U.S. Department of Labor

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

BRB No. 17-0389 BLA

ANDREA WOODS[1] (o/b/o LARRY DAVID DANIELS, deceased) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/17/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

[1] The miner died on July 16, 2016. Claimant, the miner's daughter, is pursuing the miner's claim on his behalf. Administrative Law Judge Order dated September 30, 2016.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2012-BLA-05547) of Lystra A. Harris rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on May 9, 2011, and is before the Board for the second time.

Pursuant to employer's previous appeal, the Board affirmed the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The Board vacated, however, the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis,[3] and thus failed to rebut the Section 411(c)(4) presumption.[4] *Daniels v. Consolidation Coal Co*., BRB No. 15-0224 BLA (Mar. 30, 2016) (unpub.).

Specifically, the Board affirmed the administrative law judge's determination that Dr. Jarboe's opinion is insufficient to establish that the miner did not have legal pneumoconiosis. *Daniels*, BRB No. 15-0224 BLA, slip op. at 5-6. The Board held, however, that the administrative law judge failed to provide a valid reason for discrediting

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] "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 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(b).

[4] The administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis was undisturbed in the prior appeal. *Daniels v. Consolidation Coal Co*., BRB No. 15-0224 BLA (Mar. 30, 2016) (unpub.); Judge Harris's 2014 Decision and Order at 24-25.

Dr. Dahhan's opinion that the miner did not have legal pneumoconiosis. *Id*. at 6. Thus, the Board remanded the case for the administrative law judge to reconsider whether employer rebutted the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis, or that his total disability was unrelated to legal pneumoconiosis. *Id*. at 7. The administrative law judge was instructed to reconsider whether Dr. Dahhan's opinion is adequately reasoned and documented.

On remand, the administrative law judge concluded that Dr. Dahhan's opinion is insufficiently reasoned and does not meet employer's burden to establish that the miner did not have legal pneumoconiosis, or that his total disability was not due to legal pneumoconiosis. The administrative law judge, therefore, again found that claimant is entitled to benefits.

On appeal, employer argues that the administrative law judge erred in weighing the medical opinion evidence in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not filed a response brief in this appeal. Employer filed a reply brief, reiterating its contentions on appeal.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

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 the miner did not have either legal or clinical pneumoconiosis, or by establishing that "no part of [the miner's] 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.

A. Legal Pneumoconiosis

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

To rebut the presumption of legal pneumoconiosis employer must prove that claimant's pulmonary or respiratory impairment was neither caused nor substantially aggravated by his coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). Relevant to the existence of legal pneumoconiosis, employer challenges the administrative law judge's weighing of Dr. Dahhan's opinion, arguing that she failed to consider it in its totality.[6] Dr. Dahhan opined that the miner did not have legal pneumoconiosis but had a restrictive impairment due to obesity, sleep apnea, and congestive heart failure. He stated that coal dust was not a cause of the miner's restrictive impairment because the pulmonary function studies reflected that the restriction was associated with normal lung volume capacity and diffusion capacity. Employer's Exhibits 1 at 3; 7 at 16-18. Dr. Dahhan explained that this pattern of impairment reflects a non-parenchymal disease process[7] and is "typical" for an individual who has severe restriction due to obesity. Employer's Exhibit 7 at 18-19.

The administrative law judge correctly observed that Dr. Dahhan relied, in large part, upon the miner's "normal lung volume capacity" to conclude that the miner's restriction was not due to coal dust exposure, but was non-parenchymal in nature. Decision and Order on Remand at 3-4, *quoting* Employer's Exhibit 1 at 3. The administrative law judge noted, however, that Dr. Dahhan's pulmonary function study lists seven different

[6] Employer asserts that the administrative law judge erred in discrediting Dr. Jarboe's opinion that the miner did not have legal pneumoconiosis. Employer's Brief at 12-20. The Board previously rejected this contention. *Daniels*, BRB No. 15-0224 BLA, slip op. at 4-6. As employer has not demonstrated any exception to the law of the case doctrine, we decline to address its argument. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We also reject, as untimely, employer's request that the Board reconsider its prior decision. *See* 20 C.F.R. §802.407; Employer's Brief at 20-22.

[7] Dr. Dahhan explained that "parenchymal means the tissue of the lung." Employer's Exhibit 7 at 18. Dr. Dahhan noted that while the miner had sufficient smoking and coal mine employment histories to cause lung disease in a susceptible individual, the miner also had a medical history of sleep apnea, congestive heart failure, and aortic valve disease. *Id*. at 12-14. He stated that a restriction can be caused by a disease process in the tissue of the lung, and that a non-parenchymal restriction would take place "in the cage where the lung sits, which is the thorax." *Id*. at 18. Dr. Dahhan opined that because the miner had normal lung volume measurements, his restriction was non-parenchymal in nature and was caused by significant weight pressing on the cage and making it smaller, and was accelerated by the miner's congestive heart failure. *Id*.

lung volume measurements[8] and Dr. Dahhan failed to explain which lung volume measurements he relied on to conclude that the miner had normal lung volume capacity. Decision and Order on Remand at 4-5. Nor did Dr. Dahhan explain what a normal lung volume range would be, specific to the miner, or how it would be assessed. *Id.* The administrative law judge further observed that Dr. Dahhan also relied, in part, on the miner's normal diffusion capacity to conclude that he did not have legal pneumoconiosis. Decision and Order on Remand at 5; Employer's Exhibits 1 at 3; 7 at 16. She noted, however, that in his report, Dr. Dahhan stated that the diffusion capacity result he obtained was invalid,[9] and Dr. Burrell, who performed the only other examination referenced in Dr. Dahhan's report, did not provide diffusion capacity results.[10] Decision and Order on Remand at 5; Employer's Exhibit 1 at 3. Further, contrary to employer's argument, while Dr. Dahhan testified that he reviewed additional pulmonary function studies in preparation for his deposition, he did not discuss those results or explain whether they supported his conclusion. Employer's Exhibit 7 at 12; Employer's Brief at 11. Rather, Dr. Dahhan indicated that his conclusions were based on the pulmonary function study results he obtained during his examination that included an invalid diffusion capacity. Employer's Exhibit 7 at 16-17. The administrative law judge therefore found that Dr. Dahhan failed to sufficiently explain how he concluded that the miner's diffusion capacity was normal.

In light of the flaws in Dr. Dahhan's explanation, the administrative law judge permissibly found that Dr. Dahhan's opinion that the miner did not have legal

[8] Dr. Dahhan's pulmonary function study yielded the following lung volume measurements: vital capacity (VC) 33% of predicted; expiratory reserve volume (ERV) 3% of predicted; residual volume (RV) 119% of predicted; total lung capacity (TLC) 65% of predicted; functional residual capacity (FRC) 77% of predicted; RV/TLC 184% of predicted, and inspiratory capacity (IC) 48% of predicted. Employer's Exhibit 1.

[9] Dr. Dahhan stated that the diffusion capacity was invalid because the miner could not hold his breath long enough to perform the maneuver. Employer's Exhibit 1 at 2.

[10] Dr. Dahhan acknowledged that, prior to his deposition, he reviewed the treatment records from University Pulmonary and Critical Care. Employer's Exhibit 7 at 12. Those records reflect that on October 24, 2011, Dr. Hawkins reported that the miner's diffusion capacity was "mildly reduced" at 62% of predicted, and on February 13, 2009, Dr. Ludwig recorded a diffusion capacity of 58% of predicted. Claimant's Exhibit 2. Dr. Dahhan also reviewed treatment records from Dr. Fernandes, who did not record or discuss a diffusion capacity measurement. Claimant's Exhibit 1; Employer's Exhibit 7 at 11-12.

pneumoconiosis is not well-reasoned and is "entitled to little probative weight."[11] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 4-5. As there are no other medical opinions supportive of employer's burden, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) by disproving the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

B. Disability Causation

The administrative law judge next addressed whether employer could establish rebuttal by showing 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). The administrative law judge permissibly found that the same reasons for which she discredited Dr. Dahhan's opinion that claimant did not suffer from legal pneumoconiosis also undercut his opinion that the miner's disabling impairment was unrelated to pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order on Remand at 5. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We

[11] Because the administrative law judge provided valid reasons for discrediting Dr. Dahhan's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons would constitute harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 5. Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Dahhan's opinion.

[12] The administrative law judge previously discredited Dr. Jarboe's disability causation opinion for similar reasons. Judge Harris's 2014 Decision and Order at 26-27. As the Board affirmed the administrative law judge's prior determination to discredit Dr. Jarboe's opinion that the miner did not have legal pneumoconiosis, there was no need for the administrative law judge to revisit Dr. Jarboe's disability causation opinion on remand. *See 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); *Daniels*, BRB No. 15-0224 BLA, slip op. at 5-6.

therefore affirm the administrative law judge's determination that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). We further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and her award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge