U.S. Department of Labor

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

BRB No. 17-0257 BLA

ROBERT M. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PIKEVILLE COAL COMPANY	)	DATE ISSUED: 01/29/2018
	)	
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 Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2013-BLA-05834) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on October 5, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties'

stipulation to twenty-two years of coal mine employment and found that all of this employment was underground or in conditions substantially similar to those in an underground mine. The administrative law judge also found claimant established that he has a totally disabling respiratory impairment and, therefore, he invoked the rebuttable presumption that his totally disabling respiratory impairment was due to pneumoconiosis[1] The administrative law judge further found that employer rebutted the existence of clinical pneumoconiosis but did not rebut the presumed existence of legal pneumoconiosis or the presumed causal link between legal pneumoconiosis and claimant's totally disabling respiratory or pulmonary impairment. The administrative law judge awarded benefits accordingly.

On appeal, employer argues that the administrative law judge's rebuttal findings on legal pneumoconiosis and total disability causation are erroneous. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief 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 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 Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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) (2012); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that: claimant had twenty-two years of qualifying coal mine employment; claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2); and claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

establishing that claimant has neither legal nor clinical 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); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-443 (6th Cir. 2013). The administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis but failed to establish that claimant does not have legal pneumoconiosis or that his totally disabling respiratory impairment is not due to legal pneumoconiosis. Decision and Order at 13-16.

I. Legal Pneumoconiosis

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic dust disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Employer submitted the medical opinions of Drs. Rosenberg and Fino in support of its burden.

Dr. Rosenberg diagnosed claimant with hypoventilation unrelated to "past coal mine dust exposure." Employer's Exhibit 3. He identified claimant's obesity and the use of Lortab, which Dr. Rosenberg indicated can suppress the brain's respiratory control system, as the causes of claimant's hypoventilation. *Id*. Dr. Fino diagnosed hypoxemia, hypercarbia and a reduction in claimant's diffusion capacity. Employer's Exhibit 5. He observed that these conditions "can be attributed to being overweight." *Id*.

The administrative law judge discredited Dr. Rosenberg's opinion because the physician did not explain why coal dust exposure was not a cause of claimant's respiratory condition, in addition to obesity and the use of Lortab. Decision and Order at 14. The administrative law judge also found that there was no evidence in the record supporting Dr. Rosenberg's opinion that claimant's respiratory impairment is related to the effects of Lortab. *Id*. Similarly, the administrative law judge discredited Dr. Fino's

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

opinion because the physician failed to explain why coal dust inhalation did not have an additive effect on claimant's hypoxemia, hypercarbia, and reduction in diffusion capacity. *Id*.

Employer initially argues that the administrative law judge erred in assuming that claimant had legal pneumoconiosis because he has a respiratory impairment and was exposed to coal dust. Employer's Brief at 12-13. In support of this argument, employer cites the holding in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, 2-651 (6th Cir. 2003), that "the mere existence of coal mine employment and . . . pulmonary disease does not constitute legal [pneumoconiosis]." *Id*. at 13. We reject employer's contention because employer fails to recognize that, in contrast to the present case, the Section 411(c)(4) presumption was not applicable to the claim at issue in *Williams*. *Williams*, 338 F.3d at 505, 22 BLR at 2-635. Based on claimant's invocation of the presumption in this case, the administrative law judge was required to presume that claimant has legal pneumoconiosis and is totally disabled by it. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(c).

Employer further alleges that, contrary to the administrative law judge's findings, Drs. Rosenberg and Fino "considered . . . legal [pneumoconiosis] and provided a reasoned rationale for attributing claimant's issues to extrinsic factors like obesity or to cigarette smoking." Employer's Brief at 12. To the extent employer argues that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Fino, we reject this contention. As the administrative law judge permissibly found, neither physician adequately explained why coal dust exposure could not have contributed to claimant's respiratory impairment. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 14; Employer's Exhibits 3, 5. Consequently, we affirm the administrative law judge's determination that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).

II. Total Disability Causation

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 15-16. The administrative law judge rationally discounted the disability causation opinions of Drs. Rosenberg and Fino because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Ogle*, 737 F.3d at 1074,

25 BLR at 2-452; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 15-16. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge