U.S. Department of Labor

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

BRB No. 17-0031 BLA

JOHN CECIL HOBBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROCK & BROCK CONTRACTING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 11/09/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER and AWARD of ATTORNEY FEES
	)	
Party-in-Interest	)	

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Johnnie L. Turner (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05875) of Administrative Law Judge Adele Higgins Odegard, rendered 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 August 20, 2012.[1]

The administrative law judge credited claimant with twenty-eight years of underground coal mine employment[2] and found that the new evidence established the existence of 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 at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in requiring employer to "rule out" the existence of pneumoconiosis and did not properly weigh the medical opinions in considering whether employer rebutted the Section 411(c)(4) presumption. Claimant filed a response, urging affirmance of the award of benefits. The

[1] This is claimant's second claim. Director's Exhibit 3. His first claim was filed on June 25, 1991. On May 2, 1992, the district director issued an Order to Show Cause why the claim should not be denied by reason of abandonment. Director's Exhibit 1. Claimant failed to respond, and the district director's denial became final on June 3, 1992. *Id.* A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] The administrative law judge found that claimant has a total of thirty-one years of coal mine employment based on the parties' stipulation. Decision and Order at 2.

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

Director, Office of Workers' Compensation Programs, filed a limited response urging the Board to reject employer's argument that the administrative law judge decided this claim based on the wrong legal standard for rebutting the presumption that claimant has legal pneumoconiosis.[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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 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)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method.

In finding that employer failed to rebut the presumed fact that claimant has legal pneumoconiosis, the administrative law judge discredited the opinions of Drs.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] "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).

Rosenberg[7] and Jarboe[8] as inadequately explained. Decision and Order at 24-27. Employer argues that, in so doing, the administrative law judge applied an incorrect standard by requiring employer's medical experts to "rule out" coal mine dust exposure as a cause of claimant's obstructive lung disease in order to disprove the existence of legal pneumoconiosis. Employer's Brief at 7-9. We disagree.

The administrative law judge correctly noted that "legal pneumoconiosis refers to all lung diseases that are significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 24; *see* 20 C.F.R. §718.201(b). The administrative law judge properly applied this standard, finding that employer did not meet its burden to establish that claimant's chronic obstructive pulmonary disease "was not significantly related to, or substantially aggravated by, his history of coal mine dust exposure." Decision and Order at 27; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting).

Moreover, contrary to employer's assertion, the administrative law judge did not determine that the opinions of Drs. Rosenberg and Jarboe are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "rule out" coal dust exposure as a causative factor for claimant's obstructive lung disease. Decision and Order at 24-27. Rather, the administrative law judge found that neither physician credibly explained how *they ruled out* coal dust exposure as a contributing or aggravating cause of claimant's obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); Decision and Order at 24-27. Drs. Rosenberg and Jarboe concluded that claimant does not have legal pneumoconiosis based, in part, on their shared view that claimant's markedly decreased FEV1 and severely reduced FEV1/FVC ratio constituted a pattern of impairment that is not characteristic of obstruction related to coal dust exposure.[9]

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[7] Dr. Rosenberg opined that claimant suffers from disabling obstructive lung disease that is due to cigarette smoking and is unrelated to coal dust exposure. Employer's Exhibit 19.

[8] Dr. Jarboe opined that claimant suffers from disabling obstructive lung disease and chronic bronchitis related to cigarette smoking, and bronchial asthma. Employer's Exhibit 4. Dr. Jarboe further opined that these conditions are not related to coal dust exposure. *Id.*

[9] Dr. Rosenberg stated that "[e]pidemiological studies summarized by NIOSH in their 1995 Criteria document, along with the investigation of Attfield and Hodous, both of which are cited by [the Department of Labor], establish that while the FEV1 decreases

Decision and Order at 24; Director's Exhibit 19 at 5-6. The administrative law judge permissibly discounted this aspect of their opinions as inconsistent with the regulations and 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); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 24-26, 27.

