U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0576 BLA

TARANCE J. MARSHALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEN R. MULLINS EXCAVATING	)	DATE ISSUED: 09/12/2018
c/o RAVEN CREST CONTRACTING	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2015-BLA-05932) of Administrative Law Judge Alan L. Bergstrom 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 miner's claim filed on September 16, 2014.

The administrative law judge found that claimant had at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, he found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption and he awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. The administrative law judge found that claimant worked for 22.5 years in surface coal mine employment, mostly around the drill and as a blaster. Decision and Order at 5, 22-23.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Because claimant's last coal mine employment was in 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); Director's Exhibit 3.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] 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). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge initially found that employer failed to disprove the existence of simple clinical pneumoconiosis and therefore could not establish that claimant does not have pneumoconiosis. Decision and Order at 30, *citing* 20 C.F.R. §718.305(d)(1)(i)(B). Although he stated that it was unnecessary to address whether employer disproved the existence of legal pneumoconiosis, he ultimately evaluated the medical opinions on this issue in conjunction with his analysis of whether employer proved that no part of claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).[5] Decision and Order at 30-33.

Specifically, the administrative law judge considered the medical opinions of Drs. Fino and Rosenberg that claimant does not have legal pneumoconiosis, but suffers from a

[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 includes, but is not limited to, 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).

[5] The administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis with his discussion of whether employer proved that no part of claimant's totally disabling respiratory impairment is due to pneumoconiosis. Decision and Order at 30-33. While these are two separate and distinct issues with two separate standards of proof, the administrative law judge's error in combining his analysis is harmless, as he properly analyzed employer's physicians' opinions on the existence of legal pneumoconiosis and permissibly discredited them as inadequately reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, employer does not challenge this aspect of the administrative law judge's decision.

disabling obstructive impairment that is due solely to cigarette smoking.[6] Employer's Exhibits 6, 7, 9, 10. The administrative law judge found their opinions to be not well-reasoned and, therefore, accorded them no weight. Decision and Order at 30-33.

We reject employer's contention that the administrative law judge erred in discrediting Dr. Fino's opinion. Employer's Brief at 10-13. The administrative law judge noted that, in excluding coal dust as a cause of claimant's impairment, Dr. Fino relied in part on statistical averages and medical studies indicating that only a small percentage of miners develops clinically significant reductions in their FEV1 and FEV1/FVC ratio from coal dust exposure, while the damage from smoking is much greater than previously believed.[7] Decision and Order at 30-31; Employer's Exhibits 6, 9. Dr. Fino also asserted that claimant's severely reduced diffusing capacity is not consistent with coal dust-induced disease, but is consistent with disease caused by cigarette smoke exposure. Decision and Order at 30-31; Employer's Exhibits 6 at 14-15; 9 at 15. The administrative law judge permissibly found that even if these premises were true, Dr. Fino did not adequately explain why claimant's more than twenty-two years of coal mine dust exposure did not contribute to, or aggravate, his disabling obstructive impairment, along with his smoking. *See* 20 C.F.R. §718.201(b) (legal pneumoconiosis includes "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 31. As the administrative law judge's basis for discrediting Dr. Fino's opinion is rational and supported by substantial evidence, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

We further reject employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 11-13. The administrative law judge correctly noted that in eliminating coal dust exposure as a cause of claimant's

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[6] The administrative law judge also considered the opinion of Dr. Ajjarapu, that claimant suffers from legal pneumoconiosis in the form of chronic bronchitis and a severe disabling pulmonary impairment due to coal mine dust exposure and cigarette smoking. Decision and Order at 12-13, 33; Director's Exhibit 10.

[7] Dr. Fino stated that the average loss of FEV1 caused by coal mine dust is only 3% per year, that 92-94% of coal miners suffer only average losses of FEV1 that are not clinically significant, and that, on average, a 1/0 profusion on x-ray correlates to an additional 7% loss of FEV1. Employer's Exhibits 6 at 8-10, 12, 15; 9 at 8-10, 12, 15.

disabling obstructive lung disease, Dr. Rosenberg relied in part on his view that claimant's significantly reduced FEV1/FVC ratio is inconsistent with obstruction due to coal dust exposure, but rather, it is indicative of a smoking related condition. Decision and Order at 31-32; Employer's Exhibits 7, 10. Dr. Rosenberg stated that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1 with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved or only mildly reduced."[8] Employer's Exhibits 7 at 3; 10 at 4. The administrative law judge permissibly discredited Dr. Rosenberg's rationale as both based on generalities and in conflict with the medical science credited by the Department of Labor, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (holding that a physician's opinion based on generalities rather than claimant's specific condition may be discredited); Decision and Order at 31, 33.

Additionally, Dr. Rosenberg opined that claimant's chronic bronchitis could not be attributable to coal dust exposure because chronic bronchitis dissipates within months of the cessation of exposure to coal mine dust. Decision and Order at 32-33; Employer's Exhibits 7, 10. The administrative law judge permissibly found Dr. Rosenberg's rationale to be unpersuasive in light of the regulations which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738, 25 BLR 2-675, 2-684-85 (6th Cir. 2014); Decision and Order at 32-33. Because the administrative law judge's bases for discrediting Dr. Rosenberg's opinion are rational and supported by substantial evidence, they are affirmed. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

As the administrative law judge permissibly discredited the opinions of Drs. Fino and Rosenberg,[9] the only opinions supportive of a finding that claimant does not suffer

[8] Specific to claimant, Dr. Rosenberg noted that there was an "extreme decline" in his FEV1/FVC ratio, indicating that his obstruction is "entirely related" to cigarette smoking. Employer's Exhibits 7 at 3; 10 at 4.

[9] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg, we need not address employer's remaining

from legal pneumoconiosis, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 34.

Finally, having permissibly discredited the opinions of Drs. Fino and Rosenberg that claimant does not have legal pneumoconiosis, the administrative law judge permissibly found that their opinions do not establish that "no part of the Claimant's totally disabling respiratory/pulmonary impairment is due to pneumoconiosis . . . ."[11] Decision and Order at 33; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015), *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding that the doctor's view on causation is independent of his mistaken belief that the miner did not have pneumoconiosis); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015) ("no need for the [administrative law judge] to analyze the opinions a second time" at disability causation where the employer failed to establish that the impairment was not legal pneumoconiosis); Decision and Order at 33. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Rosenberg, the only opinions supportive of employer's burden on the cause of claimant's total disability,[12] we affirm his determination that employer did not rebut the Section 411(c)(4)

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arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 7-9.

[11] Employer does not cite to any evidence indicating that the opinions of Drs. Fino and Rosenberg as to causation were independent of their mistaken belief that claimant did not have legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

[12] Dr. Ajjarapu opined that claimant is totally disabled due in part to his severe coal mine dust-related pulmonary impairment. Director's Exhibit 10. We decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Ajjarapu's opinion, as it does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 9-10.

presumption by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 33-34.

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