U.S. Department of Labor

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

BRB No. 15-0068 BLA

MELVIN E. MUNCY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	DATE ISSUED: 11/23/2015
	)	
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 on Second Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2010-BLA-5031) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed on December 24, 2008, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act).[1] This case is before the Board for the third time. In its most recent decision, the Board held that the administrative law judge "did not specifically address whether the opinions of Drs. Rosenberg and Castle submitted by employer are sufficiently documented and reasoned to establish rebuttal" of the amended Section 411(c)(4) presumption by affirmatively proving that no part of claimant's total respiratory disability is due to pneumoconiosis.[2] *Muncy v. Elkay Mining Co.*, BRB No. 13-0007 BLA, slip op. at 6 (Sept. 17, 2013) (unpub.); *see* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Therefore, the Board vacated the denial of benefits and specifically remanded the case to the administrative law judge to reconsider whether employer rebutted the presumed fact that claimant is totally disabled due to pneumoconiosis.[3] *Muncy*, slip op. at 4 n.4, 6.

On remand, the administrative law judge reconsidered the opinions of Drs. Rosenberg and Castle, the only medical opinions indicating that claimant is not totally disabled due to pneumoconiosis, and concluded that they were insufficient to establish rebuttal of the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that the opinions of Drs. Rosenberg and Castle were insufficient to rebut the presumed

[1] At claimant's request, his cross-appeal was dismissed by the Board. *Muncy v. Elkay Mining Co.*, BRB No. 15-0068 BLA-A (Apr. 29, 2015) (unpub. Order).

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] The administrative law judge found in his 2012 Decision and Order on Remand that, because the x-ray readings and medical opinions were in equipoise regarding the existence of clinical pneumoconiosis, employer did not carry its burden to disprove the existence of pneumoconiosis. 2012 Decision and Order on Remand at 5; *see* 20 C.F.R. §718.305(d)(1)(i).

fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii). In addition, employer asserts that the administrative law judge selectively weighed the opinions and qualifications of the physicians in order to award benefits in the current decision, without reconciling the award with his denial of benefits in his previous decision.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a brief asserting that the administrative law judge's discrediting of the medical opinions of employer's experts was within his discretion.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[6] 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).

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[4] Employer initially alleged that the administrative law judge applied an improper standard on rebuttal. Employer's Brief in Support of Petition for Review at 6-16. However, in its reply brief, employer acknowledged that, based on recent case law, the administrative law judge applied the correct standard by requiring employer to prove that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. Employer's Reply Brief at 3-4; *see Minich v. Keystone Mining Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, BLR (4th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, BLR (4th Cir. 2015). However, employer indicated that should the case law change, this issue is preserved for a future appeal.

[5] In the 2012 Decision and Order on Remand, the administrative law judge found that claimant established fifteen years and eight months of qualifying coal mine employment in an underground coal mine, or on the surface at an underground mine. 2012 Decision and Order on Remand at 2-3. Based on this finding, and the Board's affirmance of the finding of total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant invoked the rebuttable presumption at amended Section 411(c)(4). *Id.* at 3-4; *see Muncy v. Elkay Mining Co.*, BRB No. 11-0187 BLA, slip op. at 3 n.2 (Nov. 30, 2011).

[6] Claimant's coal mine employment was in West Virginia. Director's Exhibit 3; Hearing Transcript at 29. 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).

Employer first alleges that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Castle under 20 C.F.R. §718.305(d)(1)(ii) because they relied on claimant's decreased FEV1/FVC ratio to exclude legal pneumoconiosis[7] as a contributing cause of his total respiratory disability. This argument has no merit. The administrative law judge acknowledged Dr. Rosenberg's statement that he ruled out legal pneumoconiosis as a cause of claimant's totally disabling obstructive impairment, because he exhibited a significant reduction in his FEV1/FVC ratio, which Dr. Rosenberg identified as characteristic of obstruction due solely to smoking. Decision and Order on Second Remand at 3; Employer's Exhibits 1, 5, 7 (at 15-16, 19, 21). The administrative law judge also indicated correctly that Dr. Castle agreed with Dr. Rosenberg on this issue. Decision and Order on Second Remand at 3; Employer's Exhibits 2, 4. The administrative law judge permissibly found that the physicians' shared opinion conflicts with the medical science the Department of Labor (DOL) cited in the preamble to the 2001 revised regulations, which holds that reductions in the FEV1/FVC ratio are evidence of an obstructive impairment that could be caused by coal dust exposure. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order on Second Remand at 3-4.

We also reject employer's contention that the administrative law judge erred in relying on *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227 (4th Cir. 2004) (unpub.), to discredit the opinions of Drs. Rosenberg and Castle, that the post-bronchodilator reversibility of claimant's respiratory impairment does not support the diagnosis of a disabling impairment caused by legal pneumoconiosis. The administrative law judge did not state that the court held that every miner's post-bronchodilator residual impairment is due to coal dust exposure. To the contrary, he cited the court's decision in support of his rational determination that Drs. Rosenberg and Castle failed to adequately explain how the partial reversibility of claimant's impairment excluded legal pneumoconiosis as a contributing cause of the impairment that remained.[8] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order on Second Remand at 4.

[7] "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).

[8] Dr. Rosenberg stated that claimant "had an improvement of 24% of ventilatory function," which "is not consistent with the presence of legal [coal workers' pneumoconiosis]." Employer's Exhibit 5. Dr. Castle noted that "[t]he significant degree of bronchoreversibility is also indicative of tobacco smoke induced airways disease rather

Additionally, employer is incorrect in contending that the administrative law judge relied on Dr. Rasmussen's opinion, that air trapping seen on blood gas studies can result from legal pneumoconiosis, to discredit the contrary opinions of Drs. Rosenberg and Castle, without explaining why Dr. Rasmussen's opinion was more credible. Rather, the administrative law judge observed:

> Dr. Rasmussen doesn't disagree [with Drs. Rosenberg and Castle] that increased CO2 and air trapping can be caused by cigarette smoking, but he adds that any type of severe airway obstruction can lead to higher CO2 levels and air trapping. On cross-examination, Dr. Rosenberg agreed that one can get some air trapping in coal mine dust induced [chronic obstructive pulmonary disease], and that air trapping can't differentiate cigarette smoking from coal dust exposure.

Decision and Order on Second Remand at 4; *see* Claimant's Exhibit 2 at 28; Employer's Exhibit 7 at 28.

Finally, we reject employer's contention that the administrative law judge "selectively analyzed the physicians' assessments and qualifications to award benefits in his 2014 decision without adequately addressing the factors he had relied on to deny benefits in his 2012 decision." Employer's Brief in Support of Petition for Review at 26. The Board instructed the administrative law judge to "specifically address" on remand:

> [W]hether the opinions of Drs. Rosenberg and Castle are sufficiently documented and reasoned to meet employer's burden to establish rebuttal. In this regard, the administrative law judge must consider the credibility of the physician's explanations, the documentation underlying their medical judgements, and the sophistication of, and bases for, their diagnoses, and must explain his findings.

Muncy, slip op. at 6. Contrary to employer's contention, the administrative law judge complied with this instruction by rationally determining that the medical opinions of Drs. Rosenberg and Castle are insufficient to establish that claimant's totally disabling respiratory impairment was not due to legal pneumoconiosis, and that Dr. Rasmussen's opinion is entitled to more weight, based on his greater experience in studying and treating pneumoconiosis.[9] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Adkins v.*

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than a fixed process such as coal mine dust induced airway obstruction." Employer's Exhibit 2.

[9] The administrative law judge found:

Director, OWCP, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order on Second Remand at 3-6.

Further, the administrative law judge did not, as employer alleges, render the 20 C.F.R. §718.305 presumption irrebuttable. Rather, the administrative law judge acted within his discretion as fact-finder in evaluating the medical evidence and rendering determinations as to their credibility and probative weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Rosenberg and Castle are insufficient to rebut, pursuant to 20 C.F.R. §718.305(d)(1)(ii), the presumed fact that claimant's total respiratory disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201.[10] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. In light of the administrative law judge's prior determination that employer did not rebut the presumed

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> [A]fter another look at the qualifications of the physicians, I find that Dr. Rasmussen's qualifications are superior. Dr. Rasmussen is Board-certified in internal medicine and specializes in pulmonary medicine. Dr. Rasmussen has an impressive background in the study and treatment of coal dust induced lung diseases. He has served on committees and published articles studying black lung disease. He has been an Assistant Professor of Medicine at Marshall University School of Medicine. His committee appointments include the Coal Mine Health Research Committee of [The National Institute for Occupational Safety and Health] [(]NIOSH[)], and he has been a consultant to NIOSH on the Respirable Coal Dust Criteria Document. He has testified before the Labor Subcommittee of the U.S. House of Representatives and the U.S. Senate. His published articles on black lung include, *An Analysis of the Effects of Smoking and Occupational Exposure on Spirometry and Arterial Blood Gases in Bituminous Coal Miners in Southern West Virginia*, Rasmussen et al., 1990, and *Lung Impairment in Non-smoking and Smoking Coal Miners*, Rasmussen et al., in American Review of Respiratory Diseases.
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> Drs. Rosenberg and Castle also have excellent qualifications as they are both Board-certified in internal medicine and pulmonary medicine, but their experience with, and study in, the area of occupational pneumoconiosis does not match that of Dr. Rasmussen.

Decision and Order on Second Remand at 5-6.

[10] Employer raises a number of additional allegations of error regarding the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Castle, and

his crediting of Dr. Rasmussen's opinion. We decline to address these contentions, because the administrative law judge has provided valid reasons for finding that the opinions of Drs. Rosenberg and Castle are insufficient to rebut the amended Section 411(c)(4) presumption. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

existence of pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i), we further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Second Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge