U.S. Department of Labor

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

BRB No. 15-0018 BLA

KENNETH E. LONG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 10/27/2015
	)	
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, 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 (2013-BLA-5379) of Administrative Law Judge Drew A. Swank (the administrative law judge) awarding benefits on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with 16 years in underground coal mine employment or in conditions substantially similar to those in an underground mine, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge also found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge therefore found that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305 of the regulations.[2] Consequently, the

[1] Claimant filed his first claim on July 13, 1987. Director's Exhibit 1. On May 25, 1989, Administrative Law Judge John C. Holmes issued a Decision and Order denying benefits. *Id*. Judge Holmes's denial was based on claimant's failure to establish the existence of pneumoconiosis and total respiratory disability. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim (a duplicate claim) on May 6, 1991. Director's Exhibit 2. It was finally denied by the district director on August 26, 1991, because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), as he did not establish any of the elements of entitlement. *Id*. Claimant filed this claim (a subsequent claim) on December 14, 2011. Director's Exhibit 4.

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge invoked the rebuttable presumption at amended Section 411(c)(4), but the organization of his Decision and Order makes it difficult to discern the standards of proof applied in making his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. Rather than initially determining whether claimant established invocation of the rebuttable presumption at amended Section 411(c)(4), the administrative law judge began his analysis by observing that claimant had the burden to establish the existence of pneumoconiosis, in the absence of a presumption, and initially analyzed the case as if the presumption did not apply. Decision and Order at 9-13. The administrative law judge should have first considered whether claimant invoked the amended Section 411(c)(4) presumption, and then analyzed the evidence as to whether

administrative law judge found that the evidence 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 failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Both claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the administrative law judge's award of benefits.[3]

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.[4] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this

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employer successfully met its burden of rebuttal by disproving the existence of pneumoconiosis or by proving that no part of claimant's total disability was caused by pneumoconiosis, as defined at 20 C.F.R. §718.201. *See Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting).

[3] Because the administrative law judge's length of coal mine employment finding and his findings that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was last employed in the coal mining industry in West Virginia. Director's Exhibits 3, 5, 7, 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

living miner's claim, 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 15 or more 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 impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005 and was pending after March 23, 2010. 30 U.S.C. §921(c)(4). We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, we will address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that no part of claimant's total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d).

Employer asserts that the administrative law judge improperly restricted it to the rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), as his application of these methods of rebuttal is contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer also asserts that the administrative law judge erred in applying the "rule out" standard on rebuttal when addressing disability causation. Specifically, employer argues that "the regulations require only a reasonable degree of medical certainty, not an absolute degree of certainty." Employer's Brief at 5. Employer maintains that "there is only a requirement that the operator show that coal mining was not a 'substantially contributing cause' of disability to a preponderance of the evidence." *Id*. at 7. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed and rejected these arguments in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *accord Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting). For the reasons set forth in *Bender* and *Minich*, we reject these assertions by employer in this case.

Employer further asserts that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Rosenberg. In addressing the issue of disability causation, the administrative law judge considered the opinions of Drs. Jaworski, Zaldivar and

Rosenberg. Dr. Jaworski diagnosed severe emphysema related to coal dust exposure and cigarette smoking, and opined that claimant's coal dust exposure and cigarette smoking are substantial contributing factors to his respiratory impairment. Director's Exhibit 16. Conversely, Dr. Zaldivar opined that claimant does not have clinical or legal pneumoconiosis, and that claimant's pulmonary impairment is caused by asthma and bullous emphysema related to smoking. Director's Exhibit 28; Employer's Exhibit 8. Similarly, Dr. Rosenberg opined that claimant does not have clinical or legal pneumoconiosis, and that claimant's disabling pulmonary impairment is caused by asthma related to smoking. Director's Exhibit 2; Employer's Exhibit 9. The administrative law judge found that "none of the three opinions are persuasive, and therefore [e]mployer has not rebutted the presumption contained at 20 C.F.R. §718.305."[5] Decision and Order at 20.

It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy a party's burden of proof. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). In this case, the administrative law judge permissibly discounted Dr. Zaldivar's opinion because Dr. Zaldivar provided a generalized opinion, rather than focusing on the specifics of claimant's condition.[6] *See Hicks*, 138 F.3d at 522, 21 BLR at 2-325; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). In addition, the administrative law judge permissibly discounted Dr. Zaldivar's opinion because of inconsistencies in the doctor's report and deposition.[7] *See Fagg v. Amax Coal*

[5] The administrative law judge found that Dr. Jaworski's opinion, that claimant's respiratory impairment was caused by coal mine dust exposure and smoking, was not persuasive because it was conclusory and without reference to diagnostic test data or medical treatise. Decision and Order at 20. No party challenges the administrative law judge's consideration of Dr. Jaworski's opinion.

[6] The administrative law judge stated that "[Dr.] Zaldivar's opinions are likewise unpersuasive; his epidemiological argument that a higher percentage of smokers, especially those with untreated asthma, develop pulmonary impairments than coal miners develop coal workers' pneumoconiosis, does nothing to help determine *in this particular case* the etiology of [c]laimant's pulmonary impairments." Decision and Order at 21.

[7] The administrative law judge noted that "[Dr. Zaldivar's] admission [in a deposition] that [c]laimant's CT scans did not indicate the presence of bullous emphysema…contradicts the diagnosis [of bullous emphysema] made in his report." Decision and Order at 21.

Co., 12 BLR 1-77 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); *see also Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge also permissibly discounted Dr. Zaldivar's opinion "that asthma is unrelated to coal dust exposure" because it is inconsistent with the view accepted by the Department of Labor in the preamble to the revised 2001 regulations.[8] Decision and Order at 21; *see* 65 Fed. Reg. 79920, 79939, 79944 (Dec. 20, 2000) (recognizing that "[t]he term 'chronic obstructive pulmonary disease' (COPD) includes . . . chronic bronchitis, emphysema and asthma," and that the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Further, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because of inconsistencies in the doctor's report and deposition.[9] *See Fagg*, 12 BLR at 1-79; *Hopton*, 7 BLR at 1-14; *see also Mabe*, 9 BLR at 1-68. The administrative law judge also permissibly discounted Dr. Rosenberg's opinion because "[h]is disassociation of asthma from coal workers' pneumoconiosis is contrary to the *Preamble* to the [r]egulations." Decision and Order at 21; *see* 65 Fed. Reg. 79920, 79939, 79944 (Dec. 20, 2000); *J.O.* [*Obush*], 24 BLR at 1-125-26. Finally, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because it is not documented.[10] Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Rosenberg.[11] We, therefore, affirm

[8] In a report dated August 2, 2012, Dr. Zaldivar opined that "[claimant's] pulmonary impairment is entirely the result of asthma which is a disease of the general population not related to coal mining work." Director's Exhibit 28.

[9] The administrative law judge stated, "[i]n his report, [Dr. Rosenberg] argues three primary ways [*i.e.*, the non-preserved FEV1/FVC ratio, the diffuse pattern of emphysema, and the reduced diffusing capacity] in which [c]laimant's smoking, and not coal mine dust exposure, is responsible for his pulmonary impairments." Decision and Order at 21. However, the administrative law judge also stated that, "[d]uring his deposition, [Dr. Rosenberg] states that neither [c]laimant's history of smoking nor coal mine dust exposure were the likely causes of his pulmonary impairments." *Id*. Further, the administrative law judge found that Dr. Rosenberg's opinion that sleep apnea caused claimant's pulmonary impairment is unpersuasive. The administrative law judge noted that, "[o]n cross examination, [Dr. Rosenberg] stated that [c]laimant's sleep apnea is not causing his pulmonary impairments." *Id.*

[10] The administrative law judge stated that "[Dr. Rosenberg] gives no support, either by reference to diagnostic testing data or medical treatise, to support his opinion that [c]laimant's pulmonary impairments are caused by his acid reflux or GERD." Decision and Order at 21.

[11] Employer argues that the administrative law judge erred in discounting Dr.

the administrative law judge's finding that employer failed to establish that no part of claimant's total disability was caused by pneumoconiosis.[12]

Furthermore, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[13] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d).

Rosenberg's testimony regarding the FEV1/FVC ratio. Employer asserts that "[the administrative law judge] found that Dr. Rosenberg's opinion regarding the preservation of the FEV1/FVC ratio was similar to an opinion he had in another case that was discredited, and discredited it on that basis." Employer's Brief at 11. Contrary to employer's assertion, as discussed, *supra*, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because of inconsistencies in the doctor's report and deposition with regard to whether smoking caused claimant's pulmonary impairment. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). Based on these inconsistencies, the administrative law judge stated that "[Dr. Rosenberg's] arguments of the preserved FEV1/FVC ratio, diffuse pattern emphysema, and reduced DLCO capacity as a means of distinguishing the effects of smoking from coal mine dust exposure are therefore rendered irrelevant." Decision and Order at 21. We, therefore, reject employer's argument that the administrative law judge erred in discounting Dr. Rosenberg's testimony regarding the FEV1/FVC ratio.

[12] We reject employer's argument that this case must be reversed and remanded for the administrative law judge to make a specific determination as to the length of time that claimant smoked cigarettes, and to state the effect that this determination has on the credibility of the various medical opinions. Employer's Brief at 4. The administrative law judge found that "[t]he evidence indicates [c]laimant had a significant smoking history." Decision and Order at 8. While the administrative law judge did not credit any of the medical opinions of record on the issues of pneumoconiosis and disability causation, he did not discount any opinion on the basis of an inaccurate smoking history. Thus, the administrative law judge's failure to weigh all relevant evidence and determine claimant's specific smoking history constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[13] Employer asserts that the administrative law judge ignored his "duty to examine the evidence that [c]laimant has no legal pneumoconiosis and weigh it to determine if [e]mployer met its burden." Employer's Brief at 12. Although the administrative law judge did not render a specific finding that employer established the absence of legal pneumoconiosis, he considered the opinions of Drs. Zaldivar and Rosenberg that claimant does not have clinical or legal pneumoconiosis. Director's Exhibits 2, 28; Employer's Exhibits 8, 9. In addressing the issue of disability causation, the

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

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administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Rosenberg because the doctors' view that asthma is not related to coal mine dust exposure is inconsistent with the view accepted by the Department of Labor in the preamble to the revised 2001 regulations. *See* 65 Fed. Reg. 79920, 79939, 79944 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). We, therefore, transfer the administrative law judge's findings regarding the opinions of Drs. Zaldivar and Rosenberg to the proper subsection, *i.e.*, 20 C.F.R. §718.202(a)(4), and hold that the medical opinion evidence is insufficient to disprove the existence of legal pneumoconiosis. *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Further, in view of our holding that the medical opinion evidence is insufficient to disprove the existence of legal pneumoconiosis, we hold that employer is precluded from establishing rebuttal of the presumption at amended Section 411(c)(4) by disproving the existence of pneumoconiosis.