U.S. Department of Labor

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

BRB No. 16-0394 BLA

RICHARD CORDOVA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNYSIDE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/05/2017
	)	
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

John L. Black, Jr., Salt Lake City, Utah, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-5794) of Administrative Law Judge Paul R. Almanza 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[1] filed on May 23, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with over fifteen years of qualifying[3] coal mine employment, and found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv) and 718.204(b)(2) overall. The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at

[1] This is claimant's third claim. Director's Exhibit 4. Claimant's first claim, filed on April 7, 1994, was finally denied by the district director on July 18, 1994 because claimant did not establish total respiratory disability. Director's Exhibit 1. Claimant's second claim, filed on July 29, 2005, was denied by the district director on April 11, 2006 because claimant did not establish any of the elements of entitlement. Director's Exhibit 2. Claimant filed requests for modification that were denied by the district director on May 17, 2006, July 12, 2006, and January 23, 2007. *Id*. Because claimant did not pursue this claim any further, the denial became final. *Id.*

[2] 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.

[3] The administrative law judge found that "[c]laimant was employed in the Sunnyside Mines for 33.25 years total, consisting of 14.75 years working underground and the remaining years working on the surface of the site." Decision and Order at 9. The administrative law judge noted that "a miner who performed above-ground work at an underground mine site is not required to prove that his working conditions were substantially similar to conditions in an underground mine in order to invoke the Section 411(c)(c) presumption." *Id*., *citing Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-504 (1979) (Smith, Chairman, dissenting).

Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a brief in this appeal. Employer has filed a brief in reply to claimant's response brief, reiterating its prior contentions.[4]

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.[5] 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).

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,[6] or 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv) and 718.204(b)(2) overall, invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that claimant's last coal mine employment was in Utah. Director's Exhibit 5; Hearing Tr. at 47, 48, 61. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[6] "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).

§718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption at Section 411(c)(4) by either method.[7]

A. The Presumed Existence of Legal Pneumoconiosis

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg, Farney and Gagon.[8] The administrative law judge noted that the doctors agreed that claimant has interstitial lung disease, but disagreed as to whether the disease was related to coal dust exposure and, thus, constituted legal pneumoconiosis.[9] Whereas Drs. Rosenberg and Farney opined that claimant does not have legal pneumoconiosis,[10] Dr. Gagon opined that

[7] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

[8] We note that employer argues that the Director, Office of Workers' Compensation Programs (the Director), "exceeded his role" by asking Dr. Gagon to supplement his Department of Labor sponsored pulmonary evaluation of claimant pursuant to 20 C.F.R. §725.406. Employer's Brief at 8 n.3. Employer specifically argues that "Section 725.406 does not require the Director to submit 'persuasive' evidence . . . [and] the Director's obligation to obtain evidence ends when the case is transmitted to the Office of Administrative Law Judge[s]." *Id.* Because employer did not raise any of these arguments before the administrative law judge, employer has waived them. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). Therefore, we decline to consider them.

[9] Employer argues that the administrative law judge inaccurately stated that "[t]he medical reports of Drs. Rosenberg, Farney, and Gagon provide the only evidence regarding legal pneumoconiosis." Employer's Brief at 20, *citing* Decision and Order at 18. Employer asserts that claimant's treatment notes constitute relevant evidence, and that they do not contain a diagnosis of legal pneumoconiosis. *Id.* Employer maintains that because the administrative law judge inferred the absence of pneumoconiosis whenever x-ray interpretations in the record did not mention the presence of the disease, he should have applied the same inference to treatment notes that do not mention legal pneumoconiosis. *Id.* Employer's argument lacks merit. Treatment notes that are silent do not necessarily aid rebuttal, and employer has not shown that in this instance the silence in these particular notes should have given rise to the inference it seeks.

[10] In a report dated May 3, 2013, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but has an interstitial lung disease that is not related to coal dust exposure. Employer's Exhibit 1 at 8. Dr. Rosenberg specifically found that "[claimant] probably has nonspecific interstitial pneumonitis (NSIP) or . . . usual

claimant has legal pneumoconiosis.[11] The administrative law judge found that the opinions of Drs. Rosenberg and Farney were not persuasive because they failed to adequately explain their conclusion that claimant's interstitial lung disease was not related to his coal dust exposure. Decision and Order at 19-20. By contrast, the administrative law judge credited Dr. Gagon's opinion as well-documented, persuasively explained, and based on the doctor's extensive experience. Decision and Order at 21-22. Consequently, the administrative law judge found that employer did not disprove the

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interstitial pneumonitis (UIP)." *Id*. At a January 12, 2015 deposition, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis because he does not have any form of lung disease caused by coal dust exposure. Employer's Exhibit 41 at 8, 9, 18, 19. Dr. Rosenberg opined that claimant has a linear form of lung disease categorized as NSIP, and that no one knows what causes this disease. Employer's Exhibit 41 at 5, 29-30. Dr. Rosenberg also opined that claimant's NSIP was not related to coal dust exposure. Employer's Exhibit 41 at 30-33.

In reports dated July 25, 2013 and October 1, 2014, and at a December 1, 2014 deposition, Dr. Farney opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 11 at 22-23, 38 at 8, 40 at 56. Dr. Farney diagnosed chronic bronchitis, interstitial pulmonary fibrosis, and nonspecific pulmonary fibrosis unrelated to coal dust exposure. Employer's Exhibit 40 at 22, 37, 55, 56. Dr. Farney also opined that coal dust does not cause NSIP or UIP. Employer's Exhibit 40 at 58.

[11] In a report dated July 22, 2012, Dr. Gagon diagnosed chronic bronchitis and coal workers pneumoconiosis related to coal dust exposure and smoking. Director's Exhibit 13. In a supplemental report dated August 12, 2014, Dr. Gagon opined that claimant could have UIP, but the more likely explanation is coal workers pneumoconiosis (CWP). Director's Exhibit 68. At a July 22, 2014 deposition, Dr. Gagon opined that claimant has clinical and legal pneumoconiosis based on his x-ray and blood gases. Employer's Exhibit 36 at 7. Although Dr. Gagon stated that the x-ray findings "could be" consistent with UIP or idiopathic pulmonary fibrosis (IPF), *Id*. at 12-13, Dr. Gagon opined that claimant has coal workers pneumoconiosis and probably has pulmonary fibrosis probably from coal dust and smoking, *Id.* at 14, 16-17, 24, 25. Subsequently, at a November 11, 2014 deposition, Dr. Gagon indicated that he stood by his prior opinion that claimant's chest x-ray abnormalities could be caused by IPF or post-inflammatory change, but are more likely due to coal dust and CWP. Employer's Exhibit 42 at 4-5. Dr. Gagon further indicated that he stood by his prior opinion that it is more likely that claimant has a coal dust-related lung disease than IPF. Employer's Exhibit 42 at 16. Dr. Gagon noted that IPF is extremely rare. *Id.*

existence of legal pneumoconiosis, thereby failing to rebut the presumed fact of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

Employer argues that the administrative law judge's finding that employer failed to establish the absence of legal pneumoconiosis is irrational. Employer specifically argues that the administrative law judge ignored the respective qualifications of the doctors in preferring Dr. Gagon's opinion over the contrary opinions of Drs. Rosenberg and Farney. We agree. The administrative law judge noted that Dr. Gagon's diagnosis was based in part on "his extensive experience with treating coal miners." Decision and Order at 21. However, the administrative law judge did not consider that Drs. Rosenberg and Farney are Board-certified in internal medicine and pulmonary disease, Employer's Exhibits 2, 12, 35 at 5, 37 at 5, while Dr. Gagon is Board-certified in family practice, Director's Exhibit 13; Employer's Exhibit 36 at 3. 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Here, the administrative law judge did not adequately explain why he found that Dr. Gagon's experience outweighed the credentials of Drs. Rosenberg and Farney as Board-certified pulmonologists. *See Wojtowicz*, 12 BLR at 1-165.

Employer also argues that "the administrative law judge did not explain how the credibility of the reports flipped when it came to assessing legal rather than clinical pneumoconiosis." Employer's Brief at 17. Employer asserts that the administrative law judge violated the APA by substituting his own medical judgment for those of Drs. Rosenberg and Farney, and by "inject[ing] his own view of the medical articles cited by Dr. Rosenberg." Employer's Brief at 14, 18-19.

In evaluating whether employer established the absence of clinical pneumoconiosis, the administrative law judge credited the opinions of Drs. Rosenberg and Farney that claimant does not have clinical pneumoconiosis over Dr. Gagon's opinion that claimant has clinical pneumoconiosis in the form of coal workers' pneumoconiosis. The administrative law judge found that Dr. Rosenberg's opinion was better supported by the totality of the objective data, clinical findings in the record, and medical literature. The administrative law judge noted that "Dr. Rosenberg explained how the CT scan, which showed pulmonary fibrosis rather than micronodular or irregular opacities, is more reliable that [sic] x-ray studies in diagnosing [c]laimant's interstitial changes." *Id*. at 18. Similarly, the administrative law judge found that Dr. Farney's opinion was better supported by medical data and clinical findings. The administrative law judge also noted that "Dr. Farney admitted that the x-ray studies and CT scans reveal interstitial changes, but that it was linear basilar fibrosis rather than the upper-lobe prominent micronodularities characteristic of clinical pneumoconiosis." *Id.* The

administrative law judge additionally noted that "Dr. Farney explained how [c]laimant's linear basilar fibrosis, is consistent with the other medical . . . data and findings in this case, such as the normal PFS results but abnormal blood gas studies, the lower lobe fine crackles observed in Dr. Farney's physical examination, and [c]laimant's smoking and medical history." *Id.* Further, the administrative law judge gave little weight to Dr. Gagon's diagnosis of clinical pneumoconiosis because it is based on a positive x-ray reading that is contrary to his finding that the x-ray evidence does not support a finding of clinical pneumoconiosis. In addition, the administrative law judge found that "Dr. Gagon failed to explain how [c]laimant's employment history and the examination alone support this diagnosis." Decision and Order at 17.

