U.S. Department of Labor

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

BRB No. 14-0229 BLA

JEFFREY L. STUPAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	DATE ISSUED: 03/27/2015
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5595) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on December 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that

claimant had a total of twenty-eight years of coal mine employment, with at least fifteen years of underground employment. The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge concluded that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that it did not rebut the amended Section 411(c)(4) presumption by proving that claimant does not have legal pneumoconiosis and is not totally disabled by pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that the Board reject employer's contentions regarding the weighing of the medical opinion evidence on rebuttal. Employer has filed a reply brief in support of its position.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[1] 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).

Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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.[2] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b), (c). Because claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifted to employer to rebut the presumption by

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Ohio. Decision and Order at 2 n.1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of coal mine employment, with at least fifteen of those years in underground coal mine employment, total respiratory disability at 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 24, 27.

proving that claimant does not suffer from either legal[3] or clinical[4] pneumoconiosis, or by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

In this case, the administrative law judge's analysis of invocation, and rebuttal, of the amended Section 411(c)(4) presumption did not conform to the terms of 20 C.F.R. §718.305. Before rendering a finding as to whether claimant invoked the amended Section 411(c)(4) presumption, the administrative law judge considered the radiological evidence relevant to the existence of clinical pneumoconiosis and concluded that the analog and digital x-rays, and the CT scans, did not support a finding of pneumoconiosis. Decision and Order at 18-19. The administrative law judge then reviewed the medical reports of Drs. Lenkey, Cohen, Rosenberg and Kline. Decision and Order at 20-22. Drs. Lenkey and Cohen diagnosed coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease (COPD) caused by smoking and coal dust exposure, while Drs. Rosenberg and Kline ruled out the presence of coal workers' pneumoconiosis and opined that claimant's emphysema/COPD is due solely to smoking. Director's Exhibit 27; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 9, 10, 13. The administrative law judge gave little weight to the opinions of Drs. Rosenberg and Kline because they relied on premises regarding the significance of decrements in claimant's FEV_1, FEV_1/FVC ratio, and diffusing capacity that conflict with the scientific views set forth by the

[3] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconiosis, *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).

Department of Labor (DOL) in the preamble to the 2001 regulations. Decision and Order at 21-22; *see* 65 Fed. Reg. 79,941-43 (Dec. 20, 2000). The administrative law judge concluded, "[b]ecause I discredit the opinions of Drs. Rosenberg and Kline and because the remaining physicians diagnosed clinical pneumoconiosis, legal pneumoconiosis, or both, I find the operator has not met his burden of proof in establishing that the claimant does not suffer from pneumoconiosis." *Id*. at 22.

After determining that claimant established total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established invocation of the amended Section 411(c)(4) presumption. Decision and Order at 24, 27. The administrative law judge further stated, claimant "will be entitled to benefits unless the employer proves that his respiratory impairment did not arise out of coal mine employment." Decision and Order at 27. The administrative law judge then relied on his discrediting of the opinions of Drs. Rosenberg and Kline on the issue of pneumoconiosis to find that employer "failed to meet [its] burden of proving that claimant's total respiratory or pulmonary disability is not due to pneumoconiosis." Decision and Order at 29.

Employer alleges that the administrative law judge provided invalid reasons for finding that the opinions of Drs. Rosenberg and Kline were insufficient to rebut the amended Section 411(c)(4) presumption. This contention is without merit. The administrative law judge observed correctly that Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that he found inconsistent with a coal mine dust-induced lung disease.[5] Decision and Order at 21; Employer's Exhibit 4 at 7. The administrative law judge rationally found that Dr. Rosenberg's premise – that coal dust exposure causes proportional decrements in the FEV_1/FVC ratio – conflicts with the scientific evidence endorsed by the DOL in the preamble. The DOL relied, in particular, on the summary of the medical literature developed by the National Institute for Occupational Safety and Health (NIOSH) in conjunction with its determination of a permissible dust exposure limit. The DOL stated:

[5] Dr. Rosenberg opined that claimant has a "marked reduction of his FEV1 to a severe level (36% predicted), along with a marked reduction of his FEV1/FVC ratio down to around 39% (preserved ratio 70% or higher)" and that "this pattern of obstruction is inconsistent with one related to past coal mine dust exposure." Employer's Exhibit 4 at 7.

> [I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple CWP [coal workers' pneumoconiosis] and PMF [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV_1 *and the ratio of* FEV_1/FVC."

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* NIOSH *Criteria Document* 4.2.3.2 (citations omitted) (emphasis added).

Contrary to employer's argument, Dr. Rosenberg's reliance on studies that post-date those cited in the preamble did not preclude the administrative law judge from discrediting his opinion. Although employer is correct in suggesting that an expert can challenge the scientific views accepted by the DOL, that expert must establish that developments have occurred subsequent to the promulgation of the 2001 regulations that invalidate the science underlying the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013). Thus, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Rosenberg's opinion was insufficient to establish that claimant's COPD/emphysema, and accompanying obstructive impairment, was not caused by dust exposure in 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); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Similarly, the administrative law judge noted correctly that Dr. Kline's opinion, that claimant's severely reduced diffusing capacity establishes that his emphysema is not related to coal dust exposure, is at odds with statements made by the DOL in the preamble. The DOL observed that sound medical science establishes that emphysema due to coal dust exposure can occur independently of clinical coal workers' pneumoconiosis, and that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. 79,943 (Dec. 20, 2000). The administrative law judge rationally found, therefore, that Dr. Kline's opinion was entitled to little weight, because it was based on a premise that conflicts with the scientific view credited by the DOL. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Accordingly, we affirm the administrative law judge's determination that the opinions of

Drs. Rosenberg and Kline were insufficient to rebut the presumed existence of "a chronic restrictive or obstructive pulmonary disease arising out of coal mine employment," i.e., legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2).[6] *See* 20 C.F.R. §718.305(d)(1)(ii)(A); *Ogle*, 737 F.3d at 1069, 25 BLR at 2-446-47; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

We also affirm the administrative law judge's finding that employer did not rebut the presumed causal connection between pneumoconiosis and claimant's totally disabling pulmonary impairment. Decision and Order at 29. Pursuant to 20 C.F.R. §718.305(d)(1)(ii), employer was required to prove 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). Rather than applying this standard, the administrative law judge considered whether employer established that claimant's "respiratory impairment did not arise out of coal mine employment." *Id*. at 27. As discussed *supra*, however, the administrative law judge rationally discredited the opinions of Drs. Rosenberg and Kline on the issue of the existence of legal pneumoconiosis, i.e., the extent to which coal dust exposure played a role in causing claimant's totally disabling COPD/emphysema. *See* slip op. at 5-8; 20 C.F.R. §718.201(a)(2), (b). As a matter of law, therefore, the opinions of employer's experts could not be credited as rebutting the existence of a causal relationship between claimant's totally disabling COPD/emphysema and pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii), regardless of the standard that the administrative law judge applied. *See Ogle*, 737 F.3d at 1071, 25 BLR at 2-447. Thus, any error in the administrative law judge's failure to apply C.F.R. §718.305(d)(1)(ii) did not affect the validity of his ultimate determination that employer did not rebut the presumed fact that claimant's totally disabling COPD/emphysema was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Rosenberg and Kline, it is not necessary for the Board to address employer's remaining arguments concerning the administrative law judge's consideration of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge