U.S. Department of Labor

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

BRB No. 15-0154 BLA

WILLIAM RAY SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/21/2016
	)	
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2012-BLA-5070) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered

on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that claimant worked for twenty-three years in qualifying employment, and found that at least fifteen years of claimant's coal mine employment consisted of underground coal mine employment. The administrative law judge determined that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that he applied an incorrect rebuttal standard and erred in weighing the evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the applicable standard for establishing rebuttal.[3]

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[1] Claimant's first application for benefits, filed on June 22, 2006, was denied by reason of abandonment by the district director on October 10, 2006. Director's Exhibit 1. Claimant filed his current claim for benefits on September 27, 2010. Director's Exhibit 3.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least fifteen years of underground coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the presumption of total disability due to pneumoconiosis at 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 3-4.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge applied an incorrect legal standard in finding that rebuttal was not established under Section 411(c)(4), arguing that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4), contrary to the unambiguous statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Arguing that employer's burden on rebuttal can be no greater than claimant's burden of proof in the absence of a presumption, employer asserts that medical opinions supportive of rebuttal need not rule out any minimal contribution from pneumoconiosis to the miner's disability. Thus, while 20 C.F.R. §718.305(d)(1)(ii) provides that rebuttal is established with a showing that "no part" of a miner's disability was caused by pneumoconiosis, employer maintains that this regulatory language should be interpreted as requiring proof that pneumoconiosis is not a "substantially contributing cause" of the miner's disabling impairment. Employer's Brief at 6-12. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Board, however, have expressly addressed and rejected similar arguments in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015), and *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015). For the reasons set forth in *Bender* and *Minich*, we reject employer's contentions in this case.

Employer next maintains that the administrative law judge failed to consider all relevant evidence and provided invalid reasons for finding that the opinions of Drs. Rosenberg and McSharry were insufficient to affirmatively rebut the presumed fact of legal pneumoconiosis. Specifically, employer asserts that the administrative law judge failed to evaluate the medical opinion evidence on the issue of legal pneumoconiosis "in light of the physicians' credentials, reasoning, and supporting medical documentation [but instead] relied solely on the decisions in other cases."[5] Employer's Brief at 15.

[4] 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. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] Employer asserts that the administrative law judge discounted Dr. Rosenberg's testimony regarding claimant's FEV_1/FVC ratio "not…based on any medical evidence in the record of this case….Instead, the ALJ found that [Dr.] Rosenberg's opinion…was similar to an opinion he had in another case that was discredited, and [he] discredited it on that basis. Essentially, Dr. Rosenberg was discredited because the BRB once found he

Employer further maintains that "merely because the FEV_1/FVC ratio is used to determine disability under the regulations … does not mean that it cannot be [used to rule out coal dust exposure as a contributing factor in claimant's disease]." *Id.* at 16. Thus, employer contends that the administrative law judge erroneously discounted Dr. Rosenberg's opinion, that the reduced FEV_1/FVC ratio demonstrated on claimant's pulmonary function studies is consistent with a smoking-related disease and not pneumoconiosis, on the ground that it was inconsistent with the preamble and the regulations. *Id.* at 12-16.[6] Employer's arguments lack merit.

The administrative law judge summarized the opinions of Drs. Rosenberg and McSharry, who opined that claimant does not have legal pneumoconiosis. Decision and Order at 5-8; Employer's Exhibits 6, 7. After reviewing the bases for the physicians' conclusions, the administrative law judge acted within his discretion in finding that the opinions of Drs. Rosenberg and McSharry were unpersuasive, as he determined that neither physician had rendered an adequately explained opinion. *Id.*; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

The administrative law judge determined that Dr. Rosenberg cited medical literature in support of his opinion that the reduction in claimant's FEV_1/FVC ratio was typical of a smoking-related disease, whereas in non-smoking miners, the ratio is preserved. Decision and Order at 7; Employer's Exhibit 10. However, the administrative

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was wrong about someone else – not because he is wrong about the Claimant." Employer's Brief at 12-13. Employer has not cited the Board case on which it relies, nor does a review of the Decision and Order reveal that the administrative law judge made such a finding.

[6] Employer additionally argues that the administrative law judge, in evaluating the evidence, failed to determine the length of claimant's smoking history, in order to better assess the credibility of the physicians' opinions concerning the existence of legal pneumoconiosis. Employer's Brief at 4. Contrary to employer's argument, however, the administrative law judge found that claimant "smoked approximately 30 years but quit," noting multiple references in the record to a smoking history from 1969 to 1999, and Dr. Gallai's reliance on a 41 pack-year history at Claimant's Exhibit 1. Decision and Order at 8. The administrative law judge, for reasons unrelated to the accuracy of claimant's smoking history, discounted the only medical opinions of record that were sufficient, if credited, to meet employer's burden on rebuttal. Thus, we reject employer's argument that remand is required for the administrative law judge to provide a more specific finding as to the length and quantity of claimant's smoking history, and a reweighing of the medical opinion evidence.

law judge observed that those articles did not address the additive effects of coal dust and smoking which had been found in other studies cited by the Department of Labor in the preamble to its 2000 rule-making in revising the definition of pneumoconiosis. Decision and Order at 7, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Further, the administrative law judge permissibly found that Dr. Rosenberg had not adequately explained how the clinical results and articles he cited supported the doctor's conclusion that claimant had no component of legal pneumoconiosis.[7] *Id.* Consequently, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's opinion was unpersuasive.[8]

Similarly, the administrative law judge determined that Dr. McSharry found that the ratio between the FEV_1 and the vital capacity was "markedly low" in claimant's pulmonary function studies. Decision and Order at 7; Employer's Exhibit 9 at 15. Dr. McSharry opined that this "is commonly seen in asthma and in emphysema, or smoking-related obstructive lung disease, and in good studies, has tended not to be seen in coal dust-induced obstructive lung disease." Employer's Exhibit 9 at 15-16. While Dr. McSharry admitted that claimant "has certainly worked around coal long enough that he

[7] Dr. Rosenberg explained how coal dust and smoking cause different pulmonary responses and consequently are evidenced by differences in pulmonary testing results. However, the doctor did not explain how physiological changes which are the effects of both coal dust and smoking would consequently result in parallel reductions in the FEV_1 and FVC (and not a reduction of FEV_1 without a reduction in FVC), although he offered conclusory statements to that effect as support for his opinion.

[8] The presumed fact of legal pneumoconiosis is rebutted with proof that the miner does not have a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b) (i.e., that it is more likely than not that the miner does not have a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment). While Dr. Rosenberg opined that smoking was the sole cause of claimant's totally disabling obstructive impairment, the administrative law judge determined that the physician failed to adequately or persuasively explain his exclusion of claimant's lengthy coal dust exposure as an aggravating factor. Decision and Order at 6, 8. As the administrative law judge provided at least one valid reason for according less weight to the opinion of Dr. Rosenberg, the administrative law judge's error, if any, in according less weight to the opinion for other reasons constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983)

could develop pneumoconiosis if he were a susceptible individual," Employer's Exhibit 6, Dr. McSharry noted that claimant's x-rays showed hyperinflation of the chest, which is typical of tissue loss from smoking-related emphysema, "but not at all the usual finding in coal dust-induced lung disease." Employer's Exhibit 9 at 18-19, 21. The administrative law judge acted within his discretion in finding that the opinion of Dr. McSharry was entitled to diminished weight, as he could permissibly find from the evidence that the physician failed to adequately relate the generalities he relied upon to claimant's specific pulmonary condition. Decision and Order at 8; *see Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

The administrative law judge ultimately concluded that both opinions were unpersuasive, as he found that Drs. Rosenberg and McSharry stressed that smoking was the sole cause of claimant's disabling obstructive disease, but failed to adequately explain their elimination of claimant's seventeen years of underground coal mining dust exposure as an aggravating factor in his pulmonary condition. Decision and Order at 3, 5-6, 8; *see* 20 C.F.R. §718.201(a)(2), (b). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis.[9]

The administrative law judge properly found that the same reasons that he provided for discrediting the opinions of Drs. Rosenberg and McSharry on the issue of legal pneumoconiosis also undercut their opinions that no part of claimant's disabling impairment was caused by pneumoconiosis. Decision and Order at 4-9; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the opinions of Drs. Rosenberg and McSharry were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii). Consequently, we affirm the administrative law judge's award of benefits.

[9] Because employer has failed to rebut the presumed fact of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge