U.S. Department of Labor

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

BRB No. 15-0188 BLA

HAROLD T. DAVIS Claimant-Respondent v. SHANNOPIN MINING COMPANY and THE FIRE & CASUALTY COMPANY OF CONNECTICUT Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/10/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, 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 (2013-BLA-5392) of Administrative Law Judge Drew A. Swank (the administrative law

judge) rendered on a 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 credited claimant with seventeen years of coal mine employment, consisting of fourteen years of underground coal mine employment and three years of coal mine employment in substantially similar conditions. 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), as implemented by 20 C.F.R. §718.305 of the regulations.[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, benefits were awarded.[3]

[1] Claimant, Harold T. Davis, filed his application for benefits on March 21, 2012. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 30 U.S.C. §921(c)(4) (2012).

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge invoked the rebuttable presumption at Section 411(c)(4), but the organization of his Decision and Order makes it difficult to discern the standards of proof applied in making his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. Rather than initially determining whether claimant established invocation of the rebuttable presumption at Section 411(c)(4), the administrative law judge began his analysis by observing that claimant had the burden to establish the existence of pneumoconiosis, in the absence of a presumption, and initially analyzed the case as if the presumption did not apply. Decision and Order at 6-11. The administrative law judge should have first considered whether claimant invoked the Section 411(c)(4) presumption, and then analyzed the evidence as to whether employer successfully met its burden of rebuttal by disproving the existence of clinical and legal pneumoconiosis or by proving that no part of claimant's total disability was caused by pneumoconiosis, as defined at 20 C.F.R. §718.201. *See Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting)(pub.).

On appeal, employer argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.[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.[5] 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 contends that the administrative law judge erred in finding that the opinion of Dr. Fino was insufficient to affirmatively rebut the Section 411(c)(4) presumption. Specifically, employer asserts that the administrative law judge erred in discounting Dr. Fino's opinion, that claimant does not have legal pneumoconiosis and that his disabling bullous emphysema is due to cigarette smoking and not coal dust inhalation, on the ground that Dr. Fino did not cite to any medical literature or studies that supported this conclusion. Conceding that the preamble to the regulations acknowledges that emphysema may be caused by coal mine dust exposure, employer asserts that, by requiring Dr. Fino to provide medical literature in support of his opinion, the administrative law judge imposed a burden of proof on employer that is not contained in either the Act or the regulations. Employer avers that, because Dr. Fino's diagnosis of bullous emphysema was corroborated by Dr. Ahmed, claimant's expert radiologist, the administrative law judge's discounting of Dr. Fino's opinion is tantamount to a complete disregard of uncontradicted medical evidence. Employer's Brief at 10-12. Employer's arguments lack merit.

At the outset, we note that the Board and multiple United States Circuit Courts of Appeal have held that an administrative law judge, as part of the deliberative process, may permissibly evaluate expert opinions in conjunction with the Department of Labor's

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least fifteen years of qualifying 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 5, 12-15.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

(DOL) discussion of prevailing medical science in the preamble to the regulations. In the present case, the administrative law judge acted within his discretion in consulting the preamble as a statement of medical science studies found credible by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 25 BLR 2-581 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

In evaluating the evidence relevant to rebuttal at Section 718.305(d), the administrative law judge accurately summarized Dr. Fino's qualifications and the underlying documentation and explanation for his opinion that claimant's disabling emphysema was not caused by pneumoconiosis. Decision and Order at 16-17; Director's Exhibits 14, 15; Employer's Exhibit 6. Dr. Fino testified that "bullous emphysema … is not caused by coal dust inhalation, unless you have complicated coal workers' pneumoconiosis, which [claimant] does not have." Employer's Exhibit 6 at 17. Since the preamble to the regulations specifies that emphysema may be caused by coal mine dust[6] and does not acknowledge an exception for bullous emphysema, the administrative law judge permissibly found that Dr. Fino's opinion was unpersuasive because the physician failed to support his conclusion with reference to any medical literature or studies that would invalidate the preamble. Decision and Order at 17, 19; *see* 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014) (absent the type and quality of medical evidence that would invalidate the scientific studies found credible by DOL in the preamble to the regulations, a physician's opinion that is inconsistent with the preamble may be discredited); *see also Midland Coal Co. v. Director, OWCP*

[6] The preamble to the regulations states that: "The term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, *emphysema*, and asthma .... Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease." *See* 65 Fed. Reg. 79,939 (Dec. 20, 2000)(emphasis added). Additionally, the preamble recognizes that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 F.3d Reg. 79,943. Hence, it is the position of the Department of Labor that emphysema may be caused by coal dust exposure and, thus, constitutes legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b).

[*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). As employer has not otherwise challenged the administrative law judge's weighing of the evidence relevant to rebuttal, and substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's conclusion that Dr. Fino's opinion is insufficient to establish rebuttal of the presumed facts of pneumoconiosis and disability causation,[7] and that employer failed to rebut 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.

Accordingly, the Decision and Order Awarding 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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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[7] While acknowledging that the rebuttal provisions at 20 C.F.R. §718.305(d) are applicable, the administrative law judge indicated that "[t]o rebut the presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' to Claimant's total pulmonary or respiratory disability, employer offers the report[s] of Drs. Fino and Kaplan." Decision and Order at 16. The standard articulated by the administrative law judge is the disability causation standard imposed upon claimants seeking entitlement to benefits under 20 C.F.R. Part 718 in the absence of a presumption. When the rebuttable presumption is invoked, an employer must establish "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)(ii) (emphasis added).