U.S. Department of Labor

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

BRB Nos. 18-0364 BLA
and 18-0364 BLA-A

RICHARD LEE FLUTY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SMC COAL TERMINAL COMPANY PIER,	)	
Self-Insured Through SHELL COAL &	)	
TERMINAL COMPANY, c/o ST. PAUL	)	
TRAVELERS BOND & FINANCIAL	)	DATE ISSUED: 05/24/2019
	)	
Employer/Carrier-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals and claimant cross-appeals the Decision and Order (2017-BLA-05115) of Administrative Law Judge John P. Sellers, III, awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on December 18, 2013.

The administrative law judge accepted the parties' stipulation that claimant has twenty-three years of underground coal mine employment,[1] and found claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore determined claimant invoked the 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 employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding 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 (the Director), has not filed a response brief. In his cross-appeal, claimant contends the administrative law judge erred in finding that employer established that claimant does not have clinical pneumoconiosis. Neither employer nor the Director has filed a brief in response to claimant's cross-appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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).

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged, 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).

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 establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of [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.

To disprove legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung disease or impairment "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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered Dr. Rosenberg's opinion[5] that claimant does not have legal pneumoconiosis, but suffers from smoking-related chronic obstructive pulmonary disease (COPD), unrelated to coal mine dust exposure. Director's Exhibit 15; Employer's Exhibit 2.

The administrative law judge accurately noted Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD in part because claimant's reduced FEV1/FVC ratio is inconsistent with obstruction due to coal mine dust exposure.[6] Decision

[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 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. Forehand's opinion that claimant has legal pneumoconiosis in the form of obstructive lung disease due to coal mine dust exposure and cigarette smoking. Decision and Order at 7-9; Claimant's Exhibit 2 at 8-9.

[6] In attributing claimant's chronic obstructive pulmonary disease to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg explained that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio is generally preserved. Director's Exhibit 15 at 3; Employer's Exhibit 2 at 4. He opined that the severe

and Order at 16-18; Director's Exhibit 15; Employer's Exhibit 2. The administrative law judge permissibly discredited his reasoning because it conflicts with the medical science accepted by the Department of Labor that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio.[7] *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 17.

The administrative law judge also accurately noted Dr. Rosenberg excluded coal dust exposure as a cause of claimant's obstructive impairment based in part on the partial reversibility of claimant's impairment after the administration of a bronchodilator. Decision and Order at 18; Director's Exhibit 15; Employer's Exhibit 2. The administrative law judge found, within his discretion, that Dr. Rosenberg failed to adequately explain why the irreversible portion of claimant's pulmonary impairment, which remained totally disabling after bronchodilation, was not due in part to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling impairment.[8] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

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reduction in claimant's FEV1/FVC ratio is not characteristic of obstruction related to coal mine dust exposure. *Id.*

[7] Employer notes that Dr. Rosenberg "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 assert it has submitted "the type and quality of medical evidence that would invalidate the DOL's position" that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *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] The administrative law judge accurately noted claimant's pulmonary function studies conducted on February 27, 2014 and November 16, 2015 produced qualifying results even after the administration of a bronchodilator. Decision and Order at 7, 18; Director's Exhibits 11, 14. A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Because the administrative law judge permissibly discounted Dr. Rosenberg's opinion,[9] we affirm his finding that employer failed to establish claimant does not have legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have 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 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 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 19-20. Therefore, we affirm the administrative law judge's determination that employer failed to disprove disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii).

[9] Because the administrative law judge provided valid bases for discrediting Dr. Rosenberg's opinion, any error he may have made in discrediting his opinion 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.

[10] Therefore, we need not address claimant's contentions of error regarding the administrative law judge's findings with respect to the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge