U.S. Department of Labor

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

BRB No. 17-0037 BLA

WILLIAM O. BONAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	
	)	DATE ISSUED: 10/18/2017
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2011-5698) of Administrative Law Judge Richard A. Morgan 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 May 12, 2010,[1] and is before the Board for the second time.

Previously, pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] *Bonar v. Quarto Mining Co.*, BRB No. 15-0094 BLA (Dec. 23, 2015) (unpub.). The Board vacated, however, the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis,[3] and thus failed to rebut the Section 411(c)(4) presumption.[4] *Id.*

Specifically, the Board affirmed the administrative law judge's determination that Dr. Fino's opinion is insufficient to establish that claimant does not have legal

[1] Claimant's previous claim, filed on September 5, 1990, was denied by the district director on January 4, 1991, because claimant failed to establish any of the elements of entitlement. Claimant took no further action on the claim. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface 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) (2012); *see* 20 C.F.R. §718.305. The administrative law judge credited claimant with at least eighteen years of coal mine employment, fifteen or more years of which were underground.

[3] "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 pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] The administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis was undisturbed in the prior appeal. *Bonar v. Quarto Mining Co.*, BRB No. 15-0094 BLA (Dec. 23, 2015) (unpub.), slip op. at 7, 10 n.10.

pneumoconiosis. *Bonar*, BRB No. 15-0094 BLA, slip op. at 5-7, 9. The Board held, however, that the administrative law judge failed to provide a valid reason for discrediting Dr. Basheda's opinion that claimant does not have legal pneumoconiosis, but has an obstructive impairment due to cigarette smoking and asthma. *Id.* at 8-10. The Board held that the administrative law judge relied on an erroneous belief that the Department of Labor and the Circuit Courts of Appeals have accepted the view that emphysema caused by coal dust exposure cannot be distinguished from emphysema caused by smoking. *Id.*

Therefore, the Board remanded the case for the administrative law judge to reconsider whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis, or that his total disability is unrelated to pneumoconiosis. *Bonar*, BRB No. 15-0094 BLA, slip op. at 9. The Board instructed the administrative law judge to reconsider whether Dr. Basheda's opinion that claimant's emphysema is entirely unrelated to coal dust exposure is adequately reasoned and documented. *Id.* at 9-10. The Board also instructed the administrative law judge to address the extent to which Dr. Basheda explained why coal dust exposure could not have also caused, or aggravated, claimant's emphysema, in addition to his smoking. *Id.* Further, the Board advised that the administrative law judge could reconsider the extent to which the premises underlying Dr. Basheda's opinion are consistent with the scientific principles set forth in the preamble to the 2001 revised regulations. *Id.* at 9-10; *citing Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-264 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

The Board also vacated the administrative law judge's determination of the date for the commencement of benefits, holding that the administrative law judge did not adequately consider Dr. Fino's opinion that claimant was not totally disabled due to pneumoconiosis in 2010. *Bonar*, BRB No. 15-0094 BLA, slip op. at 11. Thus, the Board instructed the administrative law judge that, if reached, he should reconsider the date from which benefits are payable, based on his consideration of all the evidence. *Id.*

On remand, the administrative law judge concluded that Dr. Basheda's opinion is inadequately explained and does not meet employer's burden to establish that claimant does not have legal pneumoconiosis, or that his total disability is not due to legal pneumoconiosis. The administrative law judge again found claimant entitled to benefits. Finding further that the evidence does not establish when claimant became totally disabled due to pneumoconiosis, the administrative law judge again awarded benefits as of May 2010, the month in which claimant filed his subsequent claim.

On appeal, employer argues that the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption is erroneous and fails to comport with the requirements of the Administrative Procedure Act (APA).[5] Additionally, employer contests the administrative law judge's determination of the date for the commencement of benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal. Employer filed a brief in reply to claimant's response brief, and reiterated its prior contentions.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 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)(i), (ii).

In determining whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge reconsidered Dr. Basheda's opinion that claimant suffers from chronic obstructive pulmonary disease (COPD) with an asthmatic component due to cigarette smoking and not coal dust exposure. Dr. Basheda explained that he could exclude coal dust as a causative, contributing, or aggravating factor to claimant's impairment because claimant's clinical history is "classic" for tobacco-

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[6] The record reflects that claimant's last coal mine employment was in Ohio. Director's Exhibits 1, 5. Therefore, the Board 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).

induced pulmonary disease. Decision and Order on Remand at 5, *quoting* Employer's Exhibit 17 at 26; Employer's Brief at 13. Dr. Basheda emphasized that claimant "would have the exact same picture and findings had he never been in a coal mine due to his significant cigarette smoking." Decision and Order on Remand at 6, *quoting* Employer's Exhibit 17 at 27.

The administrative law judge noted, however, that in addition to his smoking history, claimant has an eighteen year history of coal dust exposure. Decision and Order on Remand at 6. Further, the administrative law judge correctly recognized that the Act does not require coal dust exposure to be the sole cause of claimant's respiratory impairment. Decision and Order on Remand at 6; *citing* 20 C.F.R. §718.201(b); *Cochran*, 718 F.3d at 323, 25 BLR at 2-263. Rather, legal pneumoconiosis is present when coal dust significantly contributes to, or substantially aggravates, a respiratory condition. *Id.*; *see* 20 C.F.R. §718.201(a)(2), (b). In light of these factors, the administrative law judge rationally concluded that, in opining that cigarette smoking could fully account for claimant's impairment, Dr. Bellotte did not adequately explain why claimant's coal dust exposure could not have also contributed to, or aggravated, claimant's COPD or asthma. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order on Remand at 6.

The administrative law judge also noted that Dr. Basheda relied, in part, on a February 10, 2009 computed tomography scan that was interpreted as showing centrilobular emphysema and bullous changes.[7] Decision and Order on Remand at 3; Employer's Exhibit 17 at 24-25. Dr. Basheda explained that "bullous disease is a classic radiographic finding [seen] with tobacco-induced COPD," while "coal dust deposition results in . . . focal emphysema." Employer's Exhibit 17 at 14, 25. The administrative law judge permissibly discredited Dr. Basheda's opinion because he found the doctor's view that coal dust causes focal emphysema to be inconsistent with the Department of Labor's position, set forth in the preamble to the 2001 regulatory revisions.[8] *See Cent.*

[7] Dr. Basheda reviewed two interpretations of a computed tomography (CT) scan dated February 10, 2009. Employer's Exhibit 17 at 24-25. Dr. Shipley interpreted the CT scan as showing, among other things, calcified nodules of healed granulomatous disease and "centrilobular emphysema . . . present bilaterally." Employer's Exhibit 7. A radiologist at Reynolds Memorial Hospital similarly identified calcified granulomas and also noted that "mild bullous changes are present in both pulmonary apices." Employer's Exhibit 6.

[8] In support of his determination, the administrative law judge noted that the preamble states that emphysema "may be legal pneumoconiosis if it arises from coal-

Ohio Coal Co. v. Director, OWCP [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order on Remand at 7; *citing* 65 Fed. Reg. at 79,939, 79,943 (identifying centrilobular emphysema and centriacinar emphysema as additional types of emphysema that may be caused by coal dust exposure). In view of the record evidence and the scientific findings credited in the preamble, the administrative law judge permissibly found Dr. Basheda's opinion regarding legal pneumoconiosis "worthy of little to no consideration."[9] Decision and Order on Remand at 7; *see Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Therefore, we further affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge

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mine employment," without any specification that this causal effect only exists with respect to certain types of emphysema. Decision and Order on Remand at 7; *referencing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Further, the administrative law judge noted, the preamble cites studies supporting the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. Decision and Order on Remand at 7, *referencing* 65 Fed. Reg. at 79,943. Thus, there is no merit to employer's contention that the administrative law judge's evaluation of Dr. Basheda's views regarding focal emphysema does not satisfy the duty of explanation required by the APA. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999) (If a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation is satisfied); Employer's Brief at 12. Further, while employer correctly asserts that Dr. Basheda did not state that centrilobular emphysema could not be caused by coal mine dust exposure, he never addressed the cause of the centrilobular emphysema identified by Dr. Shipley on the February 10, 2009 CT scan. Employer's Brief at 12; Employer's Exhibit 17 at 24-25.

[9] Because the administrative law judge provided valid reasons for discrediting the opinion of Dr. Basheda, the administrative law judge's error, if any, in according less weight to his opinion for other reasons would constitute harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 7. Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Basheda's opinion.

rationally determined that because Dr. Basheda did not diagnose legal pneumoconiosis or total respiratory disability, his opinion is not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis.[10] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order on Remand at 7. 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). We further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(i), (ii).

Benefits Commencement Date

If the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable from the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co*., 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). The administrative law judge found claimant totally disabled based on Dr. Lenkey's June 14, 2010 examination and Dr. Fino's October 15, 2012 examination. He further found that the credible medical evidence establishes only that the miner became totally disabled at some time prior to the date of that evidence. He therefore held that benefits should commence May 2010, when claimant filed his subsequent claim. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985); Decision and Order on Remand at 8.

Employer asserts that the administrative law judge should credit Dr. Fino's opinion that claimant was not disabled in 2010 because he relied on Dr. Fino's opinion in determining that claimant was disabled in 2012. This contention lacks merit.

Contrary to employer's argument, the administrative law judge specifically considered that he had relied, in part, on Dr. Fino's diagnosis of a totally disabling respiratory impairment, based on a qualifying pulmonary function study performed on

[10] Beyond asserting that the administrative law judge erred in discrediting Dr. Basheda's opinion relevant to the existence of legal pneumoconiosis, employer does not contest this determination. Employer's Brief at 14.

October 15, 2012.[11] Decision and Order on Remand at 7. The administrative law judge also considered Dr. Fino's opinion that claimant was not disabled in 2010 because Drs. Lenkey and Basheda obtained non-qualifying pulmonary function studies on June 14, 2010 and December 29, 2010, respectively. Decision and Order on Remand at 7; Employer's Exhibits 10, 16 at 19, 21.

The administrative law judge correctly noted, however, that Dr. Lenkey rationally interpreted the June 14, 2010 non-qualifying studies as showing a disabling respiratory impairment, in light of the heavy labor required in claimant's usual coal mine work. Decision and Order on Remand at 7; *referencing* Director's Exhibit 26 at 25-29; *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). Moreover, the administrative law judge reasoned that, while he had accorded Dr. Lenkey's disability opinion "slightly less weight" than Dr. Fino's opinion, he did not totally discount it.[12] Decision and Order on Remand at 7. In contrast, he discredited Dr. Basheda's opinion that claimant was not totally disabled on December 29, 2010 entirely.[13] *Id.* In light of these facts, the administrative law judge permissibly found that

[11] Dr. Lenkey diagnosed a totally disabling respiratory impairment based, in part, on the results of his June 14, 2010 pulmonary function study that, while non-qualifying, he interpreted as reflecting the presence of an impairment. Director's Exhibit 26 at 25-29. Dr. Basheda opined that claimant was not totally disabled, based on the non-qualifying results of his December 29, 2010 pulmonary function study. Employer's Exhibit 1 at 17. Dr. Fino diagnosed a totally disabling respiratory impairment based on the qualifying results of his October 15, 2012 pulmonary function study. Employer's Exhibit 10. Following his review of the pulmonary function studies performed by Drs. Lenkey and Basheda, Dr. Fino concluded that claimant's disabling respiratory impairment "was not present in 2010 and it developed sometime between 2010 and 2012." Employer's Exhibit 16 at 21.

[12] In the prior appeal, the Board rejected employer's contention that the administrative law judge was precluded from crediting Dr. Lenkey's opinion relevant to the onset of disability because he accorded Dr. Lenkey's diagnosis of total disability "less weight" pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Bonar*, BRB No. 15-0094 BLA, slip op. at 11 n.12. The Board held that because the administrative law judge did not wholly reject or discredit Dr. Lenkey's opinion on the issue of total disability, he should address it when reconsidering the appropriate date of onset under 20 C.F.R. §725.503. *Id.*

[13] In the prior appeal the Board held that the administrative law judge permissibly discredited Dr. Basheda's opinion on the issue of total disability because he did not assess the extent of claimant's impairment without the use of bronchodilators. *Bonar*,

Dr. Fino's opinion did not establish that claimant could perform his usual coal mine work in 2010. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The administrative law judge's finding that the medical evidence does not reflect the date upon which claimant became totally disabled thus is supported by substantial evidence. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. We therefore affirm the determination that benefits are payable from the month in which claimant filed this claim. 20 C.F.R. §725.503(b).

BRB No. 15-0094 BLA, slip op. at 11 n.11. Thus, the Board rejected employer's assertion that Dr. Basheda's report, concluding that claimant was not totally disabled at the time of his examination on December 29, 2010, supports Dr. Fino's opinion. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge