U.S. Department of Labor

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

BRB No. 15-0345 BLA

DANNY H. BRADLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	
	)	DATE ISSUED: 06/30/2016
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe & M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), 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 (2011-BLA-06318) of Administrative Law Judge Lystra A. Harris 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 subsequent claim[1] filed on June 7, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with seventeen years of coal mine employment,[3] as stipulated by the parties and supported by the record, with "at least sixteen years" in underground coal mine employment. The administrative law judge also noted that employer conceded that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[4]

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[1] This is claimant's third claim. Claimant's most recent prior claim for benefits, filed on December 9, 2003, was denied by Administrative Law Judge Richard A. Morgan on March 5, 2008 because, while claimant established total respiratory disability, he failed to establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least fifteen years of qualifying coal mine

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 establishing that claimant has neither legal nor clinical pneumoconiosis,[5] or by establishing 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).

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rasmussen, Splan, Klayton, Zaldivar, and Rosenberg. Drs. Rasmussen and Splan opined that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure.[6] Director's Exhibit 14; Employer's Exhibit 2; Claimant's Exhibit 3. Dr. Klayton also opined that claimant

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employment, and the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and, therefore, invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7-8.

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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] Drs. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema attributable to both coal mine dust exposure and cigarette smoking. Director's Exhibit 14; Employer's Exhibit 2. Dr. Splan diagnosed COPD with chronic bronchitis due to the inhalation of both coal mine dust and cigarette smoke. Claimant's Exhibit 3.

suffers from legal pneumoconiosis.[7] Claimant's Exhibit 4. By contrast, Drs. Zaldivar and Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from an obstructive impairment caused by cigarette smoking, unrelated to coal mine dust exposure.[8] Director's Exhibit 20; Employer's Exhibits 3, 5, 6.

The administrative law judge credited the opinions of Drs. Rasmussen and Splan, finding their opinions to be well-reasoned and well-documented. The administrative law judge accorded "slightly less weight" to Dr. Zaldivar's opinion, as inadequately explained and based on generalities. Finally, the administrative law judge discounted Dr. Rosenberg's opinion, finding it unreasoned and inconsistent with the regulations and the medical science accepted by the Department of Labor (the Department) in the preamble to the 2001 regulatory revisions.[9] Weighing the medical opinions together, the administrative law judge found that the opinions of Drs. Rasmussen and Splan outweighed the opinion of Drs. Zaldivar and Rosenberg, and "established the existence of legal pneumoconiosis."[10] Decision and Order at 25. Therefore, the administrative law

[7] Dr. Klayton diagnosed severe obstructive lung disease with emphysema, due to coal mine dust exposure. Decision and Order at 23; Claimant's Exhibit 4.

[8] Dr. Zaldivar diagnosed COPD/emphysema with asthma caused by cigarette smoking, that is unrelated to coal mine dust exposure. Director's Exhibit 20; Employer's Exhibit 6. Dr. Rosenberg diagnosed COPD with emphysema, due to cigarette smoking, and not due to coal mine dust exposure. Employer's Exhibits 3, 5.

[9] The administrative law judge also accorded "significantly diminished weight" to Dr. Klayton's opinion, that claimant's obstructive lung disease is due to coal mine dust exposure, because he relied on a "very inaccurate" cigarette smoking history. Decision and Order at 23; Claimant's Exhibit 4.

[10] Employer correctly asserts that, in concluding her analysis, the administrative law judge stated: "I . . . found Dr. Zaldivar and Dr. Splan's opinions regarding Claimant's legal pneumoconiosis to be well-reasoned, and I accord them significant weight. The evidence therefore supports my finding that Claimant has legal pneumoconiosis . . . ." Decision and Order at 25; Employer's Brief at 12. Contrary to employer's contention, however, this reference to Dr. Zaldivar's opinion as "well-reasoned" did not render the administrative law judge's decision internally inconsistent or unclear. Employer's Brief at 12. Rather, the context of the administrative law judge's decision reflects that the reference to the opinion of Dr. Zaldivar, instead of the opinion of Dr. Rasmussen, was a typographical error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20-25.

judge found that employer failed to rebut the presumption by establishing that claimant does not have pneumoconiosis. *Id.*

Employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Rasmussen and Splan, that claimant suffers from legal pneumoconiosis, than to the contrary opinions of Drs. Zaldivar and Rosenberg. We disagree.

Initially, we reject employer's contention that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Splan to be well-reasoned. The administrative law judge noted that Dr. Rasmussen is highly qualified, had examined claimant, and considered his symptoms, his "significant" coal mine employment and cigarette smoking histories, and the objective test results. Decision and Order at 14-15; 21; Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge found that Dr. Rasmussen also "discussed at length" how claimant's coal mine dust and cigarette smoke exposures contributed to his lung impairment. Decision and Order at 21; Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge also noted Dr. Rasmussen's explanation that because coal mine dust and cigarette smoke exposure cause the same type of abnormalities, "it is not possible to exclude coal mine dust as a cause of Claimant's disabling lung impairment." Decision and Order at 21; Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge further noted that Dr. Rasmussen supported his opinion with references to epidemiologic studies that have shown that coal mine dust exposure and cigarette smoking both independently contribute to airway obstruction, and that miners more heavily exposed to coal mine dust, regardless of their smoking history, show greater impairment in function. Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's COPD is due to both smoking and coal mine dust exposure, we affirm the administrative law judge's permissible finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "well-reasoned" and entitled to "significant weight." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); Decision and Order at 21.

Similarly, the administrative law judge permissibly found the opinion of Dr. Splan, attributing claimant's severe COPD to both coal mine dust exposure and cigarette smoking, to be well-reasoned and well-documented because Dr. Splan based his conclusions on claimant's symptoms, his "significant" coal mine employment history, an accurate cigarette smoking history, the objective test results illustrating severe obstruction, and his clinical findings and observations on physical examination. *See*

Hicks, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 26; Claimant's Exhibit 3.

We further reject employer's argument that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Rosenberg. The administrative law judge correctly noted that, in attributing claimant's severe COPD solely to cigarette smoking, Dr. Zaldivar cited to medical studies and statistics indicating that claimant's smoking history is "sufficient in itself to produce severe lung disease in a large number of people" and that "[e]ven smoking less than [twenty] pack years causes COPD in susceptible individuals." Decision and Order at 22; Director's Exhibit 20 at 3. Further, Dr. Zaldivar stated that claimant's clinical presentation is identical to that of smokers, regardless of occupation. Decision and Order at 22; Director's Exhibit 20 at 3. The administrative law judge permissibly discounted Dr. Zaldivar's opinion, finding that, although Dr. Zaldivar discussed the medical studies in general terms, he failed to adequately relate the studies to claimant's specific condition, or explain how the studies supported his conclusion that coal mine dust did not contribute to claimant's impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 22.

The administrative law judge also considered Dr. Rosenberg's opinion that claimant's significantly reduced FEV1/FVC ratio supported the conclusion that claimant's COPD was caused by smoking alone. Decision and Order at 24; Employer's Exhibit 3 at 13-14. Dr. Rosenberg explained that smoking-related forms of obstructive lung disease are associated with a reduction in the FEV1/FVC ratio, while impairments related to coal dust exposure generally do not affect this value. Decision and Order at 24; Employer's Exhibit 3 at 13-14. Contrary to employer's contention, the administrative law judge permissibly discredited this reasoning as contrary to the regulations, which allow a claimant to establish disability due to pneumoconiosis by showing such a reduction. *See* 20 C.F.R. §718.204(b)(2)(i)(C); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 24.

The administrative law judge further considered Dr. Rosenberg's opinion "that he could determine if emphysema was caused by cigarette smoking or coal dust because coal dust produces a more localized form of emphysema, while smoking causes more widespread destruction of the alveolar capillary bed." Decision and Order at 24; Employer's Exhibit 3 at 13-14. Contrary to employer's argument, the administrative law

judge did not find that Dr. Rosenberg's opinion was hostile to the Act. Employer's Brief at 13. Rather, the administrative law judge permissibly found Dr. Rosenberg's opinion to be inadequately reasoned because it conflicted with the scientific findings accepted by the Department in the preamble to the 2001 regulatory revisions that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Looney*, 678 F.3d at 311, 25 BLR at 2-125.

Finally, we reject employer's assertion that the administrative law judge gave disparate treatment to the opinions of Drs. Rasmussen, Splan, Zaldivar, and Rosenberg. Employer's Brief at 8-12. As discussed above, the administrative law judge provided a comprehensive discussion of the conflicting medical opinions and, after fully delineating the physicians' findings and the bases supporting their opinions, permissibly accorded greater weight to the opinions of Drs. Rasmussen and Splan diagnosing legal pneumoconiosis than to the contrary opinions of Drs. Zaldivar and Rosenberg. We therefore affirm her finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Employer next contends that the administrative law judge did not adequately address whether employer rebutted the presumed fact of total disability causation, by establishing that no part of claimant's total pulmonary or respiratory disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(ii); Employer's Brief at 18-20. We disagree.

As previously discussed, the administrative law judge accorded greater weight to the opinions of Drs. Rasmussen and Splan that claimant suffers from legal pneumoconiosis in the form of an obstructive impairment due, in part, to coal mine dust exposure, than to the opinions of Drs. Zaldivar and Rosenberg that claimant's obstructive impairment is due solely to smoking. The administrative law judge rationally concluded that, given this finding, employer could not establish that pneumoconiosis did not contribute to claimant's total disability. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (a doctor's opinion as to causation may not be credited unless there

[11] Therefore, we need not address employer's arguments challenging the administrative law judge's weighing of the x-ray and medical opinion evidence relevant to whether employer disproved the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 16-18.

are "specific and persuasive resons" for concluding that the doctor's view on causation is independent of his mistaken belief that the miner did not have pneumoconiosis), *quoting Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 26. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing 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); Decision and Order at 26.

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