U.S. Department of Labor

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

BRB No. 16-0504 BLA

TROY YATES (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK GOLD COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/27/2017
	)	
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.

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

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05495) 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 filed on October 21, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-two years of underground coal mine employment and found that the evidence established that claimant had 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 of total disability due to pneumoconiosis pursuant to Section 411(c)(4),[3] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] The

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on July 2, 2001, was denied by the district director on October 25, 2002, because claimant failed to establish any element of entitlement. Director's Exhibit 3. Claimant died on March 1, 2015 and his widow is pursuing the current claim on his behalf. Decision and Order at 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and where a totally disabling respiratory or pulmonary impairment is established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] The administrative law judge also found that the evidence did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore determined that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was

administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge applied an incorrect standard in considering whether employer rebutted the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in weighing the medical opinions in finding that employer failed to rebut the presumption. Claimant did not file a response brief in this appeal. The Director, Office of Workers' Compensation Programs, filed a response brief urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its arguments on appeal.[5]

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.[6] 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, the burden shifted to employer to rebut the presumption by establishing that claimant had neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner's respiratory or

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based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish any element of entitlement. Thus, in order to obtain review of the merits of his claim, claimant had to establish at least one of the requisite elements. *See* 20 C.F.R. §725.309(c)(3), (4).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had more than fifteen years of qualifying coal mine employment, and his determinations that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), invocation of the rebuttable presumption of total disability due to pneumoconiosis under 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, 1-711 (1983); Decision and Order at 7, 24-26.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[7] 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 pulmonary disease or respiratory or pulmonary

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). After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. The administrative law judge rejected the opinions of Drs. Rosenberg and Fino that claimant did not have legal pneumoconiosis[8] and found that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 29-33.

Employer initially asserts that the administrative law judge erred in requiring employer to "entirely rule[ ] out" any contribution from coal mine dust as a cause of claimant's impairment in order to disprove the existence of legal pneumoconiosis. Employer's Brief at 12-13, *quoting* Decision and Order at 29. Employer further asserts that the administrative law judge erred by stating that "rebuttal is accomplished only by strongly persuasive evidence demonstrating the falsity of a presumed fact." *Id.*

Contrary to employer's assertion, the administrative law judge correctly stated that in order to rebut the presumed existence of legal pneumoconiosis, employer must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including a "chronic pulmonary disease . . . significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 29; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A). Moreover, the administrative law judge did not find that the opinions of Drs. Rosenberg and Fino were insufficient to disprove the existence of legal pneumoconiosis on the grounds that they failed to rule out coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order 29-33. Rather, the administrative law judge found that

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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).

[8] Dr. Rosenberg examined claimant on December 11, 2012, and diagnosed severe chronic obstructive pulmonary disease (COPD) with emphysema due to cigarette smoking. Employer's Exhibit 23 at 14-15. Dr. Fino examined claimant on October 20, 2011, and diagnosed severe pulmonary emphysema due to cigarette smoking and post-inflammatory changes in the right lung of indeterminate etiology. Director's Exhibit 16 at 11, 16.

their opinions were not credible, taking into consideration the rationale each doctor provided for why claimant did not have the disease.[9] Decision and Order at 29-33. Thus, error, if any, in the administrative law judge's recitation of the legal standard for rebuttal is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Moreover, we reject employer's contention that the administrative law judge's use of the preamble, the Department of Labor's (DOL) regulations, and the Board's case law rendered the Section 411(c)(4) presumption "virtually impossible" to rebut. Employer's Brief at 14, 22. Contrary to employer's argument, in assessing the credibility of the medical opinion evidence, the administrative law judge permissibly consulted the preamble as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Specifically, the administrative law judge accurately found that, in eliminating coal mine dust exposure as a cause of claimant's obstructive lung disease, Dr. Rosenberg relied, in part, on his view that claimant's significantly reduced FEV1/FVC ratio is inconsistent with obstruction due to coal mine dust exposure. Decision and Order at 30; Employer's Exhibit 10 at 3-5. Dr. Rosenberg explained that smoking-related forms of

[9] In setting forth its argument, employer states that "[t]he [administrative law judge] announced that in order to rebut, a doctor must 'entirely rule out the possibility that coal dust exposure played any role in contributing to or aggravating the Claimant's smoking-induced lung disease." Employer's Brief at 13, *quoting* Decision and Order at 31. However, employer has taken the administrative law judge's statement out of context. In fact, the administrative law judge stated that "*Dr. Rosenberg* failed to adequately explain why *he* entirely ruled out the possibility that coal dust exposure played any role in contributing to or aggravating the Claimant's smoking-induced lung disease." Decision and Order at 31 (emphasis added). Thus, the material quoted by employer was not a statement of employer's burden of proof on the issue of legal pneumoconiosis, but a description of Dr. Rosenberg's opinion. *See* Decision and Order at 31; Employer's Exhibit 10 at 5; Employer's Exhibit 23 at 22-24.

obstructive lung disease are generally associated with a reduction in the FEV1/FVC ratio, while impairments related to coal dust exposure generally do not affect this value.[10] Decision and Order at 30; Employer's Exhibit 10 at 3-5. Contrary to employer's contention, the administrative law judge permissibly discredited this reasoning as in conflict with the medical science credited by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[11] *See* 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 30.

Additionally, while employer generally asserts that Dr. Rosenberg's opinion regarding the significance of claimant's FEV1/FVC ratio "take[s] into account evolution of the medical science," employer fails to identify how the more recent studies cited by Dr. Rosenberg are more reliable than the studies found credible by the DOL in promulgating its regulations. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-265; Employer's Brief at 15-16. A party may establish that the science credited by the DOL in the preamble is archaized or invalid only by laying the appropriate foundation. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-265; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Absent the type and quality of medical evidence that would invalidate the scientific studies found credible by the DOL in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See Sterling*, 762 F.3d at 491-492, 25 BLR at 2-645.

[10] Dr. Rosenberg stated that "while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio is generally preserved . . . [i]n contrast, with smoking-related forms of COPD, the FEV1/FVC ratio is generally reduced." Employer's Exhibit 10 at 3.

[11] We reject employer's contention that the administrative law judge improperly discredited Dr. Rosenberg's opinion based on his conclusions in other cases. The administrative law judge properly evaluated Dr. Rosenberg's opinion based on the facts of this case, and we see no error in his reference to the Board's holdings in *Smith v. Kentland Elkorn Coal Co.*, BRB No. 09-0862 BLA (Oct. 28, 2010) (unpub.); *M.A v. Jones Fork Operation*, BRB No. 08-0308 BLA Jn. 16, 2009) (unpub.); *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008) (unpub.), as support for his credibility findings. *See* Decision and Order at 30.

Further, regarding Dr. Rosenberg's opinion that claimant's reduced diffusing capacity was characteristic of a diffuse form of emphysema related to smoking and not coal dust exposure, the administrative law judge rationally found that Dr. Rosenberg failed to adequately explain why claimant's emphysema, even if diffuse, was not aggravated by his significant history of coal dust exposure.[12] *See* 20 C.F.R. §718.201(a)(2), (b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 30-31. The administrative law judge also considered Dr. Rosenberg's reliance on the reversible nature of claimant's obstructive impairment to exclude a contribution from coal dust. Decision and Order at 31. Contrary to employer's argument, having found that all of claimant's post-bronchodilator pulmonary function studies produced qualifying values, the administrative law judge permissibly concluded that Dr. Rosenberg's failure to address the significance of the impairment that remained detracted from the probative value of his opinion.[13] *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also 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); Decision and Order at 25, 31; Employer's Brief at 17-18. We therefore affirm the administrative law judge's determination that Dr. Rosenberg's opinion is not sufficient to meet employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 31.

There is also no merit to employer's argument that the administrative law judge improperly discredited Dr. Fino's opinion. The administrative law judge noted correctly that Dr. Fino opined that claimant did not have legal pneumoconiosis based, in part, on "assumptions about 'average' loss of FEV1 in coal miners."[14] Decision and Order at 32, *quoting* Director's Exhibit 16. The administrative law judge permissibly found Dr.

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[12] Dr. Rosenberg testified that "[e]verything is consistent with smoking related [chronic obstructive pulmonary disease (COPD)]. That rules out legal [coal workers' pneumoconiosis]." Employer's Exhibit 23 at 23.

[13] Dr. Rosenberg stated that "I would expect that with coal mine induced airways disease you would not have a bronchodilator response." Employer's Exhibit 23 at 16.

[14] Dr. Fino stated that "[s]tatistically speaking, about 80-90% of the studied miners suffered an average loss of FEV1. The average loss of FEV1 may be statistically significant, but that loss is not a clinically significant contribution to their loss in lung function. In other words, it does not participate in impairment or disability." Director's Exhibit 16 at 13.

Fino's reliance on "generalities" unpersuasive, stating that "[t]he fact that, from a purely statistical standpoint, Claimant's smoking puts him at a greater risk for developing airway obstruction than his coal mine dust exposure, does not explain why, in his particular circumstances, his coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 32-33; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-104; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

The administrative law judge next considered Dr. Fino's opinion that he could exclude coal mine dust as a cause of claimant's obstructive impairment because claimant's lung function was normal when he left the mines in 1985 and did not begin to decline until six years later in 1991. Decision and Order at 33; Employer's Exhibit 22 at 28. Dr. Fino testified that "[i]f you leave the mines with no obstruction and emphysema, the development of obstruction and emphysema years later is not going to be due to coal mine dust inhalation." Employer's Exhibit 22 at 30. Contrary to employer's contention, the administrative law judge permissibly discredited this reasoning as inconsistent with the regulation at 20 C.F.R. §718.201(c), which provides that legal pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after [the] cessation of coal mine dust exposure." Decision and Order at 33; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506, 25 BLR 2-713, 2-723 (4th Cir. 2015) (a medical opinion that is not in accord with the accepted view that pneumoconiosis is both latent and progressive may be discredited); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-26 (2004) (en banc); Employer's Brief at 20. We therefore affirm the administrative law judge's determination to accord Dr. Fino's opinion no weight. Decision and Order at 33.

It is for the administrative law judge to assess the credibility of the evidence and determine how much weight to assign it. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45, 25 BLR 2-289, 2-711 (4th Cir. 2015). Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Fino, we affirm the administrative law judge's finding that employer failed to prove that claimant did not have legal pneumoconiosis, and therefore failed to rebut the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i).

[15] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Rosenberg and Fino, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

The administrative law judge next addressed whether employer established rebuttal by proving 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)(ii). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Rosenberg and Fino that claimant did not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment was not caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Epling*, 783 F.3d at 504-05, 25 BLR at 2-720-24, *citing Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); Decision and Order at 33-34. As the opinions of Drs. Rosenberg and Fino are the only opinions supportive of employer's burden, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii).

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