U.S. Department of Labor

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

BRB No. 17-0187 BLA

THOMAS R. JAMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/17/2018
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Lucinda L. Fluharty and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in an Initial Claim[1] (2013-BLA-05798) of Administrative Law Judge Larry S. Merck, issued 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 credited claimant with at least twenty-three and one-

[1] Claimant filed his claim on April 24, 2012. Director's Exhibit 2.

half years of coal mine employment and found that at least nineteen and one-half years were spent as an underground miner. The administrative law judge also determined that claimant has a totally disabling respiratory or pulmonary impairment, and thus found that claimant 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 failed to rebut the presumption and he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to 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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption,[4] 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

[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.

[3] As claimant's coal mine employment was in Virginia, this case arises within the jurisdiction 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); Director's Exhibit 4.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the claim was timely filed and that: Claimant established at least nineteen and one-half years of underground coal mine employment; a totally disabling respiratory or pulmonary impairment; and invocation of the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

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 failed to establish rebuttal by either method.

Rebuttal - Existence of Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that it did not disprove the existence of legal pneumoconiosis. We disagree. The administrative law judge noted correctly that employer relied on the opinions of Drs. Rosenberg and Basheda to establish rebuttal of the Section 411(c)(4) presumption. Each of these physicians opined that claimant suffers from disabling chronic obstructive pulmonary disease (COPD) unrelated to coal dust exposure and due entirely to smoking. Director's Exhibit 12; Employer's Exhibits 2, 8, 9. The administrative law judge accurately found that Dr. Rosenberg relied, in part, on his view that claimant's pulmonary function tests showing a reduced FEV1/FVC ratio is a pattern of impairment that is generally consistent with smoking-induced obstruction and not impairment related to coal dust exposure.[6] Decision and Order at 18; Director's Exhibit 12; Employer's Exhibit 9. Contrary to employer's contention, the administrative law judge permissibly discredited Dr. Rosenberg's rationale as it conflicts with the medical science credited by the Department of Labor (DOL), recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72, BLR (4th Cir. Nov. 29, 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013)

---

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).

[6] Dr. Rosenberg reported that claimant's FEV1 was "significantly reduced to 28% predicted with a marked reduction of his FEV1/FVC ratio down to around 31%." Director's Exhibit 12. Dr. Rosenberg stated that "the general pattern [with obstruction caused by coal dust exposure] is that of a reduced FEV1 with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved." *Id.* He further explained that while coal dust exposure may cause the FEV1 and FVC values to lower to disability levels, the FEV1/FVC ratio is preserved and remains in the "normal" range of 70% or higher. *Id.*

(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

The administrative law judge also correctly noted that Drs. Rosenberg and Basheda excluded a diagnosis of legal pneumoconiosis because claimant's obstructive respiratory impairment was partially reversible with the use of bronchodilators. Decision and Order at 21, 24; Director's Exhibit 12; Employer's Exhibit 2. The physicians explained that coal dust exposure causes a fixed and irreversible respiratory impairment that does not respond to bronchodilator treatment. Director's Exhibit 12; Employer's Exhibit 8. We affirm the administrative law judge's decision to discredit the their opinions because they failed to adequately explain why the fixed and irreversible aspect of claimant's pulmonary impairment was not caused by coal dust exposure.[7] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

Additionally, we see no error in the administrative law judge's decision to give less weight to their opinions to the extent that they rely on statistical averaging to support their conclusions.[8] Decision and Order at 22-23, 26. The administrative law judge observed correctly that the DOL has concluded that "statistical averaging conceals the fact that coal dust [exposure] and cigarette smoke are injurious to the lungs in roughly

[7] Dr. Rosenberg acknowledged that claimant's pulmonary function tests did not completely reverse back to normal, but attributed the fixed impairment to remodeling due to asthma that was not properly treated with medication. Director's Exhibit 12; Employer's Exhibit 9. The administrative law judge found that Dr. Rosenberg "did not point to any objective evidence to verify that remodeling had occurred." Decision and Order at 21. To the extent that Dr. Rosenberg suggested that claimant failed to properly take his asthma medication, the administrative law judge specifically found that the treatment record showed that claimant was compliant with his medication and stopped taking only one drug based on an allergic reaction. Decision and Order at 21 n.17; Employer's Exhibit 9 at 8-9. Thus, the administrative law judge rationally found Dr. Rosenberg's explanation regarding the cause of claimant's fixed impairment to be unpersuasive. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

[8] Drs. Rosenberg and Basheda opined that the average annual loss in FEV1 caused by coal dust exposure is significantly lower than the average annual loss in FEV1 experienced by a susceptible smoker. Director's Exhibit 12; Employer's Exhibit 2. Dr. Basheda opined that, statistically, a cigarette smoker has a fifteen percent risk of developing airway obstruction in comparison to a six to eight percent risk for a coal miner. Employer's Exhibit 2.

equal measure" such that miners can suffer severe respiratory disease even if the average loss of FEV1 per year is clinically insignificant. Decision and Order at 23, *citing* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *see Cochran*, 718 F.3d at 324, 25 BLR at 2-265; *see also Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Thus, because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis.[9] *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). We therefore affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10] Decision and Order at 27.

Rebuttal - Disability Causation

The administrative law judge found that employer did not rebut the presumed fact of disability causation. Decision and Order at 28. Employer contends that the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Rosenberg and Basheda.[11] The administrative law judge permissibly rejected their opinions regarding the cause of claimant's respiratory disability, however, as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504, 25 BLR 2-713, 2-720 (4th Cir. 2015); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 28. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption by establishing that "no part of [claimant's] respiratory or

[9] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Rosenberg and Basheda, it is not necessary that we address employer's remaining challenges to the weight accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, it is not necessary that we address employer's assertion that the administrative law judge erred in failing to determine whether employer disproved the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

[11] As employer bears the burden of proof on rebuttal and the administrative law judge has given credible reasons for rejecting employer's evidence, we need not address employer's arguments regarding Dr. Habre's opinion. *Larioni*, 6 BLR at 1-278.

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); *see* Decision and Order at 28.

Accordingly, the Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge