U.S. Department of Labor

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

BRB No. 16-0380 BLA

JIMMY D. GOAD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SELECT MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/21/2017
	)	
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 Richard A. Morgan, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand Denying Benefits (2013-BLA-5390) of Administrative Law Judge Richard A. Morgan rendered 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 February 6, 2012 and is before the Board for the second time.

In his initial Decision and Order, applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least thirty-four years of qualifying[2] coal mine employment and found that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge also found that employer rebutted the presumption by disproving the existence of both legal and clinical pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) and, therefore, affirmed invocation of the Section 411(c)(4) presumption. *Goad v. Select Mining, Inc.*, BRB No. 15-0041 BLA, slip op. at 2 n.1, 3 (Sept. 30, 2015) (unpub.). The Board also affirmed the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis. *Goad*, BRB No. 15-0041 BLA, slip op. at 2 n.1. However, the Board vacated the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis. *Goad*, BRB No. 15-0041 BLA, slip op. at 5. The Board therefore vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption, and remanded the case for further consideration. *Id*.

[1] 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.

[2] While the administrative law judge noted that claimant worked for fifteen years or more in underground mines, he also found that "claimant was a coal miner (underground or in conditions substantially similar thereto) . . . for at least 34 years." Decision and Order on Remand at 3.

On remand, the administrative law judge again found that employer disproved the existence of legal pneumoconiosis. The administrative law judge therefore found that employer rebutted the Section 411(c)(4) presumption. Accordingly, the administrative law judge again 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 pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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.[3] 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).

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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing 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." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer rebutted the presumption under the first method by establishing the absence of legal and clinical pneumoconiosis.

Existence of Legal Pneumoconiosis

On remand, the administrative law judge considered Dr. Rasmussen's[4] opinion that claimant has legal pneumoconiosis, Director's Exhibit 12, and the opinions of Drs.

[3] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 6; Hearing Tr. at 39. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] In a report dated May 2, 2012, Dr. Rasmussen opined that claimant has a restrictive lung disease related to coal mine dust exposure with significant potential for some impairment from asbestos exposure, obesity and mild elevation of right hemidiaphragm. Director's Exhibit 12. In a report dated April 1, 2014, he opined that

Rosenberg[5] and Zaldivar[6] that claimant does not have legal pneumoconiosis, Director's Exhibit 21; Employer's Exhibits 2, 10 at 35. The administrative law judge determined that the physicians are equally ranked based on their qualifications and expertise, and that each of the doctors provided a well-documented and well-reasoned opinion. The administrative law judge found Dr. Rosenberg's opinion more persuasive than the others, however, and that employer disproved the existence of legal pneumoconiosis because of it.

Claimant argues that the administrative law judge erred in according dispositive weight to Dr. Rosenberg's opinion. Claimant contends that Dr. Rosenberg's opinion is insufficient to rebut the presumed fact of legal pneumoconiosis because it is inconsistent with the regulations that recognize that legal pneumoconiosis may include restrictive lung disease. Claimant's Brief at 11-12. Claimant's contention has merit.

The regulations provide that clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, and the absence of clinical pneumoconiosis does not preclude the

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claimant has a restrictive lung disease and gas exchange impairment caused in significant part by coal mine dust exposure. Claimant's Exhibit 2. He noted that claimant's risk factors included coal mine dust exposure and diaphragmatic elevation. *Id.* At a deposition dated April 4, 2014, Dr. Rasmussen opined that claimant's restrictive lung disease was caused by coal dust exposure, asbestos exposure, obesity and a mild elevation of his right hemidiaphragm. Claimant's Exhibit 1 at 11, 12.

[5] In a report dated August 22, 2012, Dr. Rosenberg opined that claimant does not have a disabling impairment related to coal dust exposure. Director's Exhibit 21. Rather, claimant's restrictive lung disease is related to extrinsic factors, such as his obesity and elevated diaphragm, particularly on the right side. *Id.* At a deposition dated April 29, 2014, Dr. Rosenberg opined that he was able to rule out coal mine dust exposure as a cause of claimant's restrictive lung disease. Employer's Exhibit 11 at 25.

[6] In a report dated April 10, 2013, Dr. Zaldivar opined that claimant's respiratory impairment is not caused by any intrinsic pulmonary disease or condition, but is caused by the mechanics of the structure surrounding his lungs, such as his paralyzed or weak right diaphragm. Employer's Exhibit 2. At a deposition dated April 28, 2014, Dr. Zaldivar opined that claimant has restriction of the lungs caused by his obesity and paralyzed diaphragm. Employer's Exhibit 10 at 36. Dr. Zaldivar further opined that he was able to rule out coal mine dust exposure as a cause of any impairment. Employer's Exhibit 10 at 42.

existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1), (2); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86, 2-91-92 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901, 19 BLR 2-61, 2-66 (4th Cir. 1995). The regulations also provide that coal mine dust can cause an obstructive or restrictive impairment. 20 C.F.R. §718.201(b). Further, the Department of Labor (DOL) has recognized that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-211, 22 BLR 2-162, 2-173-75 (4th Cir. 2000) ("[e]vidence that does not establish medical pneumoconiosis . . . should *not necessarily* be treated as evidence weighing *against* a finding of legal pneumoconiosis.").

In vacating the prior decision the Board held, in part, that the administrative law judge failed to critically analyze the opinions of Drs. Zaldivar and Rosenberg and explain his findings, as required by the Administrative Procedure Act (APA).[7] *Goad*, BRB No. 15-0041 BLA, slip op. at 4. Specifically, the Board held that the administrative law judge did not address whether the physicians adequately explained their opinions that claimant's restrictive impairment is not significantly related to, or substantially aggravated by, his history of at least thirty-four years of coal mine dust exposure. *Id.*, slip op. at 5.

On remand, the administrative law judge found that Dr. Zaldivar's opinion "excludes the possibility" that claimant could suffer from a restrictive impairment without x-ray evidence of progressive massive fibrosis.[8] Decision and Order at 13. Thus

[7] The Administrative Procedure Act, as incorporated into the Act by 30 U.S.C. §932(a), provides that adjudicatory decisions 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." 5 U.S.C. §557(c)(3)(A).

[8] In his prior decision, the administrative law judge gave less weight to the opinions of Drs. Zaldivar and Rosenberg that a restrictive impairment due to coal mine dust exposure should be supported by radiographic evidence of pneumoconiosis, because "the [Black Lung Benefits Act] contemplates lung disease absent radiographic evidence." 2014 Decision and Order at 20, *referencing* 20 C.F.R. §718.202(b). Nonetheless, the administrative law judge found their opinions to be well-documented and reasoned because they also relied on other factors to conclude that claimant does not suffer from legal pneumoconiosis. *Id*. Thus, the administrative law judge found their opinions sufficient to disprove the existence of legal pneumoconiosis. On remand, the administrative law judge revisited that finding, and noted that "Dr. Zaldivar definitively

the administrative law judge discounted Dr. Zaldivar's opinion as inconsistent with the plain language of regulations that "[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray."[9] 20 C.F.R. §718.202(b); Decision and Order at 13.

In contrast, the administrative law judge found Dr. Rosenberg's opinion to be "more nuanced," because he did not foreclose the possibility that a restrictive impairment may be due to coal mine dust exposure, even in the absence of positive radiographic evidence of clinical pneumoconiosis.[10] Decision and Order at 13. Further, the administrative law judge found that Dr. Rosenberg "thoroughly explained" how the objective test results supported his conclusion that claimant's restrictive impairment is not due to scarring and fibrosis within the lungs and, therefore, is not due to coal mine dust exposure.[11] Decision and Order at 12. Thus, the administrative law judge found that

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opined that 'the *only* case where a restriction would occur' in [coal workers' pneumoconiosis] is in a situation with widespread radiographic changes and progressive massive fibrosis." Decision and Order at 13, *quoting* Employer's Exhibit 10 at 29-30.

[9] In light of the administrative law judge's finding that Dr. Zaldivar's opinion is not persuasive, we need not address claimant's contentions that Dr. Zaldivar's opinion is inconsistent with the regulations and poorly reasoned.

[10] As the administrative law judge noted, Dr. Rosenberg stated that it was "more likely than not" that lung disease of sufficient severity to cause a restrictive impairment would be visible on a chest x-ray, and that it "would be unlikely" but not impossible for a restrictive impairment to result from less severe category 1 or 2 pneumoconiosis. Decision and Order at 13, *quoting* Employer's Exhibit 11 at 23, 27. Thus the administrative law judge found that Dr. Rosenberg's opinion "does not preclude restriction from lower-profusion clinical [coal workers' pneumoconiosis] . . . or exclude restriction without x-ray evidence." Decision and Order at 13. The administrative law judge further found that while Dr. Rosenberg opined that the negative computed tomography scan results supported his conclusion that claimant's restrictive impairment was not due to coal mine dust exposure, Dr. Rosenberg also relied on other objective evidence. *Id.* at 12.

[11] Dr. Rosenberg stated that restrictive impairments, which result when the lungs become smaller, are caused by either intrinsic or extrinsic factors. Employer's Exhibit 11 at 19-20. He explained that intrinsic restriction occurs when scarring and fibrosis within the lungs, such as that caused by clinical pneumoconiosis, stiffens and shrinks the lungs. *Id.* Extrinsic restriction occurs when something outside of the lungs, such as an elevated hemidiaphragm or obese abdomen, pushes against the lungs or prevents expansion.

Dr. Rosenberg's opinion is not inconsistent with the regulatory provision that no claim shall be denied "solely on the basis of a negative chest X-ray," *see* 20 C.F.R. §718.202(b), and persuasive evidence to rebut the presumed existence of legal pneumoconiosis. *Id.* at 12-13.

As claimant correctly asserts, however, the administrative law judge failed to consider whether in relying on the absence of scarring and fibrosis to exclude coal mine dust as a cause of claimant's restrictive impairment, Dr. Rosenberg's opinion is nonetheless inconsistent with DOL's recognition that legal and clinical pneumoconiosis are distinct diseases, and that coal mine dust exposure can cause a disabling obstructive *or* restrictive impairment even where no clinical pneumoconiosis is present. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,943; *see also Compton*, 211 F.3d at 210-211, 22 BLR at 2-173-75; Claimant's Brief at 12. Because the administrative law judge failed to critically analyze the bases for Dr. Rosenberg's opinion that coal mine dust exposure did not contribute to claimant's disabling restrictive impairment as a basis for legal pneumoconiosis, we must vacate the administrative law judge's finding that employer rebutted the presumption at 20 C.F.R. §718.305(d)(1)(i). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also* 20 C.F.R. §§718.201(a)(2), 718.202(b); *Compton*, 211 F.3d at 210-211, 22 BLR at 2-173-75; 65 Fed. Reg. at 79,943. On remand, the administrative law judge must reconsider Dr. Rosenberg's opinion and explain his findings.

On remand the administrative law judge must also reconsider the opinion of claimant's physician, Dr. Rasmussen. The administrative law judge's analysis of Dr. Rasmussen's opinion is inconsistent and contrary to law. Dr. Rasmussen opined that coal dust exposure, asbestos exposure, obesity and a mild elevation of the right hemidiaphragm all contribute to claimant's restrictive impairment. Claimant's Exhibit 1 at 38. The administrative law judge initially found that diagnosis "well documented and reasoned" because it was "based on testing, medical and work history, and symptoms" and because Dr. Rasmussen "adequately explain[ed] how the documentation led to his diagnosis." Decision and Order at 11. The administrative law judge then directly contradicted that conclusion, however, finding that "Dr. Rasmussen cannot point to any

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Employer's Exhibit 11 at 19, 21-22. Dr. Rosenberg further explained that claimant's preserved PO2 with exercise and normal diffusion capacity support his conclusion that claimant's restrictive impairment is not due intrinsic scarring or fibrosis within the lungs. *Id.* at 19-20. On this basis, Dr. Rosenberg concluded that claimant's restrictive impairment is not due to coal mine dust exposure. *Id.* at 25.

data that make one or another [causative] factor more likely."[12] *Id.* at 11-12. According to the administrative law judge, Dr. Rasmussen's failure to definitively identify the primary cause of claimant's pulmonary impairment thus would render his opinion "inadequate to establish the existence of legal pneumoconiosis" if the Section 411(c)(4) presumption did not apply. *Id.* at 12. The administrative law judge discounted the opinion solely on that basis, providing no other reason to discredit Dr. Rasmussen.

Whether Dr. Rasmussen's opinion is sufficient to establish the existence of legal pneumoconiosis, however, is not a proper inquiry in the instant case, where it is employer's burden to disprove the existence of the disease. If Dr. Rasmussen's opinion that coal dust exposure was a contributor to claimant's restrictive pulmonary impairment is well documented and reasoned, as the administrative law judge explicitly found, then he must reconcile that position with Dr. Rosenberg's contrary position that he was able to completely eliminate coal dust exposure as a cause of the impairment. In light of his failure to resolve this material discrepancy, the administrative law judge has not adequately complied with the requirements of the APA.[13] *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); *Wojtowicz*, 12 BLR at 1-165.

[12] Specifically, the administrative law judge noted that in attributing claimant's restrictive impairment, in part, to coal mine dust exposure, Dr. Rasmussen testified that he could not exclude "a diaphragm effect, a coal mine dust effect, an asbestos effect and obesity" as contributing factors. Decision and Order at 11, *quoting* Claimant's Exhibit 1 at 38. Dr. Rasmussen further testified that claimant is "not all that obese, so you could have - - one or the other could be the sole cause, but you can't demonstrate that it's one or the other." Claimant's Exhibit 1 at 38.

[13] Moreover, contrary to the administrative law judge's finding, Dr. Rasmussen identified coal mine dust exposure as a "significant contributing cause" of claimant's impairment. Director's Exhibit 12; *see* Claimant's Exhibit 2. The fact that he did not directly apportion the damage among the causes of the impairment would not automatically render Dr. Rasmussen's opinion insufficient to establish the existence of legal pneumoconiosis, even if the presumption did not apply. *See* 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006) (a physician's opinion that either cigarette smoking or coal mine dust could have caused the miner's airflow obstruction is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. 718.202(a)(4)); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

On remand, the administrative law judge should consider whether employer disproved the existence of legal pneumoconiosis by establishing that claimant does not have a chronic lung disease or impairment "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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the presumption at 20 C.F.R. §718.305(d)(1)(i). If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part of claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis, as defined in 20 C.F.R. §718.201. *Minich*, 25 BLR at 1-158-59.

When considering all the relevant medical opinion evidence of record the administrative law judge should address the explanations for the physicians' conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[14] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Further, the administrative law judge should set forth his findings on remand in detail, including the underlying rationale of his decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

[14] In so doing, the administrative law judge should consider claimant's argument that the medical opinions are in conflict regarding whether the claimant's obesity and elevated diaphragm are sufficiently severe to contribute to his restrictive impairment. Claimant's Brief at 12-14.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's finding that employer rebutted the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). Specifically, I disagree with the majority that the administrative law judge erred in finding Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, to be reasoned and documented. In our prior decision, we vacated the administrative law judge's denial of benefits, in part, because the administrative law judge failed to critically analyze Dr. Rosenberg's opinion and explain his findings, as required by the Administrative Procedure Act. *Goad*, BRB No. 15-0041 BLA, slip op. at 4. On remand, the administrative law judge complied with our instructions and considered the bases for Dr. Rosenberg's conclusions.

Contrary to claimant's characterization, Dr. Rosenberg did not base his opinion that claimant's restrictive impairment is unrelated to coal mine dust exposure on the absence of clinical pneumoconiosis. Claimant's Brief at 12. Rather, Dr. Rosenberg

explained that he relied upon the CT scan evidence to determine that claimant's lungs were free of any scarring or fibrotic disease. Employer's Exhibit 11 at 23. In finding that claimant suffers from no intrinsic pulmonary process, Dr. Rosenberg further relied upon claimant's objective test results including the normal response to exercise during blood gas testing and the normal diffusing capacity measurement. Moreover, the physician explained why claimant's restrictive impairment was solely the result of extrinsic causes, namely an elevated or paralyzed hemidiaphram and obesity.[15] As such, substantial evidence supports the administrative law judge's determination that Dr. Rosenberg's opinion is sufficient to establish that claimant does not suffer from legal pneumoconiosis, i.e. an impairment caused by coal dust exposure.

In challenging the administrative law judge's weighing of the medical opinion of Dr. Rasmussen, claimant generally argues that "Dr. Rasmussen's opinion should be found to be well-documented and well-reasoned and therefore entitled to controlling weight." Claimant's Brief at 10. As claimant has raised no specific allegations of error with regard to the administrative law judge's evaluation of Dr. Rasmussen's opinion, I would affirm his finding that Dr. Rasmussen's opinion is not sufficiently persuasive to outweigh the rebuttal opinion of Dr. Rosenberg. Decision and Order at 11-12, 13; *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Consequently, under the facts of this case, I would affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not suffer from both legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i) and, therefore, I would affirm the denial of benefits.

RYAN GILLIGAN
Administrative Appeals Judge

[15] Dr. Rasmussen similarly found claimant was obese and had an elevated hemidiaphram.