U.S. Department of Labor

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

BRB No. 14-0383 BLA

FRANK WALK, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LADY JANE COLLIERIES COMPANY, INCORPORATED	)	DATE ISSUED: 07/30/2015
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Health M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

James C. Munro, II (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-5156) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on July 13, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). The administrative law judge acknowledged that the parties stipulated to twenty-seven years of coal mine employment and determined that the evidence of record supported their stipulation. The administrative law judge further found that claimant established at least fifteen years of underground coal mine employment, or employment in conditions that are substantially similar to those in underground mines. With respect to the merits of entitlement, the administrative law judge determined that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), (2), as the preponderance of the x-ray evidence was not positive for pneumoconiosis, and there was no biopsy evidence in the record. Based on the reference to 20 C.F.R. §718.305 that appears in 20 C.F.R. §718.202(a)(3), the administrative law judge next considered the applicability of the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge determined that claimant invoked the amended Section 411(c)(4) presumption, as claimant had more than fifteen years of qualifying coal mine employment and the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer asserts that, in considering rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge erred in discrediting the opinions of Drs. Fino and Pickerill that coal dust exposure was not a contributing cause of claimant's totally disabling pulmonary impairment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, urging the Board to reject employer's assertion that, to establish

[1] In 2010, Congress reinstated the rebuttable presumption of total disability due to pneumoconiosis appearing in Section 411(c)(4) of the Act, and made it applicable to claims filed after January 1, 2005, that were pending as of March 23, 2010. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if: he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine; invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 cannot be established by the x-ray evidence; and the miner has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

rebuttal, it is required to prove that coal dust exposure was not a contributing cause of claimant's total disability.[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 supported by substantial evidence, is rational, and is 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).

In order to rebut the presumption, employer is required to affirmatively establish that claimant does not have legal and clinical pneumoconiosis,[4] or that no part of claimant's pulmonary or respiratory disability was caused by pneumoconiosis as defined at 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). In this case, the administrative law judge observed that, because claimant established the existence of "coal workers' pneumoconiosis" by operation of the amended Section 411(c)(4) presumption, "the single issue to be determined is whether [c]laimant's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 16. The administrative law judge indicated that employer relied on the opinions of Drs. Fino and Pickerill to rebut the presumption. *Id.*

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least fifteen years of qualifying coal mine employment, has a totally disabling respiratory impairment and, thus, invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[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).

at 19. The administrative law judge then summarized each of these opinions in detail. *Id*. at 19-21.

The administrative law judge noted that Dr. Fino examined claimant on November 13, 2012 and that, in a report dated December 11, 2012, he diagnosed a moderately severe obstructive ventilatory defect caused by emphysema, and attributed this disease solely to claimant's cigarette smoking.[5] Decision and Order at 19; Employer's Exhibit 2. In addition, the administrative law judge observed that Dr. Fino stated that medical studies establish that the vast majority of coal miners exhibit clinically insignificant reductions in their FEV1 and that, by comparison, smoking causes "a more deleterious effect on lung function." Decision and Order at 19, *quoting* Employer's Exhibit 2. The administrative law judge also acknowledged Dr. Fino's explanation that, in cases in which coal dust exposure is a causal factor in the development of an obstructive impairment, the existence and severity of coal workers' pneumoconiosis is apparent on the miner's chest x-rays. Decision and Order at 19. Finally, the administrative law judge indicated that, in a deposition taken on May 8, 2013, Dr. Fino testified that claimant's obstructive impairment is due entirely to his cigarette smoking, and that his elevated lung volumes and reduced diffusing capacity are not consistent with a coal dust-induced impairment. *Id*. at 20; Employer's Exhibit 8 at 12-15.

With respect to Dr. Pickerill's opinion, the administrative law judge stated that the physician examined claimant on December 18, 2012 and diagnosed tobacco smoke-induced chronic obstructive pulmonary disease (COPD) and pulmonary emphysema.[6] Decision and Order at 20; Employer's Exhibit 3. The administrative law judge also indicated that in Dr. Pickerill's deposition, taken on June 11, 2013, he testified that the primary reason that he excluded pneumoconiosis as the cause of claimant's disabling pulmonary impairment was the negative chest x-ray evidence. Decision and Order at 20; Employer's Exhibit 9 at 13, 15. The administrative law judge further observed that Dr. Pickerill stated that claimant has a moderate obstructive defect, with hyperinflation of the lungs, and that coal mine dust exposure "generally doesn't cause the hyperinflation"

[5] Dr. Fino observed that claimant was an active smoker as of the date of examination, and recorded a smoking history of less than a pack-per-day for "approximately" sixty-two years. Employer's Exhibit 2. The administrative law judge stated, "[t]he evidence indicates [c]laimant smoked for over sixty (60) years and, notwithstanding his breathing problems, was still smoking at the time of the hearing." Decision and Order at 6.