The administrative law judge noted that Drs. Rosenberg and Jarboe also relied, in part, on studies showing that smoking is more harmful and causes a greater loss of FEV1 than the inhalation of coal mine dust. Decision and Order at 25-26, 27; Director's Exhibit 19 at 8; Employer's Exhibit 4. The administrative law judge permissibly found that even assuming cigarette smoking was the primary cause of claimant's respiratory impairment, neither physician adequately explained why, in this particular case, claimant's loss of FEV1 could not be due to his inhalation of coal mine dust, as well as his cigarette smoking. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26, 27. The administrative law judge noted that neither Dr. Rosenberg nor Dr. Jarboe addressed the potential additive effects of cigarette smoking and coal mine dust exposure on claimant's pulmonary function. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 27, *referencing* 65 Fed. Reg. at 79,940.

Drs. Rosenberg and Jarboe also relied on the reversibility of claimant's obstructive impairment to support their conclusions that the impairment is due to the effects of cigarette smoking and/or asthma and is unrelated to coal mine dust exposure. Director's Exhibit 19; Employer's Exhibit 4. The administrative law judge permissibly discounted this aspect of their opinions because neither physician adequately explained why the irreversible portion of claimant's pulmonary impairment, which was still fully disabling after the administration of bronchodilators,[10] was not due, in part, to coal mine dust

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in relationship to coal mine dust exposure, the FEV1/FVC ratio generally is preserved." Director's Exhibit 19 at 3. Dr. Rosenberg further stated, however, that "with smoking-related forms of [chronic obstructive pulmonary disease], the FEV1/FVC ratio is generally reduced." *Id*. Dr. Jarboe similarly opined that claimant's "disproportionate reduction of FEV1 compared to the FVC . . . is the type of functional abnormality seen in cigarette smoking and asthma, and not coal dust inhalation." Employer's Exhibit 4 at 6.

[10] The administrative law judge accurately noted that both of the post-bronchodilator results from the pulmonary function studies are qualifying. Decision and Order at 12, 26.

exposure. *See* 20 C.F.R. §718.201(a)(2); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Clark*, 12 BLR at 1-155; Decision and Order at 26, 27; Director's Exhibit 19 at 8; Employer's Exhibit 4 at 8-9.

Finally, the administrative law judge permissibly found Dr. Jarboe's opinion that chronic bronchitis due to coal dust exposure will generally resolve after dust exposure ceases "contrary to the concept, recognized by the Act, that disabling pneumoconiosis, whether clinical or legal, can develop years after a miner leaves the mines." Decision and Order at 27; *see* 20 C.F.R. §718.201(c); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 25 BLR 2-675 (6th Cir. 2014).

As the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Jarboe,[11] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[12] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by showing 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); Decision and Order at 28-29. The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Rosenberg and Jarboe that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Kennard*, 790 F.3d at

[11] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Jarboe, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Moreover, because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding Dr. Baker's opinion that claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Consequently, we need not address employer's contentions of error relevant to the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

668, 25 BLR at 2-741; *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 28. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and employer did not rebut the presumption, we affirm the administrative law judge's finding that claimant is entitled to benefits.

Attorney Fee Award

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board from October 22, 2016 to January 30, 2017 in conjunction with this appeal.[13] *See* 20 C.F.R. §802.203. Claimant requests an hourly rate of $250.00 for 4 hours and 25 minutes of legal services, which equates to a total fee of $1,105.00.[14] No objection to this fee petition has been filed. The Board finds the requested fee to be reasonable in light of the necessary services performed, and approves a fee of $1,105.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203. The attorney's fee award is not enforceable until the award of benefits becomes final. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co*., 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Goodloe v. Peabody Coal Co*., 19 BLR 1-91, 1-100 n.9 (1995).

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[13] We note that claimant's counsel also filed a fee petition in the amount of $3,334.00 for work performed before the Office of Administrative Law Judges (OALJ) on behalf of claimant in this case. A request for approval of a fee before the Board may not include time spent for services rendered at another level in the adjudication process. *See* 20 C.F.R. §§725.366(a), 802.203(d); *Neal v. Clinchfield Coal Co.*, 1 BLR 1-427 (1978). Consequently, we decline to consider claimant's counsel's fee petition for services rendered before the OALJ.

[14] We note that claimant requested a total fee of $1,010.00 for work performed before the Board. That amount, however, is based on a mathematical error, as 4 hours and 25 minutes, or 4.42 hours, of legal services at an hourly rate of $250.00 equals $1,105.00.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of $1,105.00 for work before the Board.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge