U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0484 BLA

MARVIN R. RADCLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY WEST MINING COMPANY	)	
	)	
and	)	
	)	
PACIFICORP ELEC OPERATIONS	)	DATE ISSUED: 06/28/2018
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Lucinda L. Fluharty (Jackson Kelly PLLC), Wheeling, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05472) of Administrative Law Judge Thomas M. Burke 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 October 16, 2014.[2]

The administrative law judge credited claimant with fifteen years of underground coal mine employment and found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

[1] This is claimant's second claim for benefits. His prior claim, filed on February 6, 2008, was denied on September 12, 2008 by the district director, who found that claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] In identifying the "filing date" of a claim, the Board refers to the date the claim was received by the office of the district director, rather than the date the claim was signed, as referenced by the administrative law judge in this case. *See* 20 C.F.R. §725.303(a)(1); Director's Exhibits 3, 21. We note, however, that the use of either date does not affect the adjudication of the claims herein.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the 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.

[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 based." 20 C.F.R. §725.309(c)(3).

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal. Employer filed a reply brief reiterating its contentions.[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 & 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,[7] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fifteen years of underground coal mine employment; the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as claimant was last employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Hearing Transcript at 29.

[7] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 821-22 (10th Cir. 2017).

To rebut the presumption of legal pneumoconiosis employer must prove that claimant's pulmonary or respiratory impairment was neither caused nor substantially aggravated by his coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). In addressing this issue, the administrative law judge considered the opinions of Drs. Devabhaktuni, Basheda and Rosenberg, all of whom opined that claimant's obstructive impairment is unrelated to coal dust exposure.[8] Decision and Order at 17-22; Director's Exhibit 1; Employer's Exhibits 2, 6, 8, 9. Dr. Devabhaktuni examined claimant on March 10, 2008 and opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 1. Dr. Basheda examined claimant on March 23, 2016 and opined that claimant has tobacco-induced obstructive lung disease with an asthmatic component. Employer's Exhibits 2, 8. Dr. Rosenberg performed a records review on August 8, 2016 and opined that claimant has COPD with an emphysematous component due to smoking. Employer's Exhibits 6, 9. The administrative law judge found that the opinions of Drs. Devabhaktuni, Basheda, and Rosenberg are not well-reasoned and inconsistent with the preamble and, therefore, did not rebut the presumed fact that claimant has legal pneumoconiosis. Decision and Order at 17-22.

Employer contends that the administrative law judge applied an incorrect rebuttal standard by requiring employer's medical experts to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment in order to disprove that claimant has legal pneumoconiosis. Employer's Brief at 19-21; Reply Brief at 7-8. We disagree.

The administrative law judge correctly stated that the definition of pneumoconiosis "includes both medical, or 'clinical' pneumoconiosis and statutory, or 'legal' pneumoconiosis." Decision and Order at 15. The administrative law judge also properly noted that legal pneumoconiosis includes lung diseases that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see* Decision and Order at 15.

Moreover, contrary to employer's assertion, the administrative law judge did not determine that the opinions of Drs. Devabhaktuni, Basheda, and Rosenberg are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "rule out"

[8] The administrative law judge also considered the opinions of Drs. Celko, Go, and Sood, who diagnosed legal pneumoconiosis in the form of an obstructive pulmonary impairment due to coal dust inhalation and cigarette smoking. Decision and Order at 5-6, 10-12; Director's Exhibit 13; Claimant's Exhibits 6, 8.

coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 17-18. Rather, the administrative law judge found that the rationale each provided for concluding "that [c]laimant's severe obstructive pulmonary condition is caused by cigarette smoking and is not significantly related to, or substantially aggravated by, dust exposure in coal mine employment" is not credible. Decision and Order at 17, 18-19. 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).

We also reject employer's contention that the administrative law judge improperly gave the preamble "the force and effect of law." Employer's Brief at 24-25. 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 Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-61, 25 BLR 2-765, 2-774-75 (10th Cir. 2015) (use of preamble's summary of medical and scientific literature to determine credibility of physician's analysis of claimant's condition held to be proper); *see also 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 correctly noted that both Dr. Basheda and Dr. Rosenberg opined that claimant does not have legal pneumoconiosis based, in part, on studies which they indicated establish that the average losses in FEV1 from cigarette smoking are far greater than those from coal mine dust exposure.[9] Decision and Order at

[9] Dr. Basheda stated that claimant's loss of FEV1 is "out of proportion" to what one would expect with coal dust-related obstruction. Employer's Exhibit 2 at 14. He based this conclusion on an article by Cohen indicating a loss of 2 to 3 cc's per year of mining after dust regulation which, if applied to claimant's fifteen-year coal mining history, "would result in an insignificant loss of lung function" due to coal mine dust exposure. *Id.* By contrast, Dr. Basheda stated that the loss of FEV1 has been estimated to be 50 to 75 cc's per year of smoking which, if applied to claimant, would result in a severe loss of FEV1 as documented by claimant's pulmonary function testing. *Id.* at 15.

18, 20. The administrative law judge permissibly found their opinions unpersuasive noting that the fact that claimant's smoking may place him at a greater risk for developing airway obstruction does not explain why, in his particular circumstances, his coal mine dust exposure could not also have contributed to his obstruction.[10] Decision and Order at 18, 20, *citing* 65 Fed. Reg. at 79,941 (stating that statistical averaging can hide the effect of coal mine dust exposure in individual miners); *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-568 (10th Cir. 2014); *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 also noted that Dr. Basheda relied, in part, on claimant's intermittent acute bronchodilator response on pulmonary function testing to determine that coal mine dust exposure is not a cause of claimant's severe obstructive impairment. Decision and Order at 17-18. Dr. Basheda stated that an acute bronchodilator response is related to the alleviation of bronchoconstriction following the administration of a bronchodilator, and that one would not see an acute response in coal dust-induced obstruction, which results in fixed changes. Employer's Exhibit 2 at 14. The administrative law judge correctly observed, however, that while claimant's post-bronchodilator values from pulmonary testing yielded evidence of some reversibility, they still produced qualifying values under the regulations. Decision and Order at 5, 18. The administrative law judge permissibly discredited Dr. Basheda's opinion because he failed to explain why the remaining irreversible portion of claimant's respiratory impairment is

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Dr. Rosenberg similarly stated that "[t]he fact that cigarette smoking is dramatically more destructive than coal dust also establishes that coal dust is not a factor in [claimant's] case." Employer's Exhibit 6 at 6. He referenced the Attfield and Hodous study, which he stated establishes that coal mine dust causes a loss of only 2 to 3 cc's of FEV1 per year of exposure after dust regulations, in contrast to the 5 cc loss of FEV1 that is caused by smoking. Employer's Exhibit 6 at 6-7. Dr. Rosenberg concluded that "[i]f one assumes this data is correct, cigarette smoking causes a 100% greater decrease in airflow in relationship to coal dust exposure occurring after [the] 1969 [dust regulations] . . . ." *Id.* at 7.

[10] While the administrative law judge provided a more detailed discussion of Dr. Rosenberg's opinion, he correctly noted that Dr. Basheda's opinion regarding the average losses of FEV1 due to coal mine dust and smoking, respectively, is "similar" and stated that their opinions "fail[] for the same reason." Decision and Order at 19, *citing Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

due entirely to smoking, and could not be caused or contributed to by coal dust exposure.[11] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 17-18.

With respect to Dr. Rosenberg's opinion, the administrative law judge accurately found that, in eliminating coal dust exposure as a cause of claimant's obstructive lung disease, Dr. Rosenberg relied, in part, on his view that claimant's significantly reduced FEV_1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 19; Employer's Exhibit 6. Dr. Rosenberg explained that smoking-related forms of obstructive lung disease are generally associated with a reduction in the ratio of FEV_1 to FVC, while impairments related to coal dust exposure are generally associated with a preserved ratio.[12] Decision and Order at 19; Employer's Exhibit 6 at 5-6. The administrative law judge permissibly discredited Dr. Rosenberg's rationale as it conflicts 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 FEV_1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72, BLR (4th Cir. Nov. 29, 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014).; *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; Decision and Order at 19-20.

Further, while employer generally asserts that Dr. Rosenberg "provided additional references to recent studies" to support his opinion regarding the significance of claimant's FEV1/FVC ratio, employer fails to identify how these more recent studies are more reliable than the studies found credible by the DOL in promulgating its regulations. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); Employer's Reply Brief at 8, *referencing* Employer's Exhibits 6 at 5-6; 9 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*

[11] As set forth above, the administrative law judge did not reject Dr. Basheda's opinion for failing to "rule out" all contribution of coal mine dust exposure to claimant's respiratory impairment, but based his credibility finding on Dr. Basheda's failure to provide sufficient reasoning for his conclusions. Thus, any error in the administrative law judge's recitation of an erroneous legal standard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[12] Dr. Rosenberg stated that claimant's "FEV_1 [was] reduced to 33% predicted with a marked reduction of his FEV_1/FVC ratio down to around 36% (preserved ratio 70% or higher)." Employer's Exhibits 6 at 5, 9.

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.

It is for the administrative law judge to assess the credibility of the evidence and determine how much weight to assign it. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993). Because the administrative law judge permissibly discredited the opinions of Drs. Basheda and Rosenberg,[13] we affirm the administrative law judge's finding that employer failed to prove that claimant does not have legal pneumoconiosis,[14] and therefore failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[15] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23-24. The administrative law judge rationally discounted the disability causation opinions of Drs. Basheda and Rosenberg because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[16] *Hobet Mining, LLC v. Epling*,

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[13] We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. Devabhaktuni's opinion is unreasoned and entitled to no weight. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

[14] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Basheda and Rosenberg, 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).

[15] Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

[16] The administrative law judge did not specifically analyze Dr. Devabhaktuni's disability causation opinion. As Dr. Devabhaktuni similarly opined that claimant does not suffer from legal pneumoconiosis, however, the administrative law judge's error, if any, in

783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 23. We, therefore, affirm the administrative law judge's determination that employer failed to establish 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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failing to discuss his opinion is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1346, 25 BLR 2-549, 2-569 (10th Cir. 2014); *Larioni*, 6 BLR at 1-1278. Moreover, employer does not challenge this aspect of the administrative law judge's decision.