U.S. Department of Labor

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

BRB No. 17-0042 BLA

GLENN HANDSHOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CRAGER FORK MINING, INCORPORATED	)	DATE ISSUED: 10/19/2017
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WASAU c/o LIBERTY MUTUAL MIDDLE MARKET	)	
	)	
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 Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, 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: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5367) of Administrative Law Judge Steven D. Bell, rendered on a claim filed on October 9, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined that employer is the properly designated responsible operator. He then credited claimant with twenty years of coal mine employment, based on the parties' stipulation, and found that all of it occurred at an underground coal mine site. He also determined that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby invoking 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 concluded that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that it was the properly designated responsible operator. In addition, employer asserts that the administrative law judge incorrectly found that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief, stating

[1] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he had 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).

that the administrative law judge properly found that employer is the responsible operator.[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).

I. Responsible Operator

As the entity identified as the responsible operator, employer has the burden of proving that it is not the "potentially liable operator" that most recently employed claimant. 20 C.F.R. §725.495(c)(2). Employer does not dispute that it meets the criteria for a potentially liable operator, nor does it dispute that claimant worked for a subsequent employer, Quality Transport, for less than one year.[4] Therefore, the only method available to employer to avoid liability is to establish that Quality Transport was a successor operator. Pursuant to 20 C.F.R. §725.492(a), a "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). The regulation at 20 C.F.R. §725.492(b) further provides that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

---

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had twenty years of coal mine employment at an underground coal mine, suffered from a totally disabling respiratory impairment, and invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 16-19, 27.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, 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).

[4] Based on claimant's Social Security earnings records, the administrative law judge found that claimant worked for Quality Transport for approximately one month in 1995. Decision and Order at 4; Director's Exhibit 7. The district director determined that claimant worked for employer "from 1993 to May 13, 1995." Director's Exhibit 35 at 15.

Employer argues that the administrative law judge's finding that Quality Transport is not a successor operator, Decision and Order at 7, is contrary to claimant's hearing testimony that employer and Quality Transport were under common ownership and operated at the same mine sites.[5] We reject employer's contention.

The administrative law judge reviewed the record and accurately found that there is no evidence that employer sold or transferred its mines, assets, or mining operations to Quality Transport, nor is there evidence that employer ceased to exist.[6] Decision and Order at 4. Accordingly, the administrative law judge rationally determined that the concurrent operation of employer and Quality Transport "preclude[d] the application of successor liability." *Id*.; *see* 20 C.F.R. §725.492(b)(1)-(3); *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 564-65, 22 BLR 2-349, 367 (6th Cir. 2002). We therefore affirm the administrative law judge's determination that employer is the properly designated responsible operator.

II. Rebuttal of Section 411(c)(4) Presumption

Once claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total

[5] The Director, Office of Workers' Compensation Programs (the Director), maintains that the hearing testimony should not be considered because claimant was not designated as a liability witness, as required by 20 C.F.R. §725.414(c), when the case was before the district director. Regardless of whether the administrative law judge's consideration of claimant's testimony was appropriate, claimant did not describe a successor operator relationship. Instead, claimant testified that: employer and Quality Transport coexisted; employer mined coal and Quality Transport trucked the coal; and that he was occasionally paid by Quality Transport but did not do any trucking. Hearing Transcript at 24-26.

[6] The administrative law judge found, "as outlined by the Director," that employer "continued to exist after Quality Transport had been dissolved." Decision and Order at 4.

[7] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease 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

disability was caused by pneumoconiosis as defined in § 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge determined that employer rebutted the presumed existence of clinical pneumoconiosis but did not rebut the presumed existence of legal pneumoconiosis, or the causal connection between claimant's totally disabling impairment and legal pneumoconiosis. Decision and Order at 19-27.

Employer initially asserts that the administrative law judge relied on an incorrect standard to find that the opinions of Drs. Castle and Rosenberg did not rebut the presumed existence of legal pneumoconiosis. According to employer, the administrative law judge believes that "legal pneumoconiosis is present when a pulmonary impairment is due to any degree to coal mine dust exposure."[8] Employer's Brief at 5. Although we agree with employer that the administrative law judge misstated the rebuttal standard,[9]

---

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).

[8] Prior to weighing the medical opinions relevant to legal pneumoconiosis, the administrative law judge discussed the Sixth Circuit's decision in *Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014). Decision and Order at 23. The administrative law judge observed that in *Groves*, the court held that while the miner was required by 20 C.F.R. §718.201(b) to prove that his chronic obstructive pulmonary disease was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," he could do so by showing that his disease was caused, "in part," by dust exposure in coal mine employment. *Id.* at 23-24, *citing Groves*, 761 F.3d at 598-99, 25 BLR at 2-618. The administrative law judge stated that he applied "these clarifying maxims to the [e]mployer's burden on rebuttal." Decision and Order at 24.

[9] In his discussion of legal pneumoconiosis, the administrative law judge appears to have combined the standards for rebuttal of legal pneumoconiosis and disability causation, stating that Dr. Rosenberg's "assessment of his own anomalous results [is] insufficient to rule out coal mine dust as a cause" of claimant's disabling impairment. Decision and Order 24. It is less clear whether the administrative law judge committed a similar error with respect to Dr. Castle, when he stated that Dr. Castle "acknowledges the inability to rule out the existence of legal pneumoconiosis." *Id.* The administrative law judge may have simply been summarizing Dr. Castle's own opinion that he could not "totally exclude a contribution from coal mine dust exposure or legal pneumoconiosis[.]" Claimant's Exhibit 8. Regardless, the proper inquiry for rebuttal of legal pneumoconiosis is whether employer established, by a preponderance of the evidence, that claimant does

we disagree that the administrative law judge's error requires remand. The administrative law judge permissibly found that Dr. Rosenberg's opinion was "inadequately documented" and that Dr. Castle's opinion "do[es] not support [e]mployer's rebuttal burden" based on deficiencies in the physicians' rationales, not because they failed to meet a particular rebuttal standard. Decision and Order at 24; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92, 25 BLR 2-633, 2-645 (6th Cir. 2014) (affirming that opinions were insufficient to rebut the presumed existence of legal pneumoconiosis because they relied on views that conflict with the Department of Labor's position in the preamble to the 2001 regulatory revisions); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073-74, 25 BLR 2-431, 2-447 (6th Cir. 2013) (affirming administrative law judge's decision to discredit physicians as insufficiently documented and reasoned where they failed to adequately explain their conclusions).

Specifically, the administrative law judge found that Dr. Rosenberg's opinion[10] was not adequately documented because, "[w]hile Dr. Rosenberg's deposition testimony highlighted the [c]laimant's lower-lobe atelectasis as primarily responsible for the spirometric and gas exchange abnormalities documented at his examination," Dr.

---

not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). To rebut total disability causation, the "rule out" standard applies, i.e., employer must show that "no part" of claimant's total respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013).

[10] Dr. Rosenberg examined claimant on April 17, 2013, and prepared a report dated April 25, 2013. Director's Exhibit 11. Dr. Rosenberg stated that claimant does not have either clinical pneumoconiosis or a disabling respiratory or pulmonary impairment. *Id*. Dr. Rosenberg opined that it is "possible" that claimant has legal pneumoconiosis "in view of [the] symmetrical reduction of FVC and FEV1 and normal TLC," but it is "more likely" related to "his marked obesity with increased abdominal girth, coupled with his previous sternotomy in relationship to coronary artery bypass surgery." *Id.* Dr. Rosenberg was deposed on April 25, 2014, and reiterated his determination that claimant does not have clinical pneumoconiosis. Employer's Exhibit 4 at 9. Dr. Rosenberg indicated that claimant is totally disabled by obesity, cardiac disease, and resting hypoxemia. *Id*. at 10. Dr. Rosenberg further stated that in light of claimant's normal diffusing capacity, which establishes that the alveolar capillary bed of his lungs is intact, claimant's abnormal blood-gas study values are the result of obesity. *Id*. at 11.

Rosenberg did not identify atelectasis on his reading of the x-ray dated April 17, 2013.[11] Decision and Order at 24, *citing* Director's Exhibits 11 at 8, 13 at 5; Employer's Exhibit 4 at 16. Because the administrative law judge reasonably determined that the basis for Dr. Rosenberg's diagnosis is not supported by the record, we conclude that he permissibly discredited Dr. Rosenberg's opinion that claimant's hypoxemia was caused by obesity rather than coal dust exposure.[12] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); Decision and Order at 24.

When considering the opinion of Dr. Castle,[13] the administrative law judge correctly noted his conclusion that:

> While I believe that it is most likely that the resting hypoxemia is due to [claimant's] morbid obesity in view of his normal ventilatory function without obstruction, restriction, or diffusion abnormality, it is impossible

[11] The administrative law judge noted that Dr. Halbert also did not identify atelectasis on his reading of the April 17, 2013 x-ray. Decision and Order at 24; Director's Exhibit 13.

[12] Employer asserts that Dr. Rosenberg "set forth logical and well-supported reasons for concluding that the miner's impairment was due to obesity and was not significantly related to his coal mine dust exposure." Employer's Brief at 5. However, such a general assertion does not constitute the necessary specific objection to the administrative law judge's findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987). Similarly, employer has not set forth an argument that Dr. Castle's opinion is sufficient to rebut the presumption that claimant has legal pneumoconiosis, apart from its assertion that the administrative law judge applied an incorrect rebuttal standard.

[13] Dr. Castle reviewed the medical evidence and concluded in a report dated June 24, 2016, that claimant does not have either legal or clinical pneumoconiosis. Employer's Exhibit 3. He further indicated that claimant does not have a permanent respiratory or pulmonary impairment because the results of the objective studies are variable. *Id*. In a supplemental report dated June 24, 2016, Dr. Castle reiterated his opinion that claimant does not have clinical pneumoconiosis. Employer's Exhibit 8. He altered his findings regarding total disability and legal pneumoconiosis, however, stating that claimant "would be disabled from his multiple medical problems including . . . his resting hypoxemia" and that he cannot definitively state that coal dust exposure did not contribute to claimant's hypoxemia. *Id*.

> for me to totally exclude a contribution from coal mine dust exposure or legal pneumoconiosis based upon all of the current information present[.]

Decision and Order at 15, *quoting* Claimant's Exhibit 8. In this statement, Dr. Castle did not identify the extent of the contribution that coal dust exposure may have made to claimant's hypoxemia.[14] Thus, the administrative law judge reasonably determined that Dr. Castle's opinion was insufficient to affirmatively disprove the existence of legal pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 24. Because the reasons the administrative law judge provided for discrediting the opinions of Drs. Castle and Rosenberg were valid and were not dependent on the application of any particular rebuttal standard, we affirm his finding that employer failed to rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Sterling*, 762 F.3d at 491-92, 25 BLR at 2-645; *Ogle*, 737 F.3d at 1072, 25 BLR at 2-447, *quoting Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989) ("determining whether a 'doctor's report was sufficiently documented and reasoned[]' [is] a credibility decision we have expressly left to the [administrative law judge]."); *Minich*, 25 BLR at 1-156.

Employer further argues that when finding that it did not rebut the presumed causal connection between legal pneumoconiosis and claimant's total disability, the administrative law judge erred by failing to apply 20 C.F.R. §718.204(c), which requires that pneumoconiosis have a "material adverse effect" on claimant's pulmonary condition. 20 C.F.R. §718.204(c)(1)(i). Employer's contention is without merit. With the Section 411(c)(4) presumption invoked, employer bears the burden of proving that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. §718.305(d)(1)(ii); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-154-56. Here, the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Castle on disability causation, based on his permissible discrediting of their opinions as to whether claimant is totally disabled or has legal pneumoconiosis. Decision and Order at 26; *see Ogle*, 737 F.3d at 1070, 25 BLR at 2-444; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). We therefore affirm the administrative law judge's determination that employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

[14] We note that Dr. Castle also stated that "when morbid obesity causes hypoxemia, it generally improves with exercise. I am unable to adequately explain the differences in the exercise studies obtained by Drs. Forehand and Dahhan." Claimant's Exhibit 8.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge