U.S. Department of Labor

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

BRB No. 19-0134 BLA

ROGER METCALF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PANTHER MINING LLC	)	
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 01/30/2020
	)	
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 Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05975) of Administrative Law Judge Lauren C. Boucher on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 24, 2014.

The administrative law judge credited claimant with twenty-nine years of underground coal mine employment, as the parties stipulated, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging rejection of employer's unsupported position regarding the constitutionality of the fifteen-year presumption at 30 U.S.C. §921(c)(4) and the provision for automatic entitlement for survivors at 30 U.S.C. §932(*l*), as revived by the Affordable Care Act. She further contends the administrative law judge permissibly relied on the preamble to the 2001 revised regulations in assessing the weight to be accorded to the medical opinions.[2]

[1] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-nine years of qualifying coal mine employment, total respiratory or pulmonary disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 15.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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).

Employer generally asserts Sections 411(c)(4) and 422(*l*) of the Act are not applicable to this case because "[S]ection 1556 of the Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the Constitution." Employer's Brief at 2. We decline to address this issue, as employer has not included a specific supporting argument. 20 C.F.R. §802.211; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Next, because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither clinical nor legal pneumoconiosis,[4] 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 employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding it failed to disprove legal

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 35.

[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 tissue 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).

pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); *see* 20 C.F.R. §718.203(a) (requiring a miner's pneumoconiosis arise "at least in part out of coal mine employment"); *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (holding a miner will be deemed to have a lung impairment "significantly related to" coal mine dust exposure, and thus legal pneumoconiosis, "by showing that his disease was caused 'in part' by coal mine employment"); *Island Creek Coal Co. v. Young*, No. 19-3113, 2020 WL 284522, at 4 (Jan. 21, 2020) (employer on rebuttal "required to disprove the existence of legal pneumoconiosis by showing [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis"). The administrative law judge addressed the sufficiency of Dr. Rosenberg's opinion.[5] Decision and Order at 23-24. Dr. Rosenberg found no evidence of an obstructive impairment related to coal dust exposure and, thus, no evidence of legal pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 1. Rather, he concluded claimant has COPD/emphysema due to cigarette smoking. The administrative law judge found Dr. Rosenberg's opinion inadequately explained and inconsistent with the preamble to the 2001 revised regulations and, therefore, insufficient to disprove legal pneumoconiosis. Decision and Order at 23-24.

We reject employer's argument that it was "inappropriate" for the administrative law judge to rely on the medical studies cited in the preamble to the 2001 revised regulations to assess the sufficiency of Dr. Rosenberg's opinion which, it generally asserts, is based on studies that post-date the preamble. Employer's Brief at 4. Contrary to employer's argument, an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the medical and scientific bases for the regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). Moreover, employer fails to identify any more recent studies or state how they are more reliable than those on which the Department of Labor (DOL) relied in promulgating its

[5] The administrative law judge also addressed the opinions of Drs. Baker and Westerfield. Dr. Baker diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and hypoxemia caused by coal mine dust exposure and cigarette smoking, while Dr. Westerfield diagnosed legal pneumoconiosis in the form of COPD due to coal mine dust exposure. Director's Exhibit 10; Claimant's Exhibit 2. The administrative law judge found neither doctor's opinion sufficiently reasoned so as to warrant more than little probative weight. Decision and Order at 22-23.

regulations.[6] *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014). Absent the type and quality of medical evidence invalidating the studies cited in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See id.* We thus reject employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion as inconsistent with the preamble. Employer's Brief at 3-4.

Specifically, Dr. Rosenberg opined that when coal mine dust exposure causes obstruction, the general pattern is a reduced FEV1 with a corresponding reduction of the FVC, preserving the FEV1/FVC ratio. Director's Exhibit 11 at 5; Employer's Exhibit 1. Due to the "extreme decline" in claimant's FEV1/FVC ratio, Dr. Rosenberg concluded cigarette smoking, not coal mine dust exposure, caused claimant's impairment. Director's Exhibit 11 at 6. Consistent with the law of the United States Court of Appeals for the Sixth Circuit, the administrative law judge permissibly discredited this aspect of Dr. Rosenberg's opinion because his reasoning conflicts with the DOL's recognition 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); *Sterling*, 762 F.3d at 491; Decision and Order at 24. Because substantial evidence supports the administrative law judge's discrediting of Dr. Rosenberg's opinion, we affirm her finding that employer failed to establish claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of [claimant'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). Using the same rationale she used to discredit Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis, she rejected his opinion that claimant's disabling respiratory impairment is not caused by pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26.

Employer does not raise any additional disability causation argument other than those raised, and rejected, with regard to the administrative law judge's finding concerning legal pneumoconiosis. *Ramage*, 737 F.3d at 1062; Employer's Brief at 4. We therefore affirm the administrative law judge's determination that employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis. *Ramage*, 737 F.3d at 1062; *see* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law

[6] Employer generally asserts "science has not remained static since 2001." Employer's Brief at 4.

judge's finding employer failed to rebut the Section 411(c)(4) presumption and the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge