U.S. Department of Labor

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

BRB No. 16-0516 BLA

RICHARD NEAL YONTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INC.	)	
	)	DATE ISSUED: 06/21/2017
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 Jennifer Gee, Administrative Law Judge, United States Department of Labor

Steven A. Sanders, Appalachian Citizens' Law Center, Whitesburg, Kentucky, for claimant.

Elizabeth A. Combs, Jackson & Kelly, PLLC, Lexington, Kentucky, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2013-BLA-5282) of Administrative Law Judge Jennifer Gee 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 claim filed on April 2, 2012.

Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with 36.94 years of qualifying coal mine employment, and accepted the parties' stipulation that claimant has a totally disabling respiratory or pulmonary impairment, as supported by the record. The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4), and further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal. [2]

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 & 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

[1] 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 establishes fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 36.94 years of qualifying coal mine employment and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

establishing that claimant does not have either legal or clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

A. Clinical Pneumoconiosis

The administrative law judge determined that the record contained six interpretations of three x-rays, and that all of the interpreting physicians were dually qualified as Board-certified radiologists and B readers. Decision and Order at 10-11. Dr. Alexander interpreted the May 16, 2012 x-ray as positive for pneumoconiosis, while Dr. Shipley interpreted it as negative; Dr. Alexander interpreted the February 27, 2013 x-ray as positive, while Dr. Seaman interpreted it as negative; and Dr. Alexander interpreted the November 12, 2015 x-ray as positive, while Dr. Meyer interpreted it as negative. *Id.*; Director's Exhibit 10; Claimant's Exhibits 1, 3; Employer's Exhibits 4, 5, 11. Finding that "equally qualified physicians reach[ed] opposite interpretations," the administrative law judge concluded that all three x-rays were in equipoise and did not rebut the presumed fact of clinical pneumoconiosis. Decision and Order at 11.

Employer contends that the administrative law judge erred in failing to consider all relevant evidence in weighing the conflicting x-ray evidence. Employer maintains that the administrative law judge should have considered that three different physicians provided negative interpretations, whereas only one physician interpreted all three x-rays as positive for pneumoconiosis. Employer also asserts that the administrative law judge failed to give proper consideration to the extensive academic and clinical experience of Drs. Shipley, Seaman, and Meyer. Employer's Brief at 8-10.

Contrary to employer's argument, although an administrative law judge may give greater weight to the interpretation of a physician based upon his or her academic qualifications, the administrative law judge is not required to do so. *See Harris v. Old*

[4] "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).

Ben Coal Co., 23 BLR 1-98, 1-114 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). In this case, the administrative law judge considered the physicians' radiological qualifications and the individual interpretations of each x-ray, and permissibly assigned equal weight to the readings by the dually-qualified physicians. Decision and Order at 10-11; *see* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Because the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, we affirm, as supported by substantial evidence, her finding that the x-ray evidence was in equipoise and, therefore, insufficient to disprove the existence of clinical pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i)(B); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). As Employer raises no additional challenges regarding the administrative law judge's consideration of the evidence relevant to clinical pneumoconiosis, we affirm her determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. Nevertheless, because the presence of legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's arguments challenging the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.

B. Legal Pneumoconiosis

The administrative law judge considered the medical opinions of Drs. Alam, Fino, and Dahhan, all of whom are Board-certified in Internal Medicine with a subspecialty in pulmonary diseases. Decision and Order at 12. Dr. Alam opined that claimant suffers from legal pneumoconiosis in the form of chronic bronchitis and emphysema caused by both coal dust exposure and smoking, Director's Exhibit 10; Claimant's Exhibit 2, whereas Drs. Fino and Dahhan opined that claimant does not suffer from legal pneumoconiosis but has emphysema due entirely to cigarette smoking.[5] Employer's

[5] Dr. Alam diagnosed legal pneumoconiosis, in the form of "emphysema caused by tobacco abuse and substantially aggravated with coal dust exposure." Director's Exhibit 10; Claimant's Exhibit 2; Employer's Exhibit 8. Dr. Fino diagnosed emphysema due to smoking, and explained that coal dust did not play a clinically significant role in claimant's disability, based on the low coal content in claimant's lungs and the reversibility demonstrated in his pulmonary function studies. Employer's Exhibit 1, 7.

Exhibits 1, 3, 6, 7. Finding that Dr. Alam's opinion was consistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulations, the administrative law judge credited the opinion as well-reasoned and well-documented. Conversely, the administrative law judge discredited the opinions of Drs. Fino and Dahhan because she found that each was inconsistent with the scientific evidence credited by the DOL in the preamble, and that neither physician adequately explained why coal dust exposure could not have been a contributing or aggravating factor in claimant's obstructive impairment. Decision and Order at 13-15.

Employer contends that the administrative law judge misinterpreted the opinions of Drs. Fino and Dahhan in finding that employer failed to rebut the presumed fact of legal pneumoconiosis. Employer asserts that, contrary to the administrative law judge's findings, neither doctor based his opinion on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant. Rather, Drs. Fino and Dahhan opined that medical research provides a means of differentiating between causes and contributors to an impairment. Employer further maintains that both doctors fully explained why coal dust exposure did not play a clinically significant role in claimant's disabling respiratory impairment, and asserts that their opinions are consistent with the preamble, whereas Dr. Alam's opinion is based on overly broad generalizations and limited medical data. Lastly, employer contends that the administrative law judge improperly substituted her judgment for that of the physicians. Employer's Brief at 10-22. Some of employer's arguments have merit.

In discounting the medical opinions of Drs. Fino and Dahhan, the administrative law judge observed that the preamble to the 2001 regulations acknowledges that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. Decision and Order at 14. We note, however, that "similar mechanisms" does not equate to "identical mechanisms." The administrative law judge further indicated that "[m]edical opinions that are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, are contrary to the premises underlying the regulations." *Id.* Employer

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Dr. Dahhan also concluded that claimant did not have legal pneumoconiosis, explaining that his obstructive ventilatory impairment "demonstrates significant waxing and weaning (sic) which is an abnormality not compatible with a fixed permanent impact of coal dust on the respiratory system." Employer's Exhibit 3 at 3. Dr. Dahhan added that claimant's loss of more than 1200cc of his FEV1 was not consistent with "a pure obstructive impact of coal dust on the respiratory system," and that claimant's lack of exposure to coal dust for the last ten years was a "duration of absence sufficient to cause cessation of any industrial bronchitis that he might have had." *Id.*

maintains, however, that the opinions of Drs. Fino and Dahhan were not based on either premise. In any event, the preamble does not state that the effects of coal dust exposure and smoking are indistinguishable, and there is no support in the preamble or regulations for the administrative law judge's assertion that a medical opinion stating that coal dust-related obstructive disease is completely distinct from smoking-related disease is contrary to the premises underlying the regulations.

We also agree with employer's argument that the administrative law judge erroneously substituted her judgment for that of the physicians when she stated that "as [c]laimant has 36.94 years of underground employment and a 34 pack year smoking history it would be unreasonable to conclude that coal dust did not significantly contribute to his disability, in addition to smoking." Decision and Order at 14; *see Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). We are unable to conclude that the administrative law judge's errors were harmless because they necessarily affected her weighing of the medical opinions on the issues of legal pneumoconiosis and disability causation. Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (ii), and remand this case for a re-evaluation and weighing of the conflicting medical opinions thereunder. In so doing, the administrative law judge may properly consult the preamble as a statement of the credible medical research accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). The administrative law judge must also consider the validity of the physicians' reasoning in light of the documentation and medical literature relied upon to support their conclusions, and determine the extent to which the opinions are reasoned and documented. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge