U.S. Department of Labor

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

BRB No. 14-0274 BLA

EARON A. HARDISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/30/2015
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

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 on Remand (2007-BLA-05542) of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the fourth time.[2]

[1] Claimant's two prior claims, filed on November 27, 1992 and November 9, 2001, were finally denied because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2. Claimant filed his current subsequent claim on June 9, 2006. Director's Exhibit 3.

In the Board's most recent Decision and Order, we affirmed the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.[3] *Hardison v. Peabody Coal Co.*, BRB No. 13-0026 BLA, slip op. at 3 n.6 (Sept. 10, 2013) (unpub.). We vacated, however, the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis, and remanded the case for reconsideration of the opinions of Drs. Repsher and Rosenberg. *Id*. at 6-8. On remand, the administrative law judge found that employer failed to rebut both the presumed existence of legal pneumoconiosis, and the presumed fact that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the amended 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, has filed a letter, asserting that the administrative law judge properly consulted the preamble to the 2001 revisions to the regulations in assessing the credibility of the medical opinion evidence. In a reply brief, employer reiterates its previous contentions.

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.[4] 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).

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[2] The complete procedural history of this case is set forth in the Board's most recent prior Decision and Order. *Hardison v. Peabody Coal Co.*, BRB No. 13-0026 BLA, slip op. at 2-3 (Sept. 10, 2013) (unpub.).

[3] 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. 30 U.S.C. §921(c)(4), as implemented 20 C.F.R. §718.305.

[4] 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, 1-202 (1989) (en banc).

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), he noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); 2014 Decision and Order at 3. Under the implementing regulation, employer may rebut the presumption by establishing both that claimant does not have legal[5] and clinical[6] pneumoconiosis, 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 [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

On remand, after noting that employer could not disprove the existence of clinical pneumoconiosis,[7] the administrative law judge addressed whether employer could disprove the existence of legal pneumoconiosis. The administrative law judge observed that he previously considered the medical opinions of Drs. Simpao, Baker and Houser, that claimant has legal pneumoconiosis, and the contrary opinions of Drs. Rosenberg and Repsher, that claimant has chronic obstructive pulmonary disease (COPD) due to smoking. 2014 Decision and Order at 2. Specifically, Dr. Rosenberg diagnosed COPD and fibrosis, each of which he attributed to claimant's cigarette smoking. Employer's

[5] "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).

[6] "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).

[7] The administrative law judge found, in his second Decision and Order, that employer could not disprove the existence of clinical pneumoconiosis, based on its stipulation that claimant has the disease. 2012 Decision and Order at 4. Because employer did not disprove the existence of clinical pneumoconiosis, employer could not establish rebuttal by proving that claimant does not have pneumoconiosis, as the regulation at 20 C.F.R. §718.305(d)(1)(i) requires that employer disprove the existence of both forms of the disease. However, in light of the relevance of legal pneumoconiosis to the second method of rebuttal, the administrative law judge appropriately considered whether employer could disprove the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); 2014 Decision and Order at 4-8.

Exhibit 1. Dr. Rosenberg also opined that claimant does not have any impairment caused by his coal mine dust exposure. *Id.* Dr. Repsher diagnosed a moderate to severe reduction in diffusing capacity, which he opined was "overwhelmingly most likely due to [claimant's] long and heavy prior cigarette smoking history." Director's Exhibit 19.

The administrative law judge determined that Dr. Rosenberg expressed views that conflicted with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. 2014 Decision and Order at 6-8. Specifically, he found that Dr. Rosenberg's opinion was contrary to the DOL's position that an obstructive impairment due to coal mine dust exposure may be detected by decreases in FEV1 and the FEV1/FVC ratio and, further, that he failed to adequately explain why claimant's history of coal dust exposure did not contribute to, or aggravate, claimant's obstructive impairment. *Id*. at 6. With respect to Dr. Repsher's opinion, the administrative law judge determined that he failed to adequately explain how he eliminated coal dust exposure as a cause of claimant's obstructive pulmonary impairment. *Id.* at 8. Thus, the administrative law judge found that these opinions were not well-reasoned, and concluded that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *Id*.

Employer argues that the administrative law judge's reliance on the preamble to discredit Dr. Rosenberg's opinion violated the Administrative Procedure Act, 500 U.S.C. *et seq*., and deprived employer of a fair adjudication of the claim. Employer maintains that the administrative law judge gave the preamble binding effect, in violation of the decision of the United States Court of Appeals for the Sixth Circuit in *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). Employer also contends that the administrative law judge based his findings on a mischaracterization of the preamble, and the opinion of Dr. Rosenberg. Employer further argues that the administrative law judge erred in determining that Drs. Rosenberg and Repsher did not adequately explain why coal dust exposure was not a contributing cause of claimant's totally disabling obstructive impairment.

Employer's allegations of error have no merit. The administrative law judge rationally accorded little weight to Dr. Rosenberg's opinion because he opined that coal mine dust exposure does not cause a clinically significant drop in FEV_1 values, a position contrary to the authoritative statement of medical principles accepted by the DOL when drafting the revised definition of legal pneumoconiosis to include "any chronic . . . obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(2)(b); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; 2014 Decision and Order at 6-7. The administrative law judge also permissibly found that Dr. Rosenberg's opinion, that impairments related to coal dust exposure generally do

not cause a reduction in the FEV_1/FVC ratio, is contrary to the preamble. *See Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; 2014 Decision and Order at 6-7.

In this regard, we are not persuaded by employer's contention that the preamble does not state that coal dust exposure causes a disproportionate decrement in the FEV_1/FVC ratio. Employer notes the DOL's citation to a summary of the medical literature prepared by the National Institute for Occupational Safety and Health (NIOSH), and studies by Attfield and Hodous, and alleges that these sources link reductions in the FEV_1/FVC ratio to COPD, but do not link them to coal dust exposure. To the contrary, the DOL quoted this passage from the NIOSH document:

> In addition to the risk of simple [coal workers' pneumoconiosis] and [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.* Decrements in lung function *associated with exposure to coal mine dust are severe enough to be disabling in some miners,* whether or not pneumoconiosis is also present.

65 Fed. Reg. at 79,943 (emphasis added). Similarly, the DOL summarized the Attfield and Hodous study as follows:

> Attfield and Hodous analyzed pulmonary function data (specifically, FEV1, FVC and FEV1/FVC ratio) drawn from Round 1 of the National Study of Coal Workers' Pneumoconiosis, along with job-specific cumulative dust exposure estimates for U.S. underground coal miners, to determine whether there was an exposure-response relationship. This group of 7,139 miners worked both before and after 1970, when federally-mandated dust control standards were implemented. Allowing for decrements due to age and smoking history, *Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters a year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis*.

65 Fed. Reg. 79,940 (Dec. 20, 2000). Additionally, although employer is correct in suggesting that an expert can challenge the scientific views accepted by the DOL, the 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). Employer has not explained how the more recent studies cited by Dr. Rosenberg accomplish this task. Thus, we hold that 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, and accompanying obstructive impairment, did not constitute legal pneumoconiosis under 20 C.F.R. §718.201(a)(2). *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In addition, the administrative law judge permissibly accorded little weight to Dr. Repsher's opinion because, "in determining that [c]laimant's reduced diffusing capacity is 'overwhelming [sic] most likely due to his long and heavy prior cigarette smoking habit,' Dr. Repsher does not explain how [h]e was able to determine that [c]laimant's coal mine dust exposure did not aggravate [c]laimant's obstructive impairment."[8] 2014 Decision and Order at 8, *quoting* Director's Exhibit 19; *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). In light of the valid rationales provided by the administrative law judge for according less weight to the opinions of Drs. Rosenberg and Repsher, we affirm his finding that employer did not rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Ogle*, 737 F.3d at 1069-70. In so doing, we reject employer's argument that the administrative law judge failed to follow the Board's remand instructions, because he did not "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 diagnoses." Employer's Brief in Support of Petition for Review at 13, *quoting Hardison*, BRB No. 13-0026 BLA, slip op. at 7-8. In assessing the credibility of the opinions of Drs. Rosenberg and Repsher, the administrative law judge reviewed their opinions in their entirety, described the documentation underlying their opinions in detail, and referenced the physicians' qualifications. Decision and Order on Remand at 6-8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002).

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by establishing that the miner's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 2014 Decision and Order at 8, *quoting* 30 U.S.C. §921(c)(4). In light of our affirmance of the administrative law judge's finding that employer did not affirmatively disprove the existence of legal pneumoconiosis, we conclude that the administrative law judge

[8] The administrative law judge accepted employer's stipulation to twenty-three years of coal mine employment, and determined that claimant worked underground for more than fifteen years. 2012 Decision and Order at 3-4; *see also* 2008 Decision and Order at 2.

rationally discounted the opinions of Drs. Rosenberg and Repsher on the issue of total disability causation, because they did not diagnose legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074. We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the amended Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge