U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0108 BLA

JERRY WAYNE HUSKEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/30/2019
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05114) of Administrative Law Judge Adele Higgins Odegard, rendered on a miner's subsequent

claim filed on February 28, 2014,[1] 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 found that claimant has nineteen years of coal mine employment, of which eighteen years and six months were spent underground, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, she found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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.[4] 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).

[1] Claimant filed a prior claim on May 5, 2003, which was denied by Administrative Law Judge Joseph E. Kane on June 26, 2006, because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions that are 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29-30.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal under either method.

Legal Pneumoconiosis

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Employer relies on the opinions of Drs. Rosenberg and Tuteur, who diagnosed chronic obstructive pulmonary disease (COPD) due entirely to smoking, and asserts that the administrative law judge erred in finding their opinions not well-reasoned. Decision and Order at 42, 47; Director's Exhibit 12; Employer's Exhibits 2, 7.

Contrary to employer's contention, we see no error in the administrative law judge's discrediting of Dr. Rosenberg's opinion. The administrative law judge noted that "Dr. Rosenberg wrote extensively as to why [c]laimant's COPD and obstruction evidenced on pulmonary function tests were related exclusively to his five-decade smoking history and not at all related to his two-decade coal mine history." Decision and Order at 39. She accurately found that his "central thesis" is that claimant's "markedly reduced FEV1/FVC ratio excludes a diagnosis of obstruction related to coal mine dust exposure. . . ."[6] *Id.; see* Director's Exhibit 12. She permissibly discounted his opinion as inconsistent with the

[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 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).

[6] Dr. Rosenberg stated that "specific to claimant, one can appreciate that his FEV1 is only reduced down to around 68 [percent] predicted or below but his FEV1/FVC ratio is down to around 48 [percent]." Director's Exhibit 12. Dr. Rosenberg indicated that a "preserved" FEV1/FVC ratio of 70 percent or higher is consistent with obstruction related to coal dust exposure, while a marked reduction in the FEV1/FVC ratio is characteristic of obstruction related to smoking. *Id.*

Department of Labor's (DOL's) recognition that a reduced FEV1/FVC ratio may support a finding that a miner's obstructive respiratory impairment is related to coal mine dust exposure.[7] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 40. Moreover, she rationally found that Dr. Rosenberg's opinion is not sufficiently reasoned because he failed to account for the DOL's position that the effects of smoking and coal mine dust exposure are additive.[8] *See* 65 Fed. Reg. at 79,940; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Additionally, the administrative law judge accurately found that Dr. Tuteur excluded a diagnosis of legal pneumoconiosis based on medical studies indicating that

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[7] Contrary to employer's assertion, the administrative law judge correctly found that NIOSH findings do not support Dr. Rosenberg's view that claimant's obstruction is due entirely to smoking, based on the markedly reduced FEV1/FVC ratio. Employer's Brief in Support of Petition for Review at 14. The preamble states:

> [I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple CWP [coal workers' pneumoconiosis] and PMF [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease (COPD)]. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC."

65 Fed. Reg. at 79,943, *quoting* NIOSH Criteria Document 4.2.3.2 (citations omitted).

[8] The administrative law judge noted that while Dr. Rosenberg "paid lip service to the proposition that coal mine dust and cigarette smoking may have an additive effect," he specifically excluded the additive effect of coal dust exposure in claimant's case based on a view that coal dust exposure does not cause a markedly reduced FEV1/FVC ratio, contrary to the Department of Labor's position in the preamble. Decision and Order at 41 n. 35.

claimant had a twenty percent greater risk of developing COPD from smoking in comparison to a one percent risk of developing COPD from coal dust exposure. Decision and Order at 44; Employer's Exhibits 2, 7 at 28. She permissibly rejected his opinion because the medical studies cited to support his conclusion showed a "higher prevalence of COPD in coal miners than the about [one percent] or less he stated" and because "the scientific evidence relied on by DOL [specifically the Marine study] also found higher risk rates." Decision and Order at 46; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-313 (4th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). The administrative law judge permissibly concluded that Dr. Tuteur's opinion "underestimates the likelihood" that coal dust exposure contributed to claimant's COPD, and also does not account for the additive effects of smoking and coal dust exposure.[9] Decision and Order at 46-47; *see* 65 Fed. Reg. at 79,940; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Barrett*, 478 F.3d at 356; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Employer's arguments on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[10] We therefore affirm her determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[11]

[9] Although employer generally asserts that Dr. Tuteur's opinion must be credited because it was expressed "to a reasonable degree of medical certainty," Employer's Brief in Support of Petition for Review at 17, we affirm the administrative law judge's rational finding that Dr. Tuteur's opinion was "not well-reasoned because the underlying documentation does not support his conclusion." Decision and Order at 47; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

[10] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Rosenberg and Tuteur, the only opinions supportive of employer's burden of proof, we need not address employer's arguments regarding the weight she accorded the opinions of Drs. Baker and Habre. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief in Support of Petition for Review at 10-12.

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical

Disability Causation

Employer generally asserts that the administrative law judge erred in finding that it did not establish the second method of rebuttal by disproving the presumed fact of disability causation. We disagree. The administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Tuteur that claimant's respiratory disability was unrelated to legal pneumoconiosis, as neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 51; Director's Exhibit 12; Employer's Exhibits 2,7. Thus, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 51.

pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief in Support of Petition for Review at 6-9.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge