U.S. Department of Labor

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

BRB No. 16-0413 BLA

JAMES E. ADKINS Claimant-Respondent v. KERMIT COAL COMPANY and ST. PAUL FIRE & MARINE INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/02/2017 DECISION and ORDER

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

Carl M. Brashear (Hoskins Law Offices), Lexington, Kentucky, for employer.

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

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5792) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on November 26, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment, and found that the new evidence submitted in this subsequent claim established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the pulmonary function tests established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred

[1] Claimant's first claim for benefits, filed on February 27, 1996, was denied by the district director on June 3, 1996 for failure to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim for benefits, filed on October 23, 2007, was denied by the district director on September 22, 2008 on the same basis. Director's Exhibit 2. Claimant took no further action until the filing of his current claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more years in underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

in finding that it did not rebut the presumption. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief.[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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

In determining that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the pulmonary function studies obtained by Drs. Gaziano and Dahhan, and found that "all of the admitted pulmonary function studies 'qualified'…". Decision and Order at 13. While employer does not challenge the administrative law judge's finding that Dr. Gaziano's studies produced qualifying values, employer asserts that the administrative law judge incorrectly characterized Dr. Dahhan's pulmonary function studies as "qualifying."[6] Employer's Brief at 3-4. We disagree.

Employer correctly notes that Dr. Dahhan's FEV1 values are qualifying both pre-bronchodilation and post-bronchodilation, but that his FVC values and FEV1/FVC ratios are non-qualifying.[7] Employer's Brief at 3; Employer's Exhibit 1. However, because

[4] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] Employer notes that a 67-year-old man with a height of 68.5 inches with qualifying FEV1 values of 1.82 or less also needs to have an FVC value of 2.34 or less, or an FEV1/FVC ratio of 55% or less, in order for his pulmonary function study to be qualifying. Employer's Brief at 13. As Dr. Dahhan's pulmonary function study produced FVC values of 2.79 pre-bronchodilation and 2.86 post-bronchodilation, and the

claimant's MVV values of 44 pre-bronchodilation and 33 post-bronchodilation are below 73, both the FEV1 values and MVV values are, in fact, qualifying for a miner of claimant's age, sex, and height at the time the test was administered.[8] *See* 20 C.F.R. §718.204(b)(2)(i), Appendix B to 20 C.F.R. Part 718. Thus, we reject employer's argument that the administrative law judge mischaracterized Dr. Dahhan's pulmonary function studies.[9]

Employer additionally argues that the administrative law judge erred in failing to discuss Dr. Rosenberg's pulmonary function studies submitted post-hearing with his medical report. As Dr. Rosenberg's pulmonary function studies also produced qualifying values,[10] however, employer has not shown how the administrative law judge's error made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because substantial evidence supports the administrative law judge's finding that "all of the admitted pulmonary function studies

---

FEV1/FVC ratios were 55.9% and 56.6%, respectively, employer maintains that this study is not qualifying. *Id.*; Employer's Exhibit 1.

[8] The administrative law judge did not resolve the height discrepancy recorded on the pulmonary function studies as required by the United States Court of Appeals for the Fourth Circuit in *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge's error is harmless, however, as claimant's pulmonary function studies produced qualifying values at both of his recorded heights of 67 inches and 68.5 inches. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] Dr. Dahhan also stated, "From a respiratory standpoint, [claimant] does not retain the physiological capacity to return to his previous coal mining work . . . based on the pulmonary function studies data." Employer's Exhibit 1 at 2.

[10] Dr. Rosenberg's pulmonary function study produced an FEV1 of 1.38 and an MVV of 31 pre-bronchodilation, and an FEV1 of 1.51 and an MVV of 35 post-bronchodilation. Employer's Exhibit 8. Dr. Rosenberg recorded claimant's age as 71 and his height at 67 inches. *Id.* In order to qualify, claimant needed to have an FEV1 of 1.66 or less at 67 inches, or an FEV1 of 1.76 or less at 68.5 inches, plus an MVV of 67 or less at 67 inches, or an MVV of 70 or less at 68.5 inches. Thus, the pulmonary function study administered by Dr. Rosenberg is qualifying regardless of the height used. Dr. Rosenberg concluded that claimant's "pulmonary function tests reveal severe airflow obstruction" and that claimant "has [a] disabling respiratory impairment." Employer's Exhibit 8 at 2, 7.

'qualified'," we affirm his finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer has raised no other allegation of error with respect to the administrative law judge's finding that claimant established the existence of a totally disabling respiratory or pulmonary impairment. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[11] 20 C.F.R. §718.305(d)(1)(i), or 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).

Employer contends that the administrative law judge erred in discounting the medical opinions of Drs. Dahhan and Rosenberg as to whether employer rebutted the existence of legal pneumoconiosis and disability causation. Employer's Brief at 5. We disagree. Drs. Dahhan and Rosenberg opined that claimant does not have either clinical or legal pneumoconiosis, but has a totally disabling pulmonary impairment attributable solely to smoking. Employer's Exhibits 1, 4, 7, 8. The administrative law judge discredited both opinions because he found that each was inconsistent with the scientific

[11] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "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 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).

evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulations. Decision and Order at 15-17.

The administrative law judge permissibly discounted Dr. Dahhan's opinion because he excluded coal dust exposure as a cause of the miner's disabling pulmonary impairment on the ground that the impairment was "purely obstructive with no restrictive component . . ." Decision and Order at 15; Employer's Exhibit 1 at 3. Given that the preamble to the 2001 regulations recognizes that coal dust exposure can cause either obstructive or restrictive impairments, Dr. Dahhan's opinion is inconsistent with the preamble and the regulations. *See* 20 C.F.R. §718.201(a)(2) (The definition of legal pneumoconiosis includes "any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment.") (emphasis added); 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012).

The administrative law judge next considered Dr. Rosenberg's opinion that coal dust exposure could be excluded as a cause of claimant's impairment because "smoking is dramatically more destructive than coal dust" and because the pattern of claimant's reduced FEV1 with a severely reduced FEV1/FVC ratio is seen with smoking but not coal dust exposure. Decision and Order at 16; Employer's Exhibit 8. The administrative law judge rationally found that Dr. Rosenberg's reliance, in part, on generalized studies showing that smoking causes greater damage than coal dust does not prove that coal dust exposure was not a contributing cause of the impairment in claimant's specific case. Decision and Order at 17; *see Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Further, the administrative law judge permissibly discounted Dr. Rosenberg's opinion as being inconsistent with the medical science credited by the DOL in the preamble, recognizing that coal dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. Decision and Order at 16; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-655, 2-656 (6th Cir. 2014).

Contrary to employer's assertion, the fact that Dr. Rosenberg cited more recent medical literature did not require the administrative law judge to conclude that advancements in science have invalidated the medical science addressing the effects of coal mine dust exposure on the lungs that was found credible and relied upon by the DOL in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"). As substantial evidence supports the administrative law judge's credibility determinations, and employer raises no additional allegations of error, we affirm the administrative law judge's findings that employer failed to rebut the Section

411(c)(4) presumption and that claimant is entitled to benefits. 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, 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