U.S. Department of Labor

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

BRB No. 18-0069 BLA

BOBBY P. STAMPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 11/30/2018
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Sean P. S. Rukavina and Joseph D. Halbert (Shelton, Branham & Halbert PLLC), Lexington, Kentucky, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05867) of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on May 6, 2014.

The administrative law judge found that claimant had seventeen years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, he determined 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).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 that he has neither legal nor clinical pneumoconiosis,[4] or that "no

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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); 20 C.F.R. §718.305(b).

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

[3] Because claimant's last coal mine employment was in Kentucky, we will apply the law 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); Director's Exhibit 3.

[4] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer did not rebut the presumption by either method.

To disprove legal pneumoconiosis employer must establish that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Rosenberg and Jarboe.[5] Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but has a severe chronic obstructive pulmonary disease (COPD) that is entirely due to cigarette smoking. Director's Exhibit 10. Dr. Jarboe similarly opined that claimant does not have legal pneumoconiosis, but has chronic bronchitis and severe COPD due to cigarette smoking and asthma, unrelated to coal mine dust exposure. Employer's Exhibits 1, 3, 4. The administrative law judge found that both physicians' opinions are poorly reasoned and inadequately explained and, therefore, do not rebut the presumption of legal pneumoconiosis. Decision and Order at 17-18.

Employer asserts that the administrative law judge applied the incorrect legal standard by requiring employer's medical experts to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. Employer's Brief at 11-14. Contrary to employer's argument, the administrative law judge did not find 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 of claimant's respiratory impairment. Decision and Order at 17-18. Rather, he found that their opinions are not credible based on the rationale each physician provided for why claimant does not have legal pneumoconiosis. *Id*.

Specifically, the administrative law judge correctly noted that in eliminating coal mine dust exposure as a cause of claimant's obstructive impairment, Drs. Rosenberg and Jarboe relied in part on their view that claimant's significantly reduced FEV1/FVC ratio is

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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 the opinion of Dr. Ajjarapu that claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease due to both coal mine dust exposure and cigarette smoking. Decision and Order at 7-8, 17; Director's Exhibits 8, 49.

inconsistent with obstruction due to coal dust exposure.[6] Decision and Order at 17-18; Director's Exhibit 10; Employer's Exhibits 1, 3, 4. The administrative law judge permissibly discounted their opinions as inconsistent with the Department of Labor's recognition that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see* 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 17-18. The administrative law judge also permissibly discredited their opinions because neither physician sufficiently explained why the smoking-related airflow obstruction they diagnosed could not "be present in combination with a coal mine dust-related airflow obstruction." Decision and Order at 17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Moreover, employer has not specifically challenged any of the reasons the administrative law judge provided for discrediting the opinions of Drs. Rosenberg and Jarboe.[7] *See Sarf v. Director,*

[6] Dr. Rosenberg stated that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1 with asymmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved or only mildly reduced. . . . the extreme decline in [claimant's] ratio down to around 50% (preserved ratio 70% or higher) indicates that the obstruction is entirely related to cigarette smoking." Director's Exhibit 10. Similarly, Dr. Jarboe provided that "[a]nother finding not characteristic of impairment caused by the inhalation of coal mine dust is the relative preservation of the FVC (74%) and a disproportionate[] reduc[tion] of the FEV1 (45%). A disproportionate reduction of FEV1 compared to FVC is the type of the functional abnormality seen in cigarette smoking and not coal dust inhalation." Employer's Exhibit 1; *see* Employer's Exhibit 3 at 16-17.

[7] We reject employer's argument that the administrative law judge considered evidence not in the record because he referenced the opinions of Drs. Fino and Dahhan, instead of Drs. Rosenberg and Jarboe, at certain points in his decision. Decision and Order at 18; Employer's Brief at 13. As employer acknowledges, the context of the administrative law judge's decision makes clear that this was a "scrivener's error." Employer's Brief at 13. We further reject employer's assertion that the administrative law judge's evaluation of the evidence was "contaminated" against employer because he stated:

> The fact that there are two physicians reaching the conclusion that [claimant's] pulmonary condition is not due to coal mine dust exposure, as compared to one physician who concludes it is due to coal mine dust exposure, has more to do with the resources available to [e]mployer as compared to [claimant] and his lay representative.

OWCP, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We, therefore, affirm the administrative law judge's finding that their opinions are entitled to "no evidentiary weight" and, therefore, are insufficient to rebut the presumption that claimant has legal pneumoconiosis. Decision and Order at 18.

As the administrative law judge permissibly discredited the only opinions supportive of a finding that claimant does not have legal pneumoconiosis,[8] we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 18.

The administrative law judge next considered whether employer rebutted the presumption 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). He permissibly discounted the opinions of Drs. Rosenberg and Jarboe because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove that claimant has the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 18-19. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR

Decision and Order at 16. The administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Jarboe, and employer neither challenges those reasons nor otherwise supports its claim of "contamination" with any evidence that the administrative law judge rendered an improper decision. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992) ("Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence."). Thus, employer has not met its burden to establish bias.

[8] We decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Ajjarapu's opinion, as it does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13-14.

[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 6-10.

at 1-109. 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. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 19.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge