U.S. Department of Labor

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

BRB Nos. 15-0522 BLA
and 15-0522 BLA-A

LONNIE A. SMITH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT/d/b/a MARROWBONE DEVELOPMENT	)	DATE ISSUED: 10/31/2016
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, D.C., for employer/carrier (employer).

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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 and claimant cross-appeals the Decision and Order Awarding Benefits (2012-BLA-05116) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on November 15, 2010, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). Based on the filing date of the claim, the administrative law judge considered claimant's entitlement under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Because claimant established at least fifteen years of qualifying coal mine employment[2] and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant was entitled to invoke the Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to establish rebuttal of the presumption and awarded benefits accordingly.

Employer argues that the administrative law judge abused his discretion in excluding Dr. Rasmussen's March 26, 2009 medical report, with the associated pulmonary function and blood gas testing, on the grounds that the evidence is in excess of the evidentiary limitations. Employer further contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge accepted the parties' stipulation to thirty-one years of coal mine employment, of which claimant testified that he worked for ten years underground. Decision and Order at 15. The administrative law judge also determined that more than five years of the remainder of claimant's work above ground was performed in conditions that were substantially similar to an underground mine. *Id*.

impairment for invocation of the Section 411(c)(4) presumption. Additionally, employer asserts that the administrative law judge erred in finding that employer failed to rebut the presumption by establishing that claimant does not have pneumoconiosis.

Claimant responds in support of the administrative law judge's award of benefits. Claimant also filed a cross-appeal, asserting that Dr. Rasmussen's March 26, 2009 report may not be considered because it was obtained in conjunction with a withdrawn claim under 20 C.F.R. §725.306(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to affirm the administrative law judge's evidentiary ruling and reject employer's arguments for the admission of Dr. Rasmussen's 2009 objective testing. Employer has submitted briefs in reply to those filed by claimant and the Director.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Evidentiary Ruling

At the hearing held on March 11, 2015, the administrative law judge agreed to leave the record open in order for the parties to obtain the depositions of Drs. Rasmussen and Rosenberg. Hearing Transcript at 10. Dr. Rasmussen examined claimant at the request of the Department of Labor (DOL) on January 25, 2011, while Dr. Rosenberg examined claimant on behalf of employer on July 6, 2011. Director's Exhibit 12; Employer's Exhibit 6.

During his deposition on March 20, 2015, Dr. Rasmussen referenced a prior examination he performed on claimant on March 16, 2009, for the DOL, in conjunction with a claim filed by claimant that had been withdrawn.[4] Claimant's Exhibit 1 at 26.

[3] Because claimant's last coal mine employment was in West Virginia, 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, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 3.

[4] When considering the March 16, 2009 report, Dr. Rasmussen stated that "[claimant's] progression in impairment in a two-year time period … it's a little fast for this much change due to coal mine dust exposure … [although] not impossible...." Claimant's Exhibit 1 at 28. Dr. Rasmussen testified that "most likely … dermatomyositis superimposed on his coal mine-induced lung disease" caused claimant's impairment.

When employer's counsel asked if the March 16, 2009 report was in the record, claimant's counsel explained that he was first made aware of it the day before the deposition: "I guess I knew he had done it, but I had forgotten because, you know, it was a prior claim that was withdrawn. So I didn't realize until Dr. Rasmussen called me yesterday and said he had the 2009 exam, but I don't actually have a copy of it…." *Id*. at 27. Employer's counsel asked that a copy of Dr. Rasmussen's 2009 report be appended to the deposition transcript and claimant's counsel noted his objection for the record. *Id*. at 35-36.

Dr. Rosenberg was later deposed on June, 10, 2015, and was asked questions pertaining to Dr. Rasmussen's 2009 report and the objective testing. Employer's Exhibit 9. Following Dr. Rosenberg's deposition, claimant also filed a post-hearing brief on July 10, 2015, asserting that Dr. Rasmussen's March 16, 2009 report was not admissible because it was obtained in conjunction with a prior claim that had been withdrawn. Employer submitted a July 13, 2015 letter to the administrative law judge, arguing that claimant was not entitled to benefits, but employer did not address the admissibility of Dr. Rasmussen's 2009 report. Employer stated only that claimant was unable to establish the element of disability causation because "[a]s [Dr. Rasmussen] conceded in deposition, when considering the prior 2009 examination, [he] could no longer assess that legal pneumoconiosis made any significant contribution to any lung impairment." Employer's July 10, 2015 Letter at 1-2.

In his August 28, 2015 Decision and Order, the administrative law judge excluded Dr. Rasmussen's March 16, 2009 report on the grounds that employer had already submitted two affirmative medical opinions[5] and failed to show good cause for exceeding

---

Although Dr. Rasmussen testified that he could not "say that [claimant's] coal mine dust was really a significant contributor," he also "couldn't rule it out." *Id.* at 34. When asked whether, "within a reasonable degree of medical certainty, …, [claimant] has … chronic respiratory or pulmonary impairment related to or substantially aggravated by his dust exposure," Dr. Rasmussen stated, "I cannot state [it] like that." *Id.* at 35. On re-direct examination he testified: "I can't completely exclude coal mine dust exposure, but the …three-year span and significant progression, it's too fast for coal mine dust alone. So I can't, really, state that I believe that coal mine dust is … much of a factor." *Id.* at 37.

[5] The applicable provisions of 20 C.F.R. §725.414 permit claimant and employer to submit, in support of their affirmative cases, "no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R.

the evidentiary limitations. Employer maintains that the administrative law judge erred in issuing his evidentiary ruling in his Decision and Order without giving the parties prior notice of his intent to exclude Dr. Rasmussen's 2009 report, and without giving the parties the opportunity to realign their evidence. Alternatively, employer argues that the administrative law judge erred in excluding Dr. Rasmussen's 2009 pulmonary function test and arterial blood gas study from consideration, as "they would have fit in the open evidence slots in the operator's case in chief as affirmative pulmonary function and blood-gas testing." Employer's Brief in Support of Petition for Review at 10. Employer's arguments are rejected as without merit.

The administrative law judge noted correctly that pursuant to 20 C.F.R. §725.306, "a withdrawn claim is considered to have never been filed" and that the "effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim." Decision and Order at 13, *citing Bailey v. Dominion Coal Corp.*, 23 BLR 1-85 (2005). The administrative law judge also noted correctly, however, that a party may submit the evidence developed in conjunction with a withdrawn claim, "subject to the evidentiary limitations or with a showing of good cause for its inclusion." Decision and Order at 13, *citing Anderson v. Kiah Creek Mining Co.*, BRB No. 03-0828 BLA (May 24, 2004) (unpub.).

Employer does not dispute that Dr. Rasmussen's medical opinion as set forth in his March 16, 2009 report was submitted in excess of the evidentiary limitations. The pertinent regulation provides that "[m]edical evidence in excess of the limitations contained in 20 C.F.R §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1) (emphasis added). As the Director points out, employer's arguments for admission of Dr. Rasmussen's 2009 medical opinion "overlooks the fact that it is incumbent on the party seeking admission of excess evidence to make *a timely good cause argument for its inclusion* when the case is before the [administrative law judge]." Director's Letter Brief at 2 (emphasis added). While an administrative law judge may find good cause for admitting additional evidence into the record in accordance with 20 C.F.R. §725.456(b)(1), he or she is not obligated to conduct, *sua sponte*, an independent assessment as to whether or not good cause justifies

---

§725.414(a)(2)(i), (3)(i). The regulation further provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible" under 20 C.F.R. §725.414(a)(2)(i), (3)(i) or under 20 C.F.R. §725.414(a)(4) ("any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence").

the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-141 (2006).

Although it is preferable for an administrative law judge to rule on evidentiary objections before the issuance of the Decision and Order, we are not persuaded that employer was prejudiced. Employer was aware of claimant's objections to the admission of Dr. Rasmussen's 2009 medical opinion and had the opportunity to present a good cause argument in its closing argument letter to the administrative law judge, but did not do so. Under the facts of this case, we see no error in the administrative law judge's determination in his Decision and Order that Dr. Rasmussen's 2009 medical opinion must be excluded because employer did not satisfy its burden under the regulations to show good cause for its admission into the record. 20 C.F.R. §725.456(b)(1); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004) (en banc).

Furthermore, we reject employer's contention that the administrative law judge should have allowed employer to modify its evidentiary designations to substitute Dr. Rasmussen's medical opinion for one of its two affirmative medical opinions, or to admit the 2009 pulmonary function test and arterial blood gas study in its available affirmative evidence slots. An administrative law judge is not required to fill or redesignate evidentiary slots for a party when the proper designations are not made. *See* 20 C.F.R. §§725.414(a)(3)(i), 725.456(b)(3). Because employer did not file a motion or make any attempt after Dr. Rasmussen's deposition to amend its evidence summary form to either substitute Dr. Rasmussen's March 16, 2009 report for one of its two affirmative medical reports, or to designate the 2009 objective testing as affirmative evidence, the administrative law judge acted within his discretion in excluding the entirety of this evidence from consideration. See 20 C.F.R. §§725.414, 725.456(b)(3), 725.455(b), (c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (en banc); *Harris Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural and evidentiary matters. *See Clark*, 12 BLR at 1-153. Thus, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must establish that the administrative law judge's action represented an abuse of his discretion. *Id*. We hold that employer has not met its burden to show an abuse of discretion in this case. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). We therefore affirm the administrative law judge's exclusion of Dr. Rasmussen's 2009 medical opinion, and accompanying objective testing, from the record. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (en banc); *Clark*, 12 BLR at 1-153. We further affirm the

administrative law judge's decision to "not take into account" the deposition testimonies of Drs. Rasmussen and Rosenberg "when that testimony considers, refers to, or mentions the March 16, 2009 report." Decision and Order at 14; *see Harris*, 23 BLR at1-108.

II. Invocation of the Section 411(c) Presumption - Total Disability

The administrative law judge determined that none of the pulmonary function tests or arterial blood gas studies is qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).[6] Decision and Order at 16. The administrative law judge also found that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as the record evidence does not include a diagnosis of cor pulmonale with right-sided congestive heart failure. *Id*. In considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave controlling weight to Dr. Rasmussen's opinion, as set forth in his 2011 medical report and 2015 deposition, that claimant is totally disabled[7] over the contrary opinions of Drs. Rosenberg and Spagnolo.[8] *Id*. at 18.

---

[7] Dr. Rasmussen explained that during the January 25, 2011 exercise blood gas study claimant achieved an oxygen consumption of 14.6 milliliters per kilogram per minute (ml/kg/min.) or 60% of the predicted maximum oxygen uptake, which would make claimant unable to perform heavy manual labor associated with his usual coal mine job. Decision and Order at 16; Director's Exhibit 12. The administrative law judge gave significant weight to Dr. Rasmussen's opinion, noting that "[a]lthough he obtained non-qualifying exercise blood gas values, he explained how he quantified [claimant's] impairment and then persuasively compared the degree of impairment with the exertional requirements of [c]laimant's usual coal mine work." Decision and Order at 16, 17; Claimant's Exhibit 1 at 23-25.

[8] The administrative law judge found that Dr. Rosenberg's opinion was not persuasive because he relied on the non-qualifying nature of the objective studies to support his conclusion that claimant is not totally disabled. Decision and Order at 18. The administrative law judge also found that Dr. Spagnolo relied on the *resting* blood gas study values in making his disability assessment, and did not adequately address why claimant was not totally disabled based on the exercise values obtained by Dr. Rasmussen. *Id*. We affirm, as unchallenged on appeal, the administrative law judge's decision to give less weight to the opinions of Drs. Rosenberg and Spagnolo on the issue of total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer asserts that Dr. Rasmussen's disability opinion is not reliable because he failed to explain why claimant's drop in PO2 with exercise is not due entirely to claimant's dermatomyositis, a non-pulmonary condition, as opposed to a primary lung disease. Contrary to employer's assertion, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the physician concludes that the miner has a respiratory or pulmonary impairment, based on the results of the objective testing, that would preclude the performance of claimant's usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv). The etiology of that respiratory or pulmonary impairment is relevant to the issue of causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d); *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015). In this case, the administrative law judge correctly focused his analysis at 20 C.F.R. §718.204(b)(2)(ii) on whether claimant's blood gas study results would preclude the performance of his usual coal mine work without regard to the etiology of his pulmonary impairment.

We also reject employer's assertion that the administrative law judge erred in crediting Dr. Rasmussen's opinion because it is based on a non-qualifying exercise blood gas study. The administrative law judge noted correctly that a doctor can offer a reasoned medical opinion diagnosing total disability, even though the underlying objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); Decision and Order at 17. The administrative law judge acted within his discretion in finding that Dr. Rasmussen provided a reasoned opinion that claimant showed a significant gas exchange impairment that precluded claimant from performing the duties required of his usual coal mine job. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order at 17; Director's Exhibit 12 at 47; Claimant's Exhibit 1 at 3-9.

As substantial evidence supports the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment, based on his consideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and based on his consideration of all of the relevant evidence at 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

III. Rebuttal of the Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[9] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 137; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected Dr. Rosenberg's opinion that claimant's pulmonary impairment is unrelated to coal dust exposure, because he expressed views that were contrary to the preamble. Decision and Order at 21. The administrative law judge also found that Dr. Spagnolo "offered no explanation as to how he could definitively exclude the [c]laimant's 31 years of coal dust exposure as a significant contributing factor" to claimant's pulmonary impairment. In contrast, the administrative law judge determined that Dr. Rasmussen provided a reasoned opinion, based on his January 25, 2011 examination, that claimant's respiratory impairment is due to a combination of coal dust exposure and dermatomyositis. *Id*. at 24.

Employer's only allegation of error is that the administrative law judge failed to properly recognize that Dr. Rasmussen "does not diagnose legal pneumoconiosis" in this case. Brief in Support of Petition for Review at 12-13. In support of its contention, employer cites to portions of Dr. Rasmussen's deposition testimony where he discussed the excluded March 16, 2009 report. As we have affirmed the administrative law judge's determination that the 2009 medical opinion and objective testing was properly excluded, we reject employer's argument. Decision and Order at 24. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's finding that the opinions of Drs. Rosenberg and Spagnolo are insufficient to disprove that claimant has legal pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Bender*, 782 F.3d at 129.

[9] "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).

With respect to whether employer could rebut the presumption by disproving the presumed fact of disability causation, the administrative law judge found that the opinions of Drs. Rosenberg and Spagnolo were not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis, as neither physician diagnosed the disease. Decision and Order at 26. We affirm the administrative law judge's finding as it is not challenged. *Skrack*, 6 BLR at 1-711; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order 26. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because employer did not establish rebuttal under 20 C.F.R. §718.305(d)(1)(i) or (ii), we affirm the administrative law judge's award of benefits.[10] 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 138-43.

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

JONATHAN ROLFE
Administrative Appeals Judge

[10] In light of our affirmance of the award of benefits, we will not address claimant's arguments on cross-appeal.