[6] Dr. Pickerill reported that claimant smoked one pack-per-day for 63 years, and that he was still smoking as of the date of the examination. Employer's Exhibit 3.

while smoking "typically" does.[7] Employer's Exhibit 9 at 14-15. Dr. Pickerill further indicated that he could not "completely exclude a contribution" from coal dust exposure, but he would not attribute any contribution to coal dust exposure unless an x-ray was "significantly positive." Decision and Order at 20, *quoting* Employer's Exhibit 9 at 20. Lastly, the administrative law judge noted that Dr. Pickerill stated that claimant's objective test results are "classical" for someone whose impairment is due to smoking, and are comparable to those of people who have never been exposed to coal dust. Decision and Order at 20, *quoting* Employer's Exhibit 9 at 22.

In reviewing the opinions of Drs. Fino and Pickerill, the administrative law judge determined that they failed to provide sufficient documentation and an adequate rationale for why they excluded coal dust exposure as a causal factor in claimant's pulmonary disability. Decision and Order at 21. Additionally, the administrative law judge gave little weight to their attribution of claimant's obstructive impairment solely to cigarette smoking because, to the extent that Drs. Fino and Pickerill provided rationales, their rationales are "contrary" to the preamble to the 2001 revised regulations. *Id*., *citing* 65 Fed. Reg. 79,920, 79,939-79 (Dec. 20, 2000). Accordingly, the administrative law judge found that the opinions of Drs. Fino and Pickerill were insufficient to establish rebuttal of the presumed causal connection between claimant's total pulmonary disability and pneumoconiosis.[8] Decision and Order at 21.

Employer argues that the administrative law judge erred in finding that Dr. Fino's opinion was both inadequately documented and based on generalities. Moreover, employer maintains that, contrary to the administrative law judge's determination, Dr. Pickerill provided several bases, in addition to the negative x-ray evidence, to support his opinion. Employer also contends that the administrative law judge required both

[7] When asked whether pneumoconiosis may cause moderate obstructive defect, hyperinflation and no significant change after bronchodilators, Dr. Pickerill opined: "it is possible for dust exposure to cause these abnormalities, but typically medical pneumoconiosis causes restrictive defects, but it can cause some obstructive defect, but generally doesn't cause the hyperinflation." Employer's Exhibit 9 at 15.

[8] The administrative law judge also addressed the medical opinion of Dr. Zlupko, who examined claimant at the request of the Department of Labor, and the opinions of Drs. Cohen and Begley. Decision and Order at 17-21. Dr. Zlupko opined that he could not rule out the "possibility" that coal mine dust exposure contributed to claimant's impairment. Director's Exhibits 13, 19. Drs. Cohen and Begley attributed claimant's total disability to coal mine dust and smoking. Claimant's Exhibits 4, 5, 7, 8. The administrative law judge discredited all of these opinions because the physicians did not adequately identify the bases for their conclusions. Decision and Order at 17-21.

physicians to express their opinions with "absolute certainty," which medical science cannot provide and which is not required by the holding of the United States Court of Appeals for the Seventh Circuit in *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992). Employer's Brief at 13. We reject employer's allegations of error.

The administrative law judge permissibly discredited Dr. Fino's conclusion, that claimant's impairment is unrelated to coal dust exposure, because it was premised on generalities, including Dr. Fino's reliance on medical literature detailing the clinically insignificant reductions in FEV1 values typically experienced by miners over time. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-415 (7th Cir. 2013); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19; Employer's Exhibits 2, 8 at 12-13. The administrative law judge also acted within his discretion in finding that Dr. Fino's opinion is inconsistent with the prevailing scientific views that the Department of Labor (DOL) relied on in the preamble to the 2001 revised regulations. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). In this regard, the administrative law judge rationally determined that Dr. Fino's views, that only a small percentage of miners develop clinically significant reductions in their FEV1, and that their reductions are attributable to coal dust exposure only when "the severity of the coal workers' pneumoconiosis is radiologically apparent," conflict with DOL's comments in the preamble. Decision and Order at 19, *quoting* Employer's Exhibit 2 at 11-13; *see Obush*, 650 F.3d. at 257, 24 BLR at 2-383; Decision and Order at 19-20. As noted by the administrative law judge, DOL indicated in the preamble that the prevailing view in the scientific community is that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); Decision and Order at 20. The administrative law judge also noted correctly DOL's observation that the Act prohibits denying a claim solely on the basis of a negative x-ray, and that the regulation at 20 C.F.R. §718.202(a)(4) provides that "notwithstanding a negative x-ray," a reasoned and documented medical opinion can establish the existence of pneumoconiosis. Decision and Order at 19, *quoting* 20 C.F.R. §718.202(a)(4); 30 U.S.C. §923; 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004) (court upheld discounting of doctor's diagnosis of legal pneumoconiosis where doctor stressed the absence of x-ray evidence, even though the doctor's opinion could have been construed differently). Because the administrative law judge provided valid reasons for discrediting Dr. Fino's opinion, we affirm the administrative law judge's determination that Dr. Fino's attribution of claimant's disabling pulmonary impairment solely to cigarette smoking is entitled to no weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004).

We further affirm the administrative law judge's decision to discredit Dr. Pickerill's opinion, as it is rational and supported by substantial evidence. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002). As the administrative law judge noted, Dr. Pickerill did not provide a basis for his conclusion in his written report, that claimant's disabling pulmonary impairment is not "occupationally related," other than observing that claimant's chest x-rays "are not diagnostic of coal workers' pneumoconiosis." Employer's Exhibit 3. In addition, the administrative law judge acknowledged Dr. Pickerill's deposition testimony that "the primary reason" that he excluded coal dust exposure/pneumoconiosis as cause of claimant's pulmonary impairment was the negative chest x-rays. Employer's Exhibit 9 at 15. The administrative law judge permissibly found that Dr. Pickerill's exclusion of coal dust exposure as a causal factor in claimant's totally disabling obstructive impairment, based on negative x-ray evidence, is inconsistent with 20 C.F.R. §718.202(a)(4) and DOL's comments in the preamble. *See Shores*, 358 F.3d at 492, 23 BLR at 2-29; 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). Thus, the administrative law judge reasonably determined that Dr. Pickerill failed to provide a valid explanation for why coal mine dust did not provide a "contribution" to claimant's totally disabling pulmonary impairment. Employer's Exhibit 9 at 20-21; *see Kramer*, 305 F.3d at 210, 22 BLR at 2-480.

Although the administrative law judge misstated the applicable rebuttal standards in this case, which are set forth in the regulations at 20 C.F.R. §718.305(d)(1), (2), the error is harmless, as his analysis reflects consideration of both the issues of legal pneumoconiosis and disability causation, and because he found that employer failed to rebut the amended Section 411(c)(4) presumption based on the lack of credibility of employer's evidence, and not application of a particular rebuttal standard.[9] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In light of the administrative law judge's permissible determination that the opinions of Drs. Fino and Pickerill, regarding the cause of claimant's disabling respiratory impairment, were not adequately reasoned, employer's evidence is insufficient to rebut the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *See Bender*, 782 F.3d 129, 138-43; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9. In addition, based on the administrative law judge's discrediting of these opinions, we affirm the administrative law judge's finding that employer did not rebut the presumed causal relationship between

[9] Employer does not argue in this appeal that it was prejudiced by the administrative law judge's failure to properly identify the rebuttal standards set forth in the regulations. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis and claimant's totally disabling pulmonary impairment under 20 C.F.R. §718.305(d)(1)(ii).[10]

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

[10] Employer contends that in order to rebut the presumed fact of disability causation it should only be required to establish that pneumoconiosis was not a "substantially contributing" cause of claimant's disability. Employer's Brief at 5-6. Because we affirm the administrative law judge's findings that the opinions of employer's physicians were not adequately reasoned on the cause of claimant's pulmonary disability, we need not reach employer's arguments relevant to the validity of the "no part" rebuttal standard that appears in 20 C.F.R. §718.305(d)(1)(ii). However, the Board and the United States Courts of Appeals for the Fourth, Sixth and Tenth Circuits have upheld this standard. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, (4th Cir. 2015); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-556 (10th Cir. 2014); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).