U.S. Department of Labor

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

BRB No. 18-0234 BLA

JEFFREY LYNN FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLOVERLICK COAL COMPANY	)	
	)	DATE ISSUED: 03/25/2019
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, 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 (2014-BLA-05145) of Administrative Law Judge William T. Barto, awarding benefits on a claim filed on December 3, 2012 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 accepted the parties' stipulation that claimant has twenty-seven years of qualifying coal mine employment,[1] and found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore determined that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 22. Accordingly, the Board will apply the law 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where he establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] "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). The definition includes "any chronic pulmonary disease or respiratory 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 conditions characterized by permanent

[his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. In evaluating whether employer met its burden, the administrative law judge considered Dr. Rosenberg's opinion.[5] Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from smoking-related chronic obstructive pulmonary disease (COPD), unrelated to coal mine dust exposure. Employer's Exhibit 1 at 8. The administrative law judge discredited Dr. Rosenberg's opinion because he found it inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 15. The administrative law judge also discredited his opinion because he found that Dr. Rosenberg failed to adequately explain how he eliminated claimant's twenty-seven years of coal mine dust exposure as a contributor to his disabling pulmonary impairment. *Id.* at 16. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

---

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] The administrative law judge also considered Dr. Alam's opinion. Decision and Order at 16. Dr. Alam diagnosed legal pneumoconiosis, in the form of emphysema/bronchitis due to both smoking and coal mine dust exposure. Director's Exhibit 12.

We reject employer's contention that the administrative law judge erred. Employer's Brief at 2-4. The administrative law judge correctly noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because he found a reduction in claimant's FEV1/FVC ratio which, in his opinion, was inconsistent with obstruction due to coal mine dust exposure.[6] Decision and Order at 15; Employer's Exhibit 1. The administrative law judge permissibly discredited Dr. Rosenberg's opinion because his reasoning for eliminating coal mine dust exposure as a source of claimant's obstructive pulmonary disease is in conflict with medical science accepted by the 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.[7] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 15. Because the administrative law judge permissibly discounted Dr. Rosenberg's opinion,[8] we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. We therefore affirm his determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

[6] Dr. Rosenberg attributed claimant's pulmonary abnormality to smoking and not coal mine dust exposure because claimant has a reduced FEV1/FVC ratio and "[e]pidemiological studies . . . establish that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio generally is preserved," and "[i]n contrast, with smoking-related forms of [chronic obstructive pulmonary disease], the FEV1/FVC ratio is generally reduced." Employer's Exhibit 1 at 3 .

[7] Employer notes that Dr. Rosenberg's opinion "relies on studies and articles done since 2001 and were not available at the time the preamble was published." Employer's Brief at 4. Employer, however, does not challenge the Department of Labor's (DOL's) position, as articulated in the regulation's preamble, that coal mine dust exposure can also cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit "the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

[8] Because the administrative law judge provided a valid basis for discrediting Dr. Rosenberg's opinion, any error he may have made in discrediting his opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Rosenberg' opinion. Employer's Brief at 2-4.

The administrative law judge next addressed whether employer established rebuttal by proving 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). The administrative law judge permissibly found that the same reasons for which he discredited Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis also undercut the doctor's opinion that claimant's disabling impairment is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 17-18. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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