U.S. Department of Labor

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

BRB No. 17-0226 BLA

JOHN T. MAY	)	
	)	
Claimant-Petitioner	)	
	)	
V.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT	)	DATE ISSUED: 07/26/2018
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (12-BLA-05618) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 24, 2010, and is before the Board for the third time.[1]

Pursuant to claimant's last appeal,[2] the Board vacated the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012).[3] *May v. Mountaineer Coal Development*, BRB No. 15-0353 BLA (April 27, 2016) (unpub.). Relevant to the existence of legal pneumoconiosis, the Board held that the administrative law judge erred in his crediting of the opinions of Drs. Rosenberg and Zaldivar that claimant does not have legal pneumoconiosis. *May*, BRB No. 15-0353 BLA, slip op. at 6-9. The Board instructed the administrative law judge to reconsider their opinions in light of the contrary opinion of Dr. Rasmussen, resolve any conflicts, and fully explain his findings. *Id*. at 9. Relevant to the existence of clinical pneumoconiosis, the Board instructed the administrative law judge to reconsider the x-ray evidence in light of claimant's challenge to the credibility of Dr. Wheeler's interpretations.

[1] Claimant filed two prior claims, each of which was denied. Director's Exhibits 1, 2. Claimant's more recent prior claim, filed on December 16, 2004, was denied by Administrative Law Judge Michael P. Lesniak on April 10, 2007, because claimant did not establish any element of entitlement. Director's Exhibit 2. On appeal, Judge Lesniak's denial of benefits was affirmed by the Board, *J.M.* [*May*] *v. Mountaineer Coal Development*, BRB No. 07-0671 BLA (May 30, 2008) (Hall, dissenting) (unpub.), and by the United States Court of Appeals for the Fourth Circuit, *May v. Mountaineer Coal Development Co.*, No. 08-1812 (4th Cir., Aug. 17, 2009) (unpub.). *Id*.

[2] A detailed procedural history is contained in the Board's prior Decision and Order. *May v. Mountaineer Coal Development*, BRB No. 15-0353 BLA (Apr. 27, 2016) (unpub.).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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); *see* 20 C.F.R. §718.305.

Id. at 10-11. Lastly, because it vacated the administrative law judge's finding that employer disproved the existence of pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), the Board vacated the administrative law judge's related finding that employer failed to establish that no part of claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *Id*. at 11. Consequently, the Board remanded the case for reconsideration of these issues. *Id.*

On remand, the administrative law judge again found the evidence sufficient to disprove the existence of both legal and clinical pneumoconiosis and, therefore, sufficient to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A), (B). Accordingly, he denied benefits.

In the present appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by disproving the existence of legal and clinical pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in 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.[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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis, 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).

Existence of Legal Pneumoconiosis

To rebut the presumption of legal pneumoconiosis, employer must prove that claimant's pulmonary or respiratory impairment is not significantly related to, or

[4] Because claimant's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 18.

substantially aggravated by, his coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). In addressing this issue on second remand, the administrative law judge again considered the medical opinions of Drs. Rosenberg, Zaldivar, and Rasmussen. Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but has chronic obstructive pulmonary disease (COPD)/asthmatic bronchitis due to smoking. Director's Exhibit 12 at 4, 6-7; Employer's Exhibit 6 at 28, 34. Dr. Zaldivar similarly opined that claimant does not have legal pneumoconiosis, but has an obstructive pulmonary impairment in the form of chronic bronchitis and bullous emphysema with an asthmatic component, due to smoking. Employer's Exhibits 1 at 5-7; 7 at 33-35, 38, 42-43. In contrast, Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of COPD, emphysema and chronic bronchitis due in significant part to coal mine dust exposure, as well as cigarette smoking. Director's Exhibit 11 at 4; Claimant's Exhibit 3 at 12-13, 30-32.

The administrative law judge found that while portions of Dr. Rosenberg's opinion were unexplained, aspects of his opinion merited "significant weight." 2017 Decision and Order on Remand at 12. The administrative law judge also accorded "significant weight" to Dr. Zaldivar's opinion, finding it well-documented and well-reasoned. *Id*. Further, the administrative law judge found that Dr. Rasmussen's contrary opinion is entitled to less weight and thus did not undermine the opinion of Dr. Zaldivar. Weighing the opinions together, the administrative law judge accorded Dr. Zaldivar's opinion "controlling weight" and, therefore, found that employer successfully rebutted the presumption that claimant has legal pneumoconiosis. *Id.* at 13.

Claimant contends that the administrative law judge again erred in crediting the opinions of Drs. Rosenberg and Zaldivar, and in discrediting the opinion of Dr. Rasmussen. Claimant's Brief at 24-30. We agree.

On remand, the administrative law judge reconsidered the opinions of Drs. Rosenberg and Zaldivar that the partial reversibility of claimant's impairment after the administration of bronchodilators implicated a non-coal mine dust-related disease. The administrative law judge found that Dr. Rosenberg's opinion is not credible and entitled to "less weight" because claimant continued to show a significant impairment after bronchodilation, and Dr. Rosenberg did not explain why claimant's partial response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the irreversible portion of his obstructive impairment. 2017 Decision and Order on Remand at 12. The administrative law judge credited, however, Dr. Zaldivar's similar opinion because, "unlike Dr. Rosenberg, Dr. Zaldivar cited to medical literature and thoroughly explained" why the fact that claimant's pulmonary impairment does not fully reverse with bronchodilation "does not necessarily indicate that part of claimant's impairment is caused by coal dust exposure." *Id.* Specifically, the administrative law judge credited Dr.

Zaldivar's explanation that one "possibility" for claimant's residual impairment is asthma-induced lung remodeling. *Id.*, *referencing* Employer's Exhibit 7 at 24, 27.

As claimant correctly asserts, the administrative law judge misapplied the legal standard in weighing Dr. Zaldivar's opinion. That Dr. Zaldivar may have offered a reason[5] for why claimant's residual impairment after bronchodilation is "not necessarily" related to coal dust does not address the relevant inquiry of whether his opinion *affirmatively disproves* that claimant's residual impairment is not significantly related to or substantially aggravated by coal dust. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *May*, BRB No. 15-0353 BLA, slip op. at 7; Claimant's Brief at 21-22. Additionally, claimant correctly asserts that the administrative law judge did not comply with the Board's instruction to explain how Dr. Zaldivar's reliance on medical literature that establishes that smoking may cause asthma supports Dr. Zaldivar's conclusion that coal mine dust did not contribute, along with cigarette smoking and asthma, to claimant's impairment.[6] *May*, BRB No. 15-0353 BLA, slip op. at 11; Claimant's Brief

[5] In addition to lung remodeling, Dr. Zaldivar offered several "possibilities" that may account for impairment after bronchodilation: the inability of medications to penetrate deeply enough to produce bronchodilation, or by insufficient medication being given; the patient is being treated to maximum effect and additional medication will not yield results (although Dr. Zaldivar stated that he did not think that was the cause in claimant's case); and obstruction may be better or worse depending on environmental conditions. Employer's Exhibit 7 at 24, 27.

[6] This is the third time the administrative law judge has failed to adequately explain why Dr. Zaldivar's reliance on certain medical literature renders his opinion well-reasoned. In his initial Decision and Order, the administrative law judge found that Drs. Rosenberg and Zalidvar "support their opinions with reference to . . . medical literature." 2013 Decision and Order at 21. The Board vacated this finding because the administrative law judge failed explain how the "medical literature cited by employer's physicians supports their conclusions." *May v. Mountaineer Coal Development*, BRB No. 13-0427 BLA, slip op. at 7 (June 30, 2014) (unpub.). In his second decision, the administrative law judge attempted to explain his crediting of Dr. Zaldivar by stating that the physician "cited several studies which showed that smoking causes asthma because the pathways that produce bronchospasm are activated by cigarette smoke." 2015 Decision and Order on Remand at 10. As discussed *supra*, the Board vacated this finding because the administrative law judge did not "explain how Dr. Zaldivar's reliance on medical studies that establish that smoking may cause asthma necessarily supported Dr. Zaldivar's conclusion that coal mine

at 25, *citing Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting).

We further agree with claimant that the administrative law judge failed to adequately resolve the conflict in medical opinion regarding the significance of the variability in claimant's pulmonary function testing. Claimant's Brief at 26-28. Drs. Rosenberg and Zaldivar opined that the variability in claimant's pulmonary function testing is not indicative of a coal dust-induced lung disease, which does not improve over time. Employer's Exhibits 6 at 27; 7 at 26, 30. In contrast, Dr. Rasmussen explained that because an impairment may have multiple concurrent causes, such as cigarette smoking, chronic bronchitis, asthma, and coal dust, the presence of variable airways obstruction does not exclude coal dust as a contributing factor in that impairment. Claimant's Exhibit 3 at 23-25. The administrative law judge accorded greater weight to the opinions of Drs. Rosenberg and Zaldivar as being more consistent with the progressive nature of coal mine dust-induced disease which, once present, does not go away. 2017 Decision and Order on Remand at 12-13.

As claimant correctly asserts, in crediting the opinions of Drs. Rosenberg and Zaldivar, the administrative law judge failed to consider Dr. Zaldivar's concession that claimant's diffusing capacity and overall lung function, while variable, have progressively worsened over time.[7] Claimant's Brief at 27-28; Employer's Exhibit 7 at 27. Nor has the administrative law judge explained what weight he accorded to Dr. Rosenberg's opinion, overall, in light of his determination to discredit Dr. Rosenberg's reliance on the reversibility of claimant's impairment after bronchodilation. Thus, his analysis does not comply with the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (providing that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record"); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In view of the foregoing, we must vacate the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-

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dust did not contribute, along with cigarette smoking and asthma, to claimant's impairment." *May*, BRB No. 15-0353 BLA, slip op. at 8-9.

[7] Dr. Zaldivar also agreed that obstructive impairments may vary, becoming better or worse depending on the environmental conditions, such as changes in the seasons or the weather, at the time of pulmonary function testing. Employer's Exhibit 7 at 25.

323, 2-336 (4th Cir. 1998); *Wojtowicz*, 12 BLR at 1-165. Therefore, we also vacate the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis, and the denial of benefits. *See* 20 C.F.R. §718.305(d)(1)(i).

Further, in light of the Board's two previous remands of this case and the repetition of error on remand we conclude that "review of this claim requires a fresh look at the evidence . . . ." by a different administrative law judge. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); 20 C.F.R. §§802.404(a), 802.405(a).

We therefore remand this case for reassignment to a different administrative law judge and for further consideration of whether employer has rebutted the Section 411(c)(4) presumption.

Remand Instructions

On remand, the administrative law judge must determine whether employer has affirmatively established that claimant has neither legal nor clinical pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[8] 20 C.F.R. §718.305(d)(1)(i), (ii); *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Relevant to legal pneumoconiosis, the administrative law judge must determine whether the opinions of Drs. Rosenberg and Zaldivar are adequately reasoned and documented, and explain his decision to credit or discredit the physicians' opinions. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). The administrative law judge must then resolve any conflicts among the medical opinions and explain his or her findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz*, 12 BLR at 1-165.

Relevant to clinical pneumoconiosis, in weighing the x-ray evidence on remand, the administrative law judge must explain his findings, taking into account both the number of

[8] Because we are remanding this case to a different administrative law judge, we decline to address, at this time, the entirety of claimant's challenges to the administrative law judge's determination employer rebutted the Section 411(c)(4) presumption. Claimant's arguments in this regard may be raised on remand.

positive and negative readings and the physicians' credentials and qualifications.[9] *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57, 25 BLR 2-779, 2-793 (4th Cir. 2016).

Finally, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated, and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[9] In the interest of judicial economy, we note that the readings of the June 1, 2011 x-ray in this case bear a factual similarity to an x-ray that was considered in *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256, 25 BLR 2-779, 2-793 (4th Cir. 2016). Analogous to the x-ray at issue in *Addison*, the June 1, 2011 x-ray was read as both positive and negative by dually-qualified radiologists, and negative by a B reader. On remand, the new administrative law judge should refrain from resolving the conflicting readings of this x-ray by a "headcount of expert witnesses" and must instead explain the weighing of the x-ray "in light of the readers' qualifications." *See Addison*, 831 F.3d at 256-57, 25 BLR at 2-793.