U.S. Department of Labor

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

BRB No. 17-0396 BLA

RALPH A. RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WELLMORE COAL CORPORATION	)	DATE ISSUED: 03/29/2018
	)	
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham & Halbert PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5071) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed on October 29, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The parties stipulated to seventeen years of underground coal mine employment and the administrative law judge determined that claimant established a

totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis under Section 411(c).[1] The administrative law judge further found that employer failed to rebut the presumption and he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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.[2] 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).

Because claimant invoked the Section 411(c)(4) presumption,[3] the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[4] or by establishing that "no part of the miner's respiratory or

[1] 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); 20 C.F.R. §718.305.

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3; Hearing Transcript at 18. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] We affirm as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, total disability and invocation of the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, i.e., the

pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Rebuttal - Existence of Legal Pneumoconiosis

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Fino and Rosenberg in finding that it did not disprove the existence of legal pneumoconiosis.[5] We disagree. The administrative law judge noted correctly that employer relied on the opinions of Drs. Fino and Rosenberg to establish rebuttal of the Section 411(c)(4) presumption. Each of these physicians opined that claimant suffers from disabling chronic obstructive pulmonary disease (COPD) unrelated to coal dust exposure and due entirely to smoking. Director's Exhibit 20; Employer's Exhibits 3, 4, 5.

Contrary to employer's contention, we see no error in the administrative law judge's decision to give less weight to Dr. Fino's opinion to the extent that Dr. Fino relied on statistical averaging to exclude a diagnosis of legal pneumoconiosis.[6] Decision and Order at 18; Employer's Exhibit 4. The administrative law judge correctly observed that the Department of Labor (DOL) has concluded that statistical averaging conceals the fact that miners can suffer from severe respiratory disease even if the average loss of FEV1 per year

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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).

[5] There is no merit to employer's assertion that the administrative law judge rejected the opinions of Drs. Fino and Rosenberg because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found their opinions not credible because they were not adequately explained. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012) (holding that an administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

[6] The administrative law judge noted correctly that Dr. Fino cited to studies showing that only 6-8 percent of miners will have a "clinically significant" loss of FEV1. Director's Exhibit 20. Dr. Fino explained that smoking causes greater reductions in the FEV1 than suggested in the preamble to the revised 2001 regulations, and that because claimant had a large reduction in his FEV1, Dr. Fino attributed claimant's chronic obstructive pulmonary disease to smoking. *Id*.

is clinically insignificant. Decision and Order at 18, *citing* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *see also Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

The administrative law judge also accurately found that Dr. Rosenberg opined that claimant does not have legal pneumoconiosis based, in part, on his view that claimant's pulmonary function tests showed a significantly reduced FEV1/FVC ratio, a pattern of impairment that is generally consistent with smoking-induced obstruction and not impairment related to coal dust exposure. Employer's Exhibits 3, 4. Contrary to employer's contention, the administrative law judge permissibly discredited Dr. Rosenberg's rationale as it conflicts with the medical science credited by DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/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); *Cochran*, 718 F.3d at 323, 25 BLR at 2-264-65; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

Additionally, we affirm the administrative law judge's finding that the opinions of Drs. Fino and Rosenberg are insufficient to disprove legal pneumoconiosis because neither physician adequately explained why coal dust exposure did not also significantly contribute to, or substantially aggravate, claimant's COPD, even if it was primarily caused by smoking.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical evidence, and assigning it appropriate weight. *See Cochran*, 718 F.3d at 321, 25 BLR at 2-262; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-130. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's

[7] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg, it is not necessary that we address employer's remaining challenges as to the weight accorded those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

finding that employer failed to establish rebuttal of the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8]

Rebuttal - Disability Causation

The administrative law judge found that employer did not rebut the presumed fact of disability causation. Decision and Order at 20-21. Contrary to employer's contention, the administrative law judge permissibly rejected the opinions of Drs. Fino and Rosenberg regarding the cause of claimant's respiratory disability, as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504, 25 BLR 2-713, 2-720 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 21. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part of [claimant'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).

[8] Although the administrative law judge found that employer disproved the existence of clinical pneumoconiosis, employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

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