U.S. Department of Labor

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

BRB No. 15-0113 BLA

ARTHUR R. RILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLEN ALLEN MINING INCORPORATED/EMPLOYERS INSURANCE OF WASAU, c/o LIBERTY MUTUAL MIDDLE MARKET	)	DATE ISSUED: 01/14/2016
	)	
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 Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2012-BLA-5105) of Administrative Law Judge Stephen R. Henley on a claim filed on January 11, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Considering the claim pursuant to Section 411(c)(4) of the

Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment, and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.[2]

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

[1] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and where a totally disabling respiratory or pulmonary impairment is established pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4). The Department of Labor (DOL) revised the regulations to implement the amendments. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[2] Employer does not challenge the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, we affirm the administrative law judge's determination that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); Decision and Order at 12, 22; Employer's Brief at 2; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 6 at 7; Decision and Order at 2. Accordingly, the Board will apply the

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption. 30 U.S.C. §921(c)(4). In order to rebut the presumption, employer must establish that claimant does not have either clinical or legal pneumoconiosis,[4] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method. Specifically, the administrative law judge found that employer failed to disprove the existence of clinical and legal pneumoconiosis, and failed to rule out a causal relationship between claimant's total disability and his pneumoconiosis.

In evaluating whether employer established that claimant does not have legal pneumoconiosis,[5] the administrative law judge considered the medical opinions of Drs.

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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 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. 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' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] As employer concedes the existence of clinical pneumoconiosis, the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis for purposes of rebuttal is affirmed. Employer's Brief at 2; Decision and Order at 15, 20; Employer's Exhibits 1 at 2, 4 at 8, 6 at 8, 7 at 10, 8 at 2-3, 9; *Skrack*, 6 BLR at 1-711. Rebuttal under 20 C.F.R. §718.305(d)(1)(i) requires affirmative evidence disproving the existence of both clinical and legal pneumoconiosis. Thus, a finding that clinical pneumoconiosis has not been disproved will preclude

Castle and Rosenberg.[6] Drs. Castle and Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from severe chronic obstructive pulmonary disease (COPD) caused by emphysema that is due to smoking. Decision and Order at 16-18; Employer's Exhibits 1, 4, 5, 7, 8. The administrative law judge found that the opinions of Drs. Castle and Rosenberg were inadequately explained and "at odds" with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 18-20. Consequently, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in determining that Drs. Castle and Rosenberg relied on "generalities" to find that claimant did not have legal pneumoconiosis. Specifically, employer contends that the administrative law judge selectively analyzed the medical opinions, and "ignored" pertinent portions of the opinions of Drs. Castle and Rosenberg addressing why claimant's coal mine employment did not significantly contribute to his respiratory impairment. Employer also challenges the administrative law judge's finding that the views of Drs. Castle and Rosenberg are inconsistent with the preamble. Employer contends that the opinions of Drs. Castle and Rosenberg are not inconsistent with the preamble, since the doctors did not opine that coal mine dust exposure can never be a cause of COPD, but instead explained why it was not a cause in claimant's case.

Initially, to the extent that employer asserts that the administrative law judge erred in relying on the preamble to the revised 2001 regulations in his assessment of the medical evidence, we reject employer's contention. The preamble sets forth the scientific studies the DOL found reliable and credible, and therefore used in developing the regulation. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255,

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rebuttal under the first method of rebuttal. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i); *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, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). However, because employer's arguments regarding the issue of legal pneumoconiosis are relevant to the second method of rebuttal, namely disability causation, we will address them.

[6] The administrative law judge also considered the opinions of Drs. Baker and Forehand. The administrative law judge found, however, that these opinions could not assist employer in rebutting the Section 411(c)(4) presumption because both doctors diagnosed the existence of pneumoconiosis and did not rule out a connection between pneumoconiosis and claimant's respiratory disability. Decision and Order at 18, 20 and 22; Claimant's Exhibit 3; Director's Exhibit 13.

2-257-58 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-209-10 (6th Cir. 2012). Hence, an administrative law judge, as part of the deliberative process, may utilize the preamble in assessing the credibility of the medical evidence. *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

Thus, in evaluating the opinions of Drs. Castle and Rosenberg, the administrative law judge properly noted that the preamble acknowledges that the prevailing view of the medical community is that the effects of smoking and coal mine dust exposure on COPD are additive, and that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,939; 79,940; 79,943 (Dec. 20, 2000). Consequently, the administrative law judge permissibly accorded little weight to the opinions of Drs. Castle and Rosenberg, because they relied, without adequate additional explanation, on claimant's improvement on bronchodilation to find that claimant had a smoke induced impairment, rather than a coal-dust induced impairment, even though claimant's pulmonary function study was still qualifying after the administration of bronchodilations. Decision and Order at 19; 65 Fed. Reg. 79, 938-43 (Dec. 20, 2000); *see generally Cumberland River Coal Co. v. Director, OWCP* [*Banks*], 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012)(the court agreed with the administrative law judge that partial reversibility after bronchodilator treatments constitutes an insufficient basis to conclude that legal pneumoconiosis is not present).

Moreover, the administrative law judge permissibly found that Dr. Rosenberg's testimony "that not all cases of coal dust [-] induced obstruction results in preserved FEV_1/FVC ratio, but it is a general pattern …" is not a well-reasoned basis for eliminating the existence of legal pneumoconiosis in claimant's case, as it is based on generalities. Decision and Order at 20; Employer's Exhibits 1 at 4-5, 4 at 10-12, 7 at 9-10; *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *see generally Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008) (general reference to medical literature, and not the miner's specific condition, not probative).[7] The administrative law judge therefore permissibly accorded little weight to the opinions of Drs. Castle and Rosenberg because the doctors failed to adequately explain why claimant's at least fifteen years of coal dust exposure, more likely than not,

[7] Employer contends generally that the administrative law judge "simply ignore[d] large portions" of the opinions of Drs. Castle and Rosenberg. It does not, however, identify those portions of their opinions that refute the administrative law judge's finding that their opinions were based on generalities and were inconsistent with the preamble and regulations. *See* Employer's Brief at 4.

did not significantly relate to or substantially aggravate his COPD.[8] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920; 79,939-79,940 (Dec. 20, 2000); *Obush*, 650 F.3d at 257, 24 BLR at 2-383; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir 1977). Consequently, we affirm the administrative law judge's finding that the opinions of Drs. Castle and Rosenberg failed to carry employer's burden of disproving the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Turning to the issue of disability causation, the administrative law judge found that the record contains "no reasoned and documented medical opinion or other competent evidence excluding coal mine dust exposure as a factor" in claimant's disability. *Id*. at 22. Specifically, because the doctors failed to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, the administrative law judge concluded that their opinions failed to rebut the presumption that claimant's total disability was due to pneumoconiosis. Medical opinions that do not diagnose the existence of legal pneumoconiosis "may not be credited at all" on causation, unless "specific and persuasive reasons" exist, demonstrating that the physician's view of causation is independent from his misdiagnosis of no pneumoconiosis, and even then his opinion may carry at most "little weight." *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 23 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by disproving the presumed fact of disability causation on the basis of Drs. Castle and Rosenberg's opinions.[9] 20 C.F.R. §718.305(d)(1)(ii); *see Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. As claimant invoked the Section 411(c)(4)

[8] A disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment *significantly related to*, or *substantially aggravated by*, dust exposure in coal mine employment. *See* 20 C.F.R. §718.201(b)(emphasis added).

[9] We decline to address employer's allegations of error concerning the administrative law judge's consideration of the opinions of Drs. Baker and Forehand. Because Drs. Baker and Forehand both concluded that claimant's disability is due, in part, to pneumoconiosis, their opinions cannot assist employer in rebutting the Section 411(c)(4) presumption by disproving the presumed fact of disability causation. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 2-4.

presumption of total disability due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the award of benefits.[10] 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

[10] We note that the administrative law judge did not apply the standard in the DOL's implementing regulations at 20 C.F.R. §718.305(d)(1)(ii) for determining whether employer rebutted the presumption of disability causation. The administrative law judge addressed the effects of claimant's coal mine employment/exposure on his respiratory impairment, instead of determining whether "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)(ii). *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting). However, the use of the incorrect standard in this case was harmless since the administrative law judge had permissibly discredited the opinions of employer's experts as to the existence of legal pneumoconiosis. Consequently, their opinions could not establish rebuttal under the correct standard either. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 23 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Larioni*, 6 BLR at 1-1278.