U.S. Department of Labor

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

BRB No. 16-0589 BLA

CURTIS BROCK (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	DATE ISSUED: 05/03/2017
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH c/o CHARTIS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 J. King, Administrative Law Judge, United States Department of Labor.

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

Bonnie Hoskins (Hoskins Law Office, PLLC), Lexington, Kentucky, 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 (2013-BLA-05803) of Administrative Law Judge William J. King awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on August 2, 2012.

The administrative law judge credited claimant[1] with twenty years of underground coal mine employment,[2] and found that the evidence established that claimant suffers from 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 Section 411(c)(4) presumption.[3] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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

[1] Claimant died on July 5, 2014, while his claim was pending before the administrative law judge. Decision and Order at 2.

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3; Claimant's Exhibit 4 at 34. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant had neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or by establishing 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 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 it is 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 does 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.

In considering whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinion of Dr. Rosenberg.[6] In his reports, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) due to cigarette smoking and asthma. Employer's Exhibits 3, 5. The administrative law judge discounted Dr. Rosenberg's opinion because he found the doctor's reasons for concluding

[5] "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). "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).

[6] The administrative law judge also considered Dr. Alam's opinion that claimant suffers from legal pneumoconiosis, but noted that it does not assist employer in rebutting the presumption. Decision and Order at 19; Director's Exhibit 10; Employer's Exhibit 4.

that claimant's COPD was not due to coal mine dust exposure to be unpersuasive. Decision and Order at 19-21.

Dr. Rosenberg relied, in part, on the fact that claimant had a disproportionately reduced FEV1/FVC ratio.[7] Employer's Exhibit 3 at 3-4. The administrative law judge discounted this aspect of Dr. Rosenberg's opinion as inconsistent with the position of the Department of Labor (DOL) that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); Decision and Order at 19-20. Employer argues that "[w]hile the medical science in 1969 may have been that a reduced FEV1/FVC ratio is appropriate for measuring impairment due to coal dust exposure, the current prevalent thinking, as outlined by Dr. Rosenberg, is that it is not." Employer's Brief at 5. Contrary to employer's contention, the administrative law judge "was entitled to consider the DOL's position and to discredit Dr. Rosenberg's [opinion] because it was inconsistent with the DOL position set forth in the preamble to the applicable regulation."[8] *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012).

The administrative law judge also noted that Dr. Rosenberg relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment. Decision and Order at 20. The administrative law judge permissibly found that Dr. Rosenberg did not adequately explain why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-

[7] In attributing claimant's chronic obstructive pulmonary disease to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg specifically opined that "while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio generally is preserved." Employer's Exhibit 3 at 3. Specific to claimant's situation, Dr. Rosenberg noted that claimant's "FEV1 was significantly reduced to 50% predicted with a marked reduction of his FEV1/FVC ratio down to around 50% (preserved ratio 70% or higher)." *Id*. at 4.

[8] In its brief, employer does not dispute the substance of the Department of Labor's position in the preamble, nor has employer submitted "the type and quality of evidence that would invalidate the [Department of Labor's] position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92, 25 BLR 2-633, 2-645 (6th Cir. 2014) (internal quotation marks omitted).

483 (6th Cir. 2007); Decision and Order at 20. As the administrative law judge permissibly discounted Dr. Rosenberg's opinion,[9] we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

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 suffer from legal pneumoconiosis also undercut the doctor's opinion that claimant's disabling impairment is unrelated to his coal mine employment. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order at 21. 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)(2)(ii).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

[9] Because the administrative law judge provided valid bases for according less weight to Dr. Rosenberg's opinion, we need not address employer's remaining arguments regarding the weight he accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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