U.S. Department of Labor

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

BRB No. 15-0326 BLA

JOHN B. STEPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARIN COUNTY COAL CORPORATION	)	DATE ISSUED: 05/27/2016
	)	
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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6049) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim filed on May 12, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge initially determined that the subsequent claim was timely filed because the only time claimant was notified that he was totally disabled due to pneumoconiosis, without a pending claim, was less than three years before he filed his initial claim. The administrative law judge accepted employer's stipulation to nineteen years of coal mine employment, and found that all of claimant's work was performed at underground mining sites. The administrative law judge also determined that, although employer conceded that claimant is totally disabled, she would have independently determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge also found that employer did not rebut the presumption and awarded benefits accordingly, with benefits commencing in May 1997, the month in which she determined that the prior denial of benefits became final.

On appeal, employer argues that the administrative law judge did not properly weigh the evidence relevant to the existence of pneumoconiosis and total disability causation. Employer also asserts that the administrative law judge did not rationally resolve the conflicting evidence regarding claimant's smoking history. Further, employer maintains that the administrative law judge erred in designating May 1997 as the date for commencement of benefits.[3] Claimant responds, urging affirmance of the award of

[1] Claimant filed his initial claim on March 4, 1993. Director's Exhibit 1. This claim was finally denied by Administrative Law Judge Paul H. Teitler on May 3, 1996, because he determined that, although claimant established total disability at 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a) and 718.204(c). *Id*. Claimant did not take any additional action until filing the current claim. Director's Exhibit 2.

[2] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she has 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) (2012), as implemented by 20 C.F.R. §718.305.

[3] Employer indicates that it preserves for appeal the issue of whether the administrative law judge properly found that the subsequent claim was timely filed, acknowledging that her determination is consistent with the relevant case law. Employer's Brief at 3 n.2.

benefits and maintaining that the date for commencement of benefits is immaterial because claimant's federal black lung benefits were completely offset by an award of state workers' compensation benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer can rebut the Section 411(c)(4) presumption by establishing that claimant has neither legal[6] nor clinical[7] pneumoconiosis, or by establishing that "no part"

[4] We affirm, as unchallenged on appeal, the administrative law judge's crediting of claimant with nineteen years of coal mine employment at underground mine sites, and her findings that claimant established total disability at 20 C.F.R. §718.204(b)(2), and invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects 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).

[6] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis,

of claimant's "respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

A. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

The administrative law judge determined that the opinions of employer's experts, Drs. Dahhan and Rosenberg, that claimant does not have legal pneumoconiosis, are not well-reasoned or well-documented and are, therefore, insufficient to rebut the presumed existence of legal pneumoconiosis.[8] Decision and Order at 35-36; Employer's Exhibits 1, 9, 13, 14. Thus, she concluded that employer failed to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 36.

Employer contends that the administrative law judge did not clearly state the legal standard she applied to determine that employer failed to meet its burden on legal pneumoconiosis, and argues that the "rule out" standard is not applicable. Employer also maintains that Drs. Dahhan and Rosenberg provided well-reasoned and well-documented opinions, taking into account claimant's coal dust exposure and "significant 75 pack-year history of cigarette smoking." Employer's Brief at 14. Employer further asserts that their opinions are not inconsistent with the medical science credited by the Department of Labor (DOL) in the preamble to the 2001 regulations,[9] and that these physicians adequately explained the role of smoking in claimant's respiratory impairment.

> massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[8] Although the administrative law judge indicated that the x-ray evidence does not support a finding of clinical pneumoconiosis, that the biopsy evidence is consistent with a diagnosis of clinical pneumoconiosis, and that the CT scan evidence does not assist employer in establishing the absence of clinical pneumoconiosis, she did not explicitly render a finding as to whether employer rebutted the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 33, 37.

[9] Employer states, "[t]hese opinions are not *consistent* with the premises in the preamble." Employer's Brief at 17 (emphasis added). Nevertheless, it is apparent from the context of the sentence that employer meant to indicate that the opinions of Drs. Dahhan and Rosenberg are not *inconsistent* with the preamble.

Employer contends that, by discrediting the opinions of Drs. Dahhan and Rosenberg, the administrative law judge erroneously "transform[ed] the preamble's premise – that coal mine dust can cause [chronic obstructive pulmonary disease (COPD)] – into a rule of law that coal dust causes all COPD in retired miners and that it can never be distinguished from smoking[-]related COPD." Employer's Brief at 18. Further, employer challenges the administrative law judge's smoking history determination, particularly in light of Dr. Rasmussen's statement that "[i]f you go up to 66-pack years, then the relative impact of coal mine dust exposure is reduced and it may be reduced to a level that really wouldn't be significant." Employer's Brief at 16, *quoting* Employer's Exhibit 12 at 17.

Contrary to employer's assertion, the administrative law judge did not apply the "rule out" standard when evaluating rebuttal of the presumed existence of legal pneumoconiosis. Rather, with respect to rebuttal of total disability causation, she observed that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the party opposing entitlement must rule out pneumoconiosis as a contributing cause of the miner's totally disabling respiratory impairment. Decision and Order at 30. She also stated, with respect to rebuttal of the presumed existence of pneumoconiosis, that employer could rebut the presumption by "establish[ing] that the miner did not have pneumoconiosis as defined in the regulations." Decision and Order at 33; 20 C.F.R. §718.305(d)(1)(i). Moreover, in evaluating the opinions of employer's experts, that coal dust exposure was not a causative factor for claimant's disabling obstructive impairment, the administrative law judge ultimately determined that employer failed to rebut the presumption based on her findings that employer's doctors lacked credibility as to the source of claimant's disabling obstructive impairment, rather than their failure to meet a particular rebuttal standard. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984).

With respect to the administrative law judge's credibility determinations at 20 C.F.R. §718.305(d)(1)(i)(A), we affirm her findings that the opinions of Drs. Dahhan and Rosenberg are insufficient to rebut the presumed existence of legal pneumoconiosis, as those findings are rational and supported by substantial evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Dr. Dahhan reported that claimant has an entirely obstructive impairment that is "associated with a loss of 1500cc of the FEV1 which is an amount that cannot be accounted for by the inhalation of coal dust which is estimated by Dr. Attfield and associate to be 5-9cc of loss in the FEV1 per year of coal dust exposure." Employer's Exhibit 1. Dr. Dahhan then attributed claimant's impairment solely to cigarette smoking, stating that claimant's "smoking habit is sufficient to cause significant loss in his FEV1 according to the literature." *Id.* However, the administrative law judge permissibly found that Dr. Dahhan's opinion was not adequately reasoned because he did

not explain why coal dust inhalation could not have been a contributing cause of claimant's reduced FEV1. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); Decision and Order at 36; Employer's Exhibits 1, 13 at 17-18.

The administrative law judge also acted within her discretion in giving less weight to Dr. Rosenberg's opinion, based on his statement that coal dust exposure could not be the cause of the significant reductions in claimant's FEV1 and FEV1/FVC ratios. Decision and Order at 36; Employer's Exhibits 9, 14. The administrative law judge rationally found that Dr. Rosenberg's views are inconsistent with the DOL's observation in the preamble to the 2001 regulations that coal dust exposure can cause obstruction as measured by a decreased FEV1 and FEV1/FVC ratio.[10] 65 Fed. Reg. 69,920, 79,943 (Dec. 20 2000); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014).

We also reject employer's argument that the administrative law judge erred in finding that claimant's smoking history is, "at most," forty-five pack-years, rather than the seventy-five or more pack-years alleged by employer. Decision and Order at 5; Employer's Brief at 18. Employer has not explained how a finding of a substantially longer smoking history would have negated the administrative law judge's valid rationales for discrediting the opinions of Drs. Dahhan and Rosenberg.[11] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it]

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[10] The Department of Labor stated:

> 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. 69,930, 79,943 (Dec. 20 , 2000) (emphasis added).