By contrast, in addressing whether employer established the absence of legal pneumoconiosis, the administrative law judge credited Dr. Gagon's opinion that attributed claimant's pulmonary fibrosis to coal dust exposure over the opinions of Drs. Rosenberg and Farney that attributed claimant's interstitial pulmonary fibrosis and disabling gas exchange abnormality to nonspecific interstitial pneumonitis (NSIP), and not coal dust exposure. Decision and Order at 19. The administrative law judge found that "Dr. Gagon's opinion is well-documented, as it is based on the radiological findings of fibrosis, [c]laimant's employment history, and his own extensive experience." *Id.* at 21. The administrative law judge also found "Dr. Rosenberg's opinion unpersuasive to establish the absence of legal pneumoconiosis because he did not adequately explain his conclusion that [c]laimant's interstitial lung disease was wholly unrelated to his coal mine employment."[12] *Id.* Further, the administrative law judge found that Dr. Rosenberg's opinion is insufficient to disprove legal pneumoconiosis "[b]ecause the regulation [at 20 C.F.R. §718.305(d)(3)] specifically states that the [Section 411(c)(4)] presumption cannot be rebutted on the basis of evidence demonstrating the existence of a totally disabling pulmonary impairment of unknown origin. *Id.* In addition, the administrative law judge found that "Dr. Rosenberg's reliance on the medical literature does not support the conclusion that coal dust exposure did not cause or contribute to [c]laimant's interstitial lung disease and resultant pulmonary impairment." *Id.* at 20. The administrative law judge also found that, "[f]or the same reasons Dr. Rosenberg's opinion is unpersuasive on this issue, Dr. Farney's conclusion that [c]laimant's impairment is caused by fibrosis of unknown cause does not preclude the existence of legal pneumoconiosis." *Id.* at 19. The administrative law judge's analysis of the evidence with respect to clinical pneumoconiosis is inconsistent with his analysis as to legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-164.

[12] The administrative law judge stated: "If [c]laimant has NSIP, then his lung disease is by definition unrelated to coal dust exposure; if [c]laimant's lung disease were related to coal dust exposure, then it could not be classified as an idiopathic disease like NSIP as the cause of the disease would be known." Decision and Order at 19.

Moreover, the administrative law judge misstated the regulation at 20 C.F.R. §718.305(d)(3), which provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). In this case, the administrative law judge noted that Drs. Rosenberg, Farney and Gagon agreed that claimant does not suffer from obstruction or restriction. Decision and Order at 19. Because neither Dr. Rosenberg, nor Dr. Farney, diagnosed an *obstructive* lung disease, the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3) as a basis for finding that employer's evidence was insufficient to rebut the presumption. *See* 20 C.F.R. §718.305(d)(3).

In view of the foregoing, we vacate the administrative law judge's finding that employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), and remand the case to the administrative law judge to provide a clear rationale that explains the relationship between his credibility determinations and his ultimate conclusions in accordance with the APA.[13] Furthermore, we vacate the administrative law judge's finding that employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(ii).

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),

[13] Employer argues that the treatment notes and CT scan reading of Dr. Cahill should be stricken from the record because they were not included in the description of Claimant's Exhibit 2 at the hearing. Employer's Brief at 16. Claimant's Exhibit 2 consists of Dr. Cahill's treatment notes, which include a blood gas analysis and the doctor's reading of a CT scan dated December 3, 2012. Claimant's Exhibit 2. At the August 12, 2014 hearing, claimant's counsel described Claimant's Exhibit 2 as "a blood gas analysis with electrolytes, performed under the order of Dr. Barbara Cahill." Hearing Tr. at 23. Claimant's counsel also stated that Dr. Cahill's curriculum vitae was attached to the exhibit. *Id*. In his Decision and Order, the administrative law judge noted that "Dr. Cahill's treatment records from April 23, 2014 also contain an interpretation of the December 3, 2012 CT scan." Decision and Order at 22, *citing* Claimant's Exhibit 2. The administrative law judge found that Dr. Cahill's CT scan reading "bolsters Dr. Gagon's opinion that [c]laimant's fibrosis, and resultant pulmonary impairment, are related to coal dust exposure." Decision and Order at 22. Because of the discrepancy in the description of Claimant's Exhibit 2 at the hearing and in the administrative law judge's Decision and Order, the administrative law judge must determine whether the treatment notes and CT scan reading of Dr. Cahill were properly admitted into the record. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989).

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, on remand, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-235; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In so doing, 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.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge