U.S. Department of Labor

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

BRB No. 15-0156 BLA

HERSKEL D. STALLARD Claimant-Respondent v. WESTMORELAND COAL COMPANY/ WELLS FARGO DISABILITY MANAGEMENT Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2016 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Rebecca J. Fiebig (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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2012-BLA-5336) of Administrative Law Judge Stephen R. Henley (the administrative law judge), 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). Upon stipulation of the parties, the administrative law judge credited claimant with thirty-four years in underground coal mine employment or in conditions substantially similar to those in an underground mine, and adjudicated this claim, filed on March 22, 2011, pursuant to 20 C.F.R. Part 718. After determining that the claim was timely filed, the administrative law judge found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of 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 further found that employer failed to rebut the presumption and, accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the miner's claim was timely filed and erred in failing to analyze the evidence regarding claimant's smoking history. Employer contends that the administrative law judge did not apply the appropriate standard in rendering his findings on rebuttal, and that he erred in weighing the relevant evidence. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge properly found the claim to be timely and applied the proper rebuttal standard.[2]

[1] Congress enacted amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Once the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 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 established more than fifteen years of qualifying coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b), 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). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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.[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).

Turning first to the issue of timeliness, the Act requires that a living miner's claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 30 U.S.C. §932(f);[4] 20 C.F.R. §725.308(a);[5] *see Island Creek Coal Co. v. Henline*, 456 F.3d 421, 423, 23 BLR 2-321, 2-325 (4th Cir. 2006); *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 996-97, 23 BLR 2-302, 2-314-15 (7th Cir. 2005). Additionally, the regulation provides a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to 20 C.F.R. §725.308(a), (c) involves factual findings that are appropriately made by the

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[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Hearing Transcript at 20.

[4] 30 U.S.C. §932(f) provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-
> (1) a medical determination of total disability due to pneumoconiosis; or
> (2) March 1, 1978.

[5] 20 C.F.R. §725.308 was promulgated to implement 30 U.S.C. §932(f). It provides in relevant part:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

Employer contends that claimant's 2011 claim was not timely filed because claimant testified that he was informed by three physicians in 1993, more than three years before this claim was filed, that he was totally disabled from a pulmonary perspective due to coal dust exposure. Employer's Brief at 4-11. We disagree.

At the hearing, claimant testified that he was hospitalized in 1993 for carbon monoxide poisoning and was treated by Dr. Estocino, who told him that the carbon monoxide poisoning would leave him, but the "other problems" would stay with him. Hearing Transcript at 18-19, 25. Dr. Estocino advised claimant not to go back to work.[6] Hearing Transcript at 25. Claimant further testified that "in the '90s" Dr. Main told him he should not go back to the mines and that he had black lung, which was not severe at that time but would get worse.[7] Hearing Transcript at 26. Claimant also testified that Dr. Dorman, who was treating claimant because he "couldn't breathe," told him in 1993 to

[6] Claimant testified as follows:

> Q: What did [Dr. Estocino] tell you about that [not going back to work]?
> A: He said the breathing problems will continue. He said the carbon monoxide poisoning, he said that will leave you. The other problems, he said they will stay with you.
> Q: Did he ever tell you that you were disabled or anything like that as a result of your breathing?
> A: He said he wouldn't advise me to go back, but I wanted to provide for my family and I thought I was doing the best thing when I went back.

Hearing Transcript at 25.

[7] Claimant testified as follows:

> Q: Did [Dr. Main] ever tell you that you were disabled from working in the mines?
> A: He said I had black lung. That's what Dr. Main said. He said, "Mr. Stallard," he said, "right now, it's not real severe, but over the years, it will increase, it will get worse and worse and worse" and he said, "it will eventually smother you to death." So that's what's going on with me right now.

Hearing Transcript at 26.

quit work and that he was "permanently disabled."[8] Hearing Transcript at 26-27. Claimant stopped working soon after his visit with Dr. Dorman. Hearing Transcript at 28.

In finding that the claim was timely filed, the administrative law judge considered claimant's testimony regarding the diagnoses rendered by Drs. Estocino, Main, and Dorman in the 1990s. The administrative law judge found that "while it is evident that there was a medical communication of pneumoconiosis more than three years before the current claim was filed, there is no specific evidence that any physician informed claimant he was totally disabled due to pneumoconiosis." Decision and Order at 6. The administrative law judge determined that the questions and responses during the hearing established that, "by the 1990s, claimant knew two things - he had black lung and he had a totally disabling impairment," but that they "do not . . . show that a physician told claimant he was totally disabled due to pneumoconiosis in 1990 or 1993." *Id*. This was a permissible finding based on the evidence. Thus, contrary to employer's contention, the administrative law judge properly found that claimant's hearing testimony was insufficient to rebut the presumption of timeliness. *See* 20 C.F.R. §725.308; *Henline*, 456 F.3d at 423, 23 BLR at 2-325; *Williams*, 400 F.3d at 996-97, 23 BLR at 2-314-15. Consequently we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308.

We next address employer's contention that the administrative law judge improperly restricted employer to the rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co*., 428 U.S. 1, 3, BLR 2-36 (1976). Employer asserts that the administrative law judge erred in applying an "unnecessarily harsh reading" of

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[8] Claimant testified as follows:

Q: What did Dr. Dorman tell you?
A: She said, "Quit work." She said "You're permanently disabled; you're not able to go."
Q: She told you that you were permanently disabled?
A: Permanently disabled.
Q: When was that?
A: That was in '93.
. . .
Q: Why did you go see her?
A: I couldn't breathe.

Hearing Transcript at 26-27.

the "rule out" standard on rebuttal, arguing that employer's burden on rebuttal can be no higher than claimant's burden to prove legal pneumoconiosis and disability causation at 20 C.F.R. §§718.202(a), 718.204(c)(1). Employer's Brief at 14-22. The Board, however, has addressed and rejected these arguments in *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149 (Apr. 21, 2015), as has the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015). For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

Employer next challenges the administrative law judge's weighing of the opinions of Drs. Rosenberg and Zaldivar, arguing that the administrative law judge's determination of claimant's smoking history lacks specificity and that the administrative law judge failed to evaluate all relevant evidence in finding it insufficient to rebut the presumed facts of legal pneumoconiosis and disability causation pursuant to Section 411(c)(4). Employer asserts that the administrative law judge improperly mixed his analysis of disability, legal pneumoconiosis, and disability causation. Employer's Brief at 22-27.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After finding that employer successfully rebutted the presumption of clinical pneumoconiosis,[9] the administrative law judge accurately summarized the conflicting medical opinions of record and the physicians' explanations for their conclusions, and determined that Drs. Gallai and Klayton diagnosed legal pneumoconiosis, whereas Drs. Rosenberg and Zaldivar opined that there is insufficient evidence of legal pneumoconiosis and that no part of claimant's obstructive impairment is due to coal dust exposure. Decision and Order at 18-24, 26; Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 8, 18.

Specifically, Dr. Rosenberg explained that claimant has a classic pattern of airflow obstruction and findings of bullous emphysema, all wholly consistent with chronic obstructive pulmonary disease (COPD) related solely to his long smoking history. Employer's Exhibit 18 at 13-14. He ruled out coal dust exposure as a contributing cause, because claimant exhibited a marked decrement in the FEV_1/FVC ratio along with a

[9] In light of the administrative law judge's determination that employer successfully rebutted the presumption of clinical pneumoconiosis, we decline to address employer's allegation that the administrative law judge failed to consider the CT scan evidence and its import on whether the medical opinions of record supported a finding of clinical pneumoconiosis. Decision and Order at 21.

reduction of FEV_1 that Dr. Rosenberg found to be "classic for a smoking-related form of COPD." Employer's Exhibits 18 at 22-23; 7 at 3-4. Similarly, Dr. Zaldivar noted that claimant's treatment records support a diagnosis of asthma exacerbated by forty pack-years of smoking, and opined that claimant does not have pneumoconiosis, but has severe lung damage caused by smoking and asthma. Employer's Exhibit 8 at 9-10, 17-18, 22.

The administrative law judge acted within his discretion in concluding that the opinions of Drs. Rosenberg and Zaldivar were insufficiently reasoned, as he permissibly determined that both physicians failed to adequately address how thirty-four years of coal dust exposure could be excluded as a contributing or aggravating factor to the miner's condition, even if it was primarily due to smoking and/or asthma.[10] Decision and Order at 22, 24; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). As to the miner's smoking history, contrary to employer's argument, the administrative law judge determined that claimant had a two to four pack-year smoking history, based on claimant's testimony that he found to be credible, and employer has failed to identify with specificity where in the record there are discrepancies in claimant's accounting of his smoking history.[11] Decision and Order at 5 n. 8; Hearing Transcript at 18, 29. Furthermore, the administrative law judge did not apply an incorrect legal standard on rebuttal; rather, he permissibly determined that the opinions of Drs. Rosenberg and Zaldivar were insufficiently reasoned and therefore accorded them little weight. Decision and Order at 22-24.

Considering the medical opinion evidence in conjunction with the "other medical evidence" at 20 C.F.R. §718.107, the administrative law judge found that employer failed to rebut the presumption of legal pneumoconiosis, as the most probative medical opinions, treatment records and CT scan evidence suggested the presence of legal

[10] The definition of legal pneumoconiosis 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(a)(2)(b) (emphasis added). Thus, the administrative law judge did not err, as part of his analysis as to rebuttal of legal pneumoconiosis, in considering whether the physicians adequately addressed the effect or relationship of the miner's coal dust exposure during employment to his impairment.

[11] The administrative law judge noted that claimant started smoking around age sixteen, and determined that, based on claimant's date of birth, he began smoking in 1954 and quit in 1993, for a total of thirty-nine years. The administrative law judge found that claimant credibly testified at the hearing to smoking one to two cigarettes per day for a two to four pack-year smoking history. Decision and Order at 5 n. 7, n. 8.

pneumoconiosis. Decision and Order at 26. As substantial evidence supports the administrative law judge's determination, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis.[12]

The administrative law judge properly found that the same reasons that he provided for discrediting the opinions of Drs. Rosenberg and Zaldivar on the issue of pneumoconiosis also undercut their opinions that no part of the miner's disabling impairment was caused by pneumoconiosis. Decision and Order at 26-27; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the opinions of Drs. Rosenberg and Zaldivar were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, the Decision and Order Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[12] Because the administrative law judge provided at least one valid reason for according less weight to the opinions of Drs. Rosenberg and Zaldivar, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Zaldivar.