[11] Dr. Dahhan indicated that claimant smoked one pack per day for twenty-five years. Employer's Exhibit 1. Dr. Rosenberg examined claimant and reviewed medical records that included reports of a smoking history of over seventy-five pack years. Employer's Exhibit 9.

points could have made any difference"). We hold, therefore, that error, if any, in the administrative law judge's finding that claimant established, "at most," a forty-five pack-year smoking history is harmless. Decision and Order at 5; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni*, 6 BLR at 1-1277. Consequently, we affirm the administrative law judge's determination that employer did not rebut the presumed existence of legal pneumoconiosis.[12]

B. Rebuttal of Total Disability Causation

At 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge acted within her discretion in giving less weight to the opinions of Drs. Dahhan and Rosenberg that claimant is not totally disabled due to legal pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See 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); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's totally disabling respiratory impairment is due to pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii), and we further affirm the award of benefits.

II. Commencement of Benefits

The administrative law judge found claimant entitled to benefits commencing in May of 1997, the month in which she determined that the prior denial of benefits, issued by Administrative Law Judge Paul H. Teitler on May 3, 1996, became final. The administrative law judge explained:

> Judge Teitler found that the Claimant was disabled by obstructive disease, but not entitled to benefits, in May 1996. There is no evidence that the Claimant was not disabled at any subsequent time. I have found that both coal mine dust exposure and smoking contributed to the Claimant's

[12] Because employer did not rebut the presumed existence of legal pneumoconiosis, we need not address employer's argument that the administrative law judge should have found that employer affirmatively established that claimant does not have clinical pneumoconiosis. Because the party opposing entitlement must establish that claimant does not have legal *and* clinical pneumoconiosis, proof of the absence of only one form of the disease is unavailing. 20 C.F.R. §718.305(d)(1)(i).

> disabling obstructive disease; thus I conclude that he was disabled due to pneumoconiosis even when Judge Teitler denied his claim.

Decision and Order at 38.

Employer argues that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), because she did not explain her finding that Judge Teitler's denial was based on a mistake in a determination of fact as to total disability causation.[13] In addition, employer asserts that the administrative law judge's selection of May 1997 was arbitrary because, pursuant to 20 C.F.R. §725.479(a), Judge Teitler's May 3, 1996 Decision and Order denying benefits actually became final in June 1996.[14] Employer further contends that there is no evidence supporting a commencement date prior to the May 2010 filing of the subsequent claim. Finally, employer maintains that the administrative law judge's determination amounts to an invalidation of the prior denial and, if affirmed, the current claim must be dismissed as untimely under 20 C.F.R. §725.308(a). In response, claimant states that the issue of the proper commencement date is "immaterial" because he is "in a complete offset of federal black lung benefits and [] is not in payment status." Claimant's Brief at 12.

Generally, an issue is considered "moot" when it no longer presents a justiciable controversy because it has become academic or settled. *See Sigma Chi Fraternity v. Regents of University of Colo.*, 258 F.Supp. 515, 523 (D. Colo. 1966). In such cases, the Board refrains from deciding the issue because of the well-established policy in federal practice against issuing advisory opinions. *See*, *e.g.*, *Andrews v. Petroleum Helicopters,*

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[13] Employer also contends that the administrative law judge's onset date determination violates 20 C.F.R. §725.477(b), requiring that a decision and order "contain a statement of the basis of the order, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge." Employer's Brief at 22 n.8, *quoting* 20 C.F.R. §725.477(b).

[14] The regulation at 20 C.F.R. §725.479(a) provides:

> A decision and order shall become effective when filed in the office of the district director, and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing.

20 C.F.R. §725.479(a) (internal citations omitted).

Inc., 15 BRBS 166 (1982). In this case, we agree with claimant that, in light of his receipt of state workers' compensation benefits since 1991, and the total offset of any federal black lung benefits as long as the state benefit payments continue, there is no real controversy for us to decide. *See* Director's Exhibit 8. We decline to reach, therefore, the issue of whether the administrative law judge properly designated May 1997 as the date of commencement of benefits.[15]

[15] Although we do not decide the issue of the appropriate date for commencement of benefits, we observe that, contrary to employer's assertion, in the context of a subsequent claim, a prior denial is assumed to be correct, and any medical opinions contrary to an administrative law judge's determination that the claimant did not establish an element, or elements, of entitlement are considered misdiagnoses. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009). Thus, a medical opinion diagnosing total disability due to pneumoconiosis that was considered by Judge Teitler cannot trigger the running of the three-year time limit for filing a subsequent claim under 20 C.F.R. §725.308.

In all other material respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge