U.S. Department of Labor

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

BRB No. 15-0102 BLA

STARLING BOWLING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEY MINING, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 11/17/2015
	)	
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 Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (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/carrier (employer) appeals the Decision and Order (13-BLA-5218) of Administrative Law Judge Pamela J. Lakes 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 subsequent claim filed on February 17, 2012.[1]

The administrative law judge credited claimant with twenty-eight years of underground coal mine employment,[2] and accepted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on those findings, the administrative law judge determined that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed six prior claims, all of which were finally denied. Director's Exhibit 1. Claimant's most recent prior claim, filed on June 13, 2007, was denied by an administrative law judge on September 3, 2009, because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id*.

[2] The record indicates that claimant's coal mine employment was in Kentucky and Tennessee. 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).

[3] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption based on the medical opinion evidence. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the award of benefits. In a reply brief, employer reiterates its previous contentions.[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. 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have either legal or 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.

Rebuttal of Pneumoconiosis

In addressing whether employer disproved the existence of clinical and legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that employer is the responsible operator, that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption, and that employer failed to establish that claimant does not have clinical pneumoconiosis based on the x-ray evidence. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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). 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).

Broudy and Rosenberg.[6] Dr. Broudy diagnosed claimant with severe hypoxemia due to "[i]nterstitial pulmonary fibrosis of undetermined etiology." Employer's Exhibit 2 at 3. Noting that claimant's chest x-rays revealed linear opacities with few rounded opacities, Dr. Broudy stated that "[t]he cause of the interstitial fibrosis is unclear, since the findings are non-specific," adding that the "radiographic appearance is not that of typical coal workers' pneumoconiosis or silicosis." Employer's Exhibit 2 at 4. Additionally, Dr. Broudy diagnosed claimant with chronic obstructive pulmonary disease (COPD), but did not discuss the cause of that disease. *Id.*

Dr. Rosenberg opined that claimant does not have clinical or legal pneumoconiosis. Noting that claimant's x-rays revealed linear interstitial scarring, and that claimant has a decreased diffusion capacity, Dr. Rosenberg opined that claimant has an interstitial lung disease lacking "the characteristics of a coal mine dust related disorder." Employer's Exhibit 1 at 11-12. Dr. Rosenberg concluded that claimant instead has x-ray changes of "one of the interstitial pneumonias such as nonspecific interstitial pneumonitis," unrelated to coal mine dust exposure. Employer's Exhibit 1 at 13. Additionally, Dr. Rosenberg diagnosed claimant with "airflow obstruction with marked bronchodilator response." *Id*. Dr. Rosenberg opined that "[i]mprovement with bronchodilators . . . does not relate to past coal mine dust exposure. The chronic airway scarring by mineral dust (Churg and Wright) would not be expected to be associated with improvement after bronchodilators." *Id.*

The administrative law judge found that the opinions of Drs. Broudy and Rosenberg were "equivocal and unsatisfactorily reasoned." Decision and Order at 18. Specifically, the administrative law judge found that the physicians failed to provide credible reasons for concluding that claimant's lung fibrosis did not constitute clinical pneumoconiosis, and that they did not adequately address whether claimant's years of coal mine dust exposure contributed to or aggravated his lung fibrosis or his COPD. *Id.* at 18-21. Accordingly, the administrative law judge concluded that the medical opinions failed to establish that claimant has neither clinical nor legal pneumoconiosis.

Employer contends that the administrative law judge erred in discounting the opinions of Drs. Broudy and Rosenberg, arguing that they unequivocally diagnosed claimant with idiopathic pulmonary fibrosis and, using sound medical reasoning, excluded coal mine dust as a factor in claimant's lung disease. Employer's Brief at 8-18. Employer's allegation of error lacks merit.

[6] The administrative law judge also considered Dr. Habre's opinion diagnosing claimant with clinical pneumoconiosis, and with legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Director's Exhibit 11.

The administrative law judge accurately noted that Drs. Broudy and Rosenberg opined that claimant does not have pneumoconiosis because the opacities seen on his x-rays are predominantly linear, not rounded as would be expected with coal workers' pneumoconiosis or silicosis. The administrative law judge, however, permissibly found their reasoning unpersuasive because the regulations do not require the presence of rounded opacities on an x-ray in order for the x-ray to constitute evidence of pneumoconiosis. *See* 20 C.F.R. §718.102(d); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Further, the administrative law judge permissibly found that, even assuming that x-ray findings of linear opacities would not be typical or expected in coal miners, Drs. Broudy and Rosenberg did not adequately explain why claimant is not one of the rare cases of a coal miner who has developed a type of pneumoconiosis showing linear opacities on an x-ray. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104 (7th Cir. 2008). Additionally, the administrative law judge rationally discounted Dr. Broudy's opinion that claimant's x-ray abnormalities are not typical of pneumoconiosis because they progressed years after claimant was no longer exposed to coal mine dust. The administrative law judge permissibly found the doctor's reasoning to be at odds with the regulatory recognition of pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-40, 25 BLR 2-675, 2-684-87 (6th Cir. 2014). Moreover, the administrative law judge acted within her discretion when she found that neither Dr. Broudy nor Dr. Rosenberg adequately explained why claimant's twenty-eight years of coal mine dust exposure did not contribute to, or aggravate, his interstitial fibrosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007); *see also Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013)(holding that the administrative law judge permissibly found that the employer's physicians did not adequately explain why claimant's interstitial fibrosis did not constitute legal pneumoconiosis); 20 C.F.R. §718.201(b).

With respect to claimant's COPD, substantial evidence supports the administrative law judge's finding that Drs. Broudy and Rosenberg did not adequately explain why claimant's years of coal mine dust exposure did not contribute to, or aggravate, his obstructive impairment. Review of the record reflects that Dr. Broudy did not address the etiology of the COPD he diagnosed. Employer's Exhibit 2 at 4. Thus, his opinion does not assist employer in carrying its burden to rebut the presumption that claimant's COPD is legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(b). Dr. Rosenberg opined that improvement with bronchodilators would not be expected with

coal mine dust exposure. Employer's Exhibit 1 at 13. Given that it is employer's burden to affirmatively show that claimant's COPD is not legal pneumoconiosis, *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011), the administrative law judge permissibly found that Dr. Rosenberg did not provide an adequate explanation for why claimant's twenty-eight years of coal mine dust exposure was not a contributing or aggravating factor to his COPD. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Moreover, as the Director notes, in light of Dr. Rosenberg's failure to explain why coal mine dust exposure was not a cause of the residual impairment that was still present even after bronchodilation, the administrative law judge reasonably found that Dr. Rosenberg's opinion was not credible. *See Barrett*, 478 F.3d at 355-356, 23 BLR at 2-483; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

In sum, the administrative law judge provided valid reasons for discounting the opinions of Drs. Broudy and Rosenberg[7] that claimant does not have clinical or legal pneumoconiosis. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Rebuttal of Disability Causation

Employer argues that the administrative law judge erred by finding that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 18-19. Contrary to employer's contention, the administrative law judge rationally discounted the disability causation opinions of Drs. Broudy and Rosenberg because neither doctor diagnosed pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove pneumoconiosis. *See Kennard*, 790 F.3d at 668-69, BLR at ; *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

[7] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Broudy and Rosenberg on the grounds stated above, we need not address employer's remaining challenges to the administrative law judge's weighing of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). We, therefore, affirm the administrative law judge's finding that employer failed to establish that no part of claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption.

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