U.S. Department of Labor

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

BRB No. 14-0427 BLA

JAMES W. JENKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERSTATE MINING CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/30/2015
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-6047)

of Administrative Law Judge Richard A. Morgan, rendered on a claim filed on October 12, 2011, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least nineteen years of coal mine employment, at least fifteen of which were in underground mines, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence was sufficient to establish total pulmonary disability pursuant to 20 C.F.R. §718.204(b). Based on this finding, the date of the claim, and claimant's years of underground coal mine employment, the administrative law judge determined that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Further, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits, commencing on October 1, 2011, the beginning of the month in which the claim was filed.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption at Section 411(c)(4). In response, claimant urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that: claimant has a totally disabling impairment; claimant worked at least fifteen years in underground coal mine employment; and claimant is entitled to the amended Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

To rebut the Section 411(c)(4) presumption, employer must affirmatively prove that claimant does not have either legal pneumoconiosis[4] or clinical pneumoconiosis,[5] or establish that "no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis, as defined in [20 C.F.R. §]718.201." 20 C.F.R. §718.305(d)(1); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, BLR (4th Cir. 2015); *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.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting). In this case, the administrative law judge found that employer successfully rebutted the presumed existence of clinical pneumoconiosis, but failed to rebut the presumed existence of legal pneumoconiosis and the presumed causal relationship between pneumoconiosis and claimant's total pulmonary disability. Decision and Order at 22-26, 35.

Employer argues that, in finding that it failed to affirmatively establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge improperly relied on the preamble to the 2001 regulations. Employer maintains that the administrative law judge's use of the preamble was inappropriate because, unlike the regulations, the preamble was not subject to notice and comment. Employer also contends that, in relying on the preamble, the administrative law judge did not render independent factual findings, based on the medical evidence of record.

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[4] Legal pneumoconiosis is defined as "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).

[5] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Employer's allegations of error are without merit. Several federal courts of appeals, and the Board, have held that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that claimant must establish in order to secure an award of benefits. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802, 25 BLR at 2-212; *Looney*, 678 F.3d at 316, 25 BLR at 2-132. In addition, the administrative law judge did not use the preamble as a pretext to substitute his own opinion for that of the medical experts, or to deprive employer of a fair hearing. Rather, in assessing the credibility of the medical opinions, he permissibly consulted the preamble, which sets forth the medical studies found credible, and relied upon, by the DOL as the bases for its regulation. *See Looney*, 678 F.3d at 313, 25 BLR at 2-139-40; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); Decision and Order at 22-24. Accordingly, we reject employer's argument that the administrative law judge erred in utilizing the preamble in his evaluation of the medical opinion evidence.

In addressing rebuttal of the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge evaluated the medical opinions of Drs. Zaldivar and Rosenberg. Decision and Order at 22-23. Dr. Zaldivar examined claimant and reviewed portions of his medical record. Director's Exhibit 25. Based on claimant's pulmonary function studies, Dr. Zaldivar diagnosed a severe, disabling pulmonary impairment caused by bullous emphysema of unknown origin. *Id.* He stated that, according to medical journal articles published in 1949 and 1982, bullous emphysema is "never a manifestation of coal workers' pneumoconiosis."[6] *Id.*; *see also* Employer's Exhibit 10 at 36-37, 41.

Dr. Rosenberg also examined claimant and reviewed his medical records. Employer's Exhibit 6. In his written report, Dr. Rosenberg diagnosed a severe

[6] Dr. Zaldivar cited J. Gough, M.D., *The pathology of pneumoconiosis*, POSTGRAD. MED. J., Dec. 1949, at 611 and B. Anne Ruckley, *et al.*, *Emphysema and dust exposure in a group of coal workers*, 189 AM. REV. OF PULM. DISEASES 528 (1982). Director's Exhibit 25.

obstructive impairment "relate[d] to his past smoking history." *Id*. at 12. In both his report and his deposition testimony, Dr. Rosenberg further stated that the reduction in the FEV1/FVC ratio on claimant's pulmonary function studies and the evidence of diffuse emphysema are consistent with damage caused solely by cigarette smoking. *Id*. at 10-11; Employer's Exhibit 11 at 25, 34-35. Dr. Rosenberg testified that coal dust exposure can cause a totally disabling obstructive impairment, even in light of a preponderance of negative x-ray readings. Employer's Exhibit 11 at 27. He also observed, however, that claimant's radiology and pulmonary function study results are consistent with a diagnosis of emphysema, unrelated to coal dust inhalation, as the emphysema is not focal and is not severe. *Id*. at 21-24, 29. In addition, Dr. Rosenberg indicated that he has not seen bullous emphysema in conjunction with diseases caused by coal dust exposure. *Id*. at 30.

The administrative law judge discredited the opinions of Drs. Zaldivar and Rosenberg on several grounds, including their reliance on premises that conflict with the DOL's preamble to the 2001 regulations. Decision and Order at 22-24. Employer contends that the administrative law judge did not identify any valid rationale for concluding that the opinions of Drs. Zaldivar and Rosenberg did not establish rebuttal of the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). We reject employer's argument.

The administrative law judge permissibly found that Dr. Zaldivar's opinion was entitled to little weight because, pursuant to 20 C.F.R. §718.305(d)(3), his diagnosis of bullous emphysema of unknown origin was insufficient to rebut the amended Section 411(c)(4) presumption.[7] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). In addition, the administrative law judge rationally determined that Dr. Zaldivar's reliance on the absence of dust retention seen in claimant's chest x-rays to rule out coal dust exposure as a potential contributing cause of the bullous emphysema conflicts with the views expressed by the DOL in the preamble and the final regulations. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). In promulgating the amended definition of legal pneumoconiosis, the DOL did not require that claimants also establish the presence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (quoting with approval a researcher's statement that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of [clinical pneumoconiosis.]"). The administrative

[7] The regulation at 20 C.F.R. §718.305(d)(3) provides, "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin."

law judge's finding is further supported by 20 C.F.R. §718.202(a)(4), which states that "[a] determination of the existence of pneumoconiosis may . . . be made if a physician, exercising sound medical judgment, *notwithstanding a negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis *as defined in* [*20 C.F.R.*] *§718.201*." 20 C.F.R. §718.202(a)(4) (emphasis added). We affirm, therefore, the administrative law judge's determination that Dr. Zaldivar's opinion is insufficient to rebut the presumed existence of legal pneumoconiosis, as he relied on a premise that conflicts with the preamble and the regulations. 20 C.F.R. §718.305(d)(1)(i)(A); *see Bender*, 782 F.3d at 137.

With respect to Dr. Rosenberg's opinion, the administrative law judge accurately found that one of the bases for the physician's rejection of coal dust exposure as a causal factor in claimant's pulmonary impairment was that the reductions in claimant's FEV1/FVC ratio are inconsistent with coal dust-related impairments. Decision and Order at 23; Employer's Exhibit 6. The administrative law judge rationally determined that "the preamble to the revised regulations indicates that a reduction in the FEV1/FVC ratio is a marker for obstructive lung disease, including that caused by coal mine employment," and that Dr. Rosenberg's view was inconsistent with this principle.[8] Decision and Order at 23, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 316, 25 BLR at 2-132. Accordingly, the administrative law judge acted within his discretion in determining that Dr. Rosenberg's opinion was insufficient to rebut the presumed existence of legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Based upon the administrative law judge's rational discrediting of the opinions of both Dr. Zaldivar and Dr. Rosenberg, we affirm his finding that employer did not establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *See Bender*, 782 F.3d at 137.

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was

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[8] The portion of the preamble which the administrative law judge cited contains the DOL's quotation of the following NIOSH statement:

> [Chronic obstructive pulmonary disease] may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,943 (Dec. 21, 2000).

caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Because the administrative law judge rationally determined that Drs. Zaldivar and Rosenberg did not provide reasoned opinions regarding the etiology of claimant's disability, he permissibly found that they also could not be credited as affirmatively establishing that no part of claimant's total pulmonary disability was due to pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii).[9] *See Bender*, 782 F.3d at 135; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Morrison*, 644 F.3d at 479-30, 25 BLR at 2-8-9; Decision and Order at 35. Therefore, we affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by proving that no part of claimant's total disability was caused by pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d 129, 137; *Minich*, slip op. at 11.

[9] Employer also argues that the administrative law judge's weighing of the medical opinions relevant to rebuttal must be vacated, as he erred in relying on claimant's hearing testimony to find that his smoking history was approximately nine pack-years. However, the valid rationales the administrative law judge provided for discrediting the opinions of Drs. Zaldivar and Rosenberg are unrelated to their understanding of claimant's smoking history. We agree with the administrative law judge, therefore, that claimant's "smoking history is not determinative" in this case, and decline to address employer's allegations of error on this issue. Decision and Order at 5; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Rosenberg, we need not address employer's remaining allegations of error regarding the administrative law judge's weighing of these opinions. *See Kozele*, 6 BLR at 1-382 n.4.

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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GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge