U.S. Department of Labor

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

BRB No. 15-0013 BLA

PAUL C. STOUT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 09/29/2015
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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.

Kathy L. Snyder and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

MacKenzie Fillow (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 (13-BLA-5348) of Administrative Law Judge Drew A. Swank awarding benefits 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 claim filed on February 2, 2012.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[2] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not establish rebuttal of the presumption. Employer further argues that the administrative law judge applied an incorrect standard in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge applied the proper rebuttal standard. In a reply brief, employer reiterates its previous contentions.[3]

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[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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 fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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 (1989) (en banc).

[3] Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(4). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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).

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 does not have either legal or clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer initially contends that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). Employer's contention is identical to the one that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43, BLR (4th Cir. 2015), and we reject it here for the reasons set forth in that decision.

Employer also asserts that the administrative law judge erred in applying the "no part," or the "rule out," standard on rebuttal when addressing disability causation, and argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute. Employer's Brief at 28-39. The Board, however, has addressed and rejected these arguments in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting), as has the United States Court of Appeals for the Fourth Circuit, in *Bender*, 782 F.3d at 137-43. For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

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

We next address employer's contention that the administrative law judge erred in finding that it did not establish rebuttal of the Section 411(c)(4) presumption. Employer's Brief at 5-19. In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Jaworski, Begley, Saludes, Bellotte, and Fino. Drs. Jaworski, Begley, and Saludes opined that claimant suffers from legal pneumoconiosis.[5] Director's Exhibit 10; Claimant's Exhibits 1, 6; Employer's Exhibits 7, 13, 15. In contrast, Drs. Bellotte and Fino opined that claimant does not suffer from legal pneumoconiosis. Drs. Bellotte and Fino opined that claimant suffers from emphysema due entirely to cigarette smoking. Director's Exhibit 30; Employer's Exhibits 3, 10, 11, 16, 17.

The administrative law judge discredited the opinions of Drs. Bellotte and Fino because he found that each was inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 25-26. The administrative law judge also found that Dr. Fino's opinion was not credible, and was based on evidence not in the record. *Id.* at 26-27. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 27.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Bellotte and Fino. We disagree. The administrative law judge found that Drs. Bellotte and Fino clearly relied upon "negative x-ray readings to determine that [c]laimant's emphysema is caused by smoking alone."[6] Decision and Order at 26. In

[5] Dr. Jaworski diagnosed legal pneumoconiosis, in the form of emphysema due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 10; Employer's Exhibit 13. Dr. Begley diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 1; Employer's Exhibit 7. Dr. Saludes also diagnosed legal pneumoconiosis, opining that claimant's chronic obstructive pulmonary disease (COPD) was due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 6; Employer's Exhibit 15.

[6] The record provides substantial evidence to support the administrative law judge's characterization of the opinions of Drs. Bellotte and Fino. The administrative law judge noted that Dr. Bellotte testified that coal mine dust-induced emphysema is "much more likely to occur if you have a high PMF [progressive massive fibrosis] reading and it's much more likely to be related to cigarette smoke-induced disease if you have a zero reading for pneumoconiosis." Decision and Order at 25-26, quoting Employer's Exhibit 10 at 30. The administrative law judge noted that Dr. Fino acknowledged that claimant "probably has some emphysema due to coal mine dust," but opined that it was "not clinically significant" because claimant did not have a positive x-ray. Decision and Order at 22, citing Employer's Exhibit 11 at 34. The administrative

other words, Drs. Bellotte and Fino believed that coal dust-induced emphysema is insignificant where a miner does not suffer from clinically significant pneumoconiosis, *i.e.*, pneumoconiosis discernible by x-ray. The viewpoint of Drs. Bellotte and Fino, however, is not supported by the regulations, which separate clinical and legal pneumoconiosis into two different diagnoses, *see* 20 C.F.R. §718.202(a)(1)-(2), and provide that "[a] claim for benefits must not be denied solely on the basis of a negative chest x-ray." 20 C.F.R. §718.202(b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-127 (4th Cir. 2012). Moreover, the administrative law judge permissibly accorded less weight to the opinions of Drs. Bellotte and Fino because their opinions conflict with the recognition in the preamble to the 2001 regulations that "coal dust-induced emphysema can occur regardless of the presence of x-ray evidence of pneumoconiosis." Decision and Order at 26, citing 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (indicating that "exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis]"); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

Additionally, the administrative law judge permissibly found Dr. Bellotte's reasoning, that coal dust and cigarette smoking cause different types of emphysema,[7] to be at odds with the Department of Labor's recognition that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 26, *quoting* 65 Fed. Reg. at 79,943; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

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law judge also noted that Dr. Fino stated that he could not "rule out coal mine dust as being a clinically significant contributing factor" in regard to the emphysema if claimant "had an x-ray of 1/1 or greater." *Id.*

[7] Dr. Bellotte stated that when a miner's x-ray reveals macroscopic changes on x-ray (bullous emphysema), it is most often attributable to cigarette smoking. Dr. Bellotte explained that when coal dust causes emphysema it is more of the microscopic or focal variety. Employer's Exhibit 10 at 24-25, 28-29. In this particular case, Dr. Bellotte stated that:

> [T]he most important point is that [claimant] has severe emphysema. It is visible on radiographs. It is *gross*, macroscopic. Emphysema in CWP is *focal*, microscopic. The radiographs in this case have shown a low dust burden. This is a classic presentation of smoking induced emphysema.

Employer's Exhibit 16 at 2.

The administrative law judge further found that Dr. Fino's opinion, that claimant "probably has some emphysema due to coal dust," Employer's Exhibit 11 at 34, and the doctor's acknowledgment that he could not "exclude some reduction in [claimant's] FEV1 value [being] due to coal mine dust," Employer's Exhibit 11 at 15, undermined his opinion that claimant's emphysema is entirely due to cigarette smoking. Decision and Order at 27. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Because the administrative law judge's credibility determination is based on substantial evidence, it is affirmed.

Because the administrative law judge permissibly discredited the opinions of Drs. Bellotte and Fino,[8] we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Employer contends that the administrative law judge did not adequately address whether employer was able to rebut the presumed fact of total disability causation, by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 18. We disagree.

As previously discussed, in addressing the issue of legal pneumoconiosis, the administrative law judge permissibly discredited the opinions of Drs. Bellotte and Fino that claimant's emphysema was due solely to smoking. Given this finding, a conclusion of no disability causation rebuttal was the only rational one that the administrative law judge could reach. Drs. Bellotte and Fino agreed that claimant's totally disabling pulmonary impairment is due to his emphysema. Director's Exhibit 30 at 5; Employer's Exhibit 3 at 10; Employer's Exhibit 10 at 28, 33; Employer's Exhibit 11 at 53. Therefore, their opinions regarding the cause of claimant's disability reiterated their opinions regarding the presence of legal pneumoconiosis. Thus, the failure of Drs. Bellotte and Fino to credibly disprove legal pneumoconiosis (that claimant's emphysema was not attributable to his coal mine dust exposure) necessarily rendered their opinions inadequate to disprove disability causation (that claimant's disability did not arise out of his coal mine employment). Under the facts of this case, there was no need for the

[8] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Bellotte and Fino, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

administrative law judge to analyze their opinions a second time. *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1346 n. 20, 25 BLR 2-549, 2-579 n.20 (10th Cir. 2014).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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