoconiosis. Accordingly, we need not determine whether the administrative law judge erred in considering Dr. Ahmed's reading of the November 3, 2010 x-ray with the analog x-ray evidence, because any such error, under these facts, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

B. Legal Pneumoconiosis

In considering whether the evidence was sufficient to rebut the presumed existence of legal pneumoconiosis, the administrative law judge summarized the parties' competing arguments regarding the probative value of the medical opinions of Drs. Rao, Castle and Vuskovich. Decision and Order at 13; Director's Exhibits 10-12; Employer's Exhibit 6. The administrative law judge stated, "[a]fter reviewing the evidence, I find that the physicians' medical opinions, insofar as they exclude legal pneumoconiosis, are not well-reasoned." Decision and Order at 13.

With respect to Dr. Rao's opinion, the administrative law judge acknowledged employer's assertion that, during his deposition, Dr. Rao deviated from his written opinion to conclude that claimant does not have legal pneumoconiosis. Decision and Order at 13. Nevertheless, the administrative law judge determined that it was "unclear whether Dr. Rao actually revised [his] opinion in [his] deposition," as Dr. Rao's testimony that claimant's respiratory impairment is due to cigarette smoking, could be

[6] Dr. Vuskovich's reading of the November 3, 2010 x-ray was not designated as affirmative or rebuttal evidence by the parties and was not admitted into the record.

consistent with the conclusion in his report that claimant's impairment is due to coal dust exposure and cigarette smoking. *Id*. In the alternative, the administrative law judge concluded that if Dr. Rao changed his opinion to exclude coal dust as a contributing factor, that opinion is inconsistent with his statement earlier in his deposition that he was unable to determine the respective contributions of coal dust and cigarette smoke to claimant's respiratory impairment. *Id*.; *see* Director's Exhibit 12 at 7. The administrative law judge also determined that Dr. Rao's testimony, that "[i]t would be unlikely" for a miner's respiratory impairment to be due to coal dust if he did not have x-ray evidence of pneumoconiosis, is contrary to the view expressed by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations, indicating that coal dust can cause a disabling respiratory impairment, even in the absence of radiographic evidence of clinical pneumoconiosis. Decision and Order at 13-14, *quoting* Director's Exhibit 12 at 26; *see also* 30 U.S.C. §923(b)(prohibiting denial of a Black Lung claim based solely on negative x-ray results).

Similarly, the administrative law judge gave less weight to Dr. Castle's opinion, as he found that Dr. Castle eliminated coal dust as a causal factor because claimant did not have radiographic evidence of coal workers' pneumoconiosis.[7] Decision and Order at 14; Employer's Exhibit 6. The administrative law judge acknowledged that Dr. Castle observed that legal pneumoconiosis could exist in the absence of x-ray evidence of clinical pneumoconiosis, but concluded that Dr. Castle's "testimony shows that he was preoccupied by the negative radiological findings." Decision and Order at 14. In support of his finding, the administrative law judge cited Dr. Castle's deposition testimony, which includes the following colloquy with claimant's counsel:

> Q. [W]hat specific findings led you to conclude that no part of [claimant's] emphysema arose from coal mine dust exposure?
>
> A. He has a much greater history of smoking than he did of working in the coal mines. He has physical findings basically going along with emphysema.
>
> . . . .

[7] Dr. Castle stated:

> In this case, [claimant] did not have any radiographic evidence indicating the presence of coal workers' pneumoconiosis. While that does not exclude the presence of disease pathologically, it simply would indicate the severity of any process would be insufficient to have played any significant role in causing impairment or disability.

Employer's Exhibit 6.

> He has diminished breath sounds, which goes along with airway obstruction. The radiographic findings don't show anything to do with coal dust exposure, even on CT scan. The physiologic changes . . . are such that[,] if you went to a textbook of end stage emphysema, you could find them right there.
>
> Q. And which physiologic changes are you referring to?
>
> A. I'm talking about his severe airway obstruction.

Employer's Exhibit 10 at 45.

The administrative law judge also determined that Dr. Castle's opinion, that coal dust can cause only focal emphysema, is contrary to comments in the preamble to the regulations, stating that both smoking and coal dust exposure can cause centrilobular emphysema. Decision and Order at 15. Finally, the administrative law judge gave less weight to the opinions of both Dr. Castle and Dr. Vuskovich, because he found that they did not adequately explain how they excluded coal dust exposure as an aggravating factor in claimant's impairment. *Id*. at 16. The administrative law judge concluded, therefore, that employer failed to rebut the presumed existence of legal pneumoconiosis. *Id*.

Employer contends that the administrative law judge erred in relying on comments in the preamble to discredit the opinions of Drs. Rao and Castle. Further, employer argues that, if the Board affirms the administrative law judge's finding that Dr. Rao's opinion is unreasoned, remand is necessary to obtain a complete pulmonary evaluation. In addition, employer maintains that the administrative law judge erred in giving less weight to the opinions of Drs. Castle and Vuskovich, as both physicians explained why coal dust exposure did not contribute to claimant's respiratory impairment.

Contrary to employer's contentions, the administrative law judge provided valid rationales for discrediting the opinions of Drs. Rao, Castle and Vuskovich. The administrative law judge acted within his discretion in finding that Dr. Rao's opinion was entitled to "little weight," based on Dr. Rao's inconsistent statements regarding whether a physician can determine "the relative contribution of coal dust exposure and cigarette smoking" to claimant's impairment.[8] Decision and Order at 13; *see Milburn Colliery Co.*

[8] We reject employer's contention that, because Dr. Rao performed the Department of Labor-sponsored pulmonary evaluation of claimant pursuant to 20 C.F.R. §725.406, this case must be remanded to cure the defects that the administrative law judge found in Dr. Rao's opinion. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete

v. Hicks, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge also rationally determined that Dr. Castle's opinion was not adequately reasoned, as it is contrary to scientific studies found to be credible by the DOL that coal dust exposure is associated with centrilobular emphysema.[9] Decision and Order at 15, *citing* 65 Fed. Reg. 79,939-79,943 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). Further, the administrative law judge rationally gave less weight to the opinion of Dr. Vuskovich because he did not adequately explain how he determined that coal dust exposure was not a contributing cause of claimant's totally disabling respiratory impairment, particularly in light of his statement that there is no objective test that can distinguish the relative contribution of different etiological factors to emphysema.[10] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Therefore, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406. As the pulmonary evaluation that the Director, Office of Workers' Compensation Programs, must provide is for the benefit of the miner, employer lacks standing to argue that Dr. Rao's opinion was deficient and therefore did not constitute a complete pulmonary evaluation. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-197 (2002)(en banc); 20 C.F.R. §802.201(a).

[9] Dr. Castle testified that coal dust "causes a condition of focal emphysema, which is similar to but not the same as centrilobular emphysema pathologically, in that the focal emphysema has the presence of a coal macule, whereas centrilobular emphysema does not." Employer's Exhibit 10 at 41.

[10] In his written report, Dr. Vuskovich recorded a smoking history of one pack per day, starting in 1960 and ending in 1980. Director's Exhibit 11. Dr. Vuskovich determined that claimant has severe pulmonary emphysema due to smoking and coal dust exposure. *Id*. At Dr. Vuskovich's deposition, employer's counsel informed him that claimant had reported to a number of physicians that he began smoking in 1955 and quit in 2000. Employer's Exhibit 2 at 25. In response to counsel's question as to whether the lengthier smoking history would change his opinion, Dr. Vuskovich stated:

> Well, considering the severity of his emphysema and the fact that he didn't have coal workers' pneumoconiosis, then to me it's medically reasonable to determine that cigarette smoke exposure was a main contributing cause of [claimant's] disabling impairment.

Director's Exhibit 11; Employer's Exhibit 2 at 24-25.

II. Rebuttal of the Presumed Causal Relationship

The administrative law judge relied on his weighing of the opinions of Drs. Rao, Castle and Vuskovich on the issue of legal pneumoconiosis to determine that they were insufficient to establish that no part of claimant's totally disabling respiratory impairment was caused by pneumoconiosis. Decision and Order at 19. Because we have affirmed the administrative law judge's finding that Drs. Rao, Castle and Vuskovich did not provide adequately reasoned opinions as to whether coal dust exposure played a role in causing claimant's impairment, we also affirm this finding. 20 C.F.R. §718.305(d)(1)(ii); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge