U.S. Department of Labor

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

BRB No. 17-0137 BLA

KENNETH E. JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RED BONE MINING COMPANY	)	DATE ISSUED: 12/20/2017
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY, 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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawloski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Andrea Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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 on Remand Awarding Benefits (2013-BLA-5789) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on October 12, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

The Board previously 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).[1] *Jackson v. Red Bone Mining Co.*, BRB No. 15-0202 BLA, slip op. at 7 (Mar. 10, 2016) (unpub.). The Board vacated the award of benefits, however, because the administrative law judge did not conduct a proper analysis of whether employer established rebuttal of the presumption. *Id*. at 8-9. On remand, the administrative law judge again determined that employer failed to rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence to be insufficient to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, addressing employer's assertion that administrative law judge erred in his treatment of a digital x-ray.[2] Employer has filed a reply brief reiterating its contentions.

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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); 20 C.F.R. §718.305.

[2] It is not necessary that the Board reach this issue, which is relevant to the existence of clinical pneumoconiosis, as we affirm, *infra*, the administrative law judge's finding that the employer failed to disprove the existence of legal pneumoconiosis.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, 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).

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] or by establishing that "no part of [claimant'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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method. Decision and Order on Remand at 16, 18.

I. Rebuttal of the Section 411(c)(4) Presumption - Legal Pneumoconiosis

In considering whether employer disproved legal pneumoconiosis, the administrative law judge considered the opinions of employer's physicians, Drs. Fino and Basheda, and found that those opinions did not satisfy employer's burden of proof. Employer contends that the administrative law judge erred in requiring its physicians to "rule out" coal mine dust as a contributing cause of claimant's lung disease in order to disprove the existence of legal pneumoconiosis. Employer also contends that the administrative law judge did not rationally explain the weight accorded the evidence. Employer's assertions of error are without merit.

[3] Because claimant's last coal mine employment was in West Virginia, we 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 6.

[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). 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).

The administrative law judge correctly noted that "employer can rebut presumed legal pneumoconiosis by proving that [claimant] does not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." Decision and Order on Remand at 5, *quoting* 20 C.F.R. §718.201(b). The administrative law judge found that Dr. Fino's opinion did not aid employer in disproving the existence of legal pneumoconiosis, based on Dr. Fino's "candid admission that he cannot, in this instance, rule out the contribution coal dust inhalation made to [c]laimant's emphysema." *Id*. at 13. Contrary to employer's assertion, the administrative law judge did not require Dr. Fino to rule out coal dust as a contributor to claimant's emphysema as a legal necessity. Rather, the administrative law judge permissibly found that Dr. Fino's opinion did not aid employer in its burden to establish that coal dust did not contribute to the miner's impairment as a factual matter, based on Dr. Fino's equivocal causation findings:

> Clearly smoking was a contributing cause. However, he has a significant history of working in the mines and a significant oxygen transfer abnormality based on the blood gases and oxygen saturations with exertion. The lung volumes, in my opinion, are helpful in determining what is occurring. I would clearly expect more overinflation on the lung volumes if the etiology was all emphysema. However the lung volumes are normal, so I suspect that there is something else going on that would reduce the lung volumes. In other words, *emphysema is causing overinflation and something else is causing underinflation; this combination is resulting in normal lung volumes.*
>
> *In my opinion, the other process is coal mine dust related disease within the lungs.* It is true that I do not see it on the chest x-ray nor did I previously see it on the CT scans. However, in this case, it is quite apparent to me that *I cannot rule out a coal mine dust*[-]*related contribution to this man's disabling emphysema*.

Employer's Exhibit 10 at 9-10 (emphasis added); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997). Because we see no error in the administrative law judge's finding that Dr. Fino's equivocal opinion does not aid employer in its affirmative burden, we affirm the administrative law judge's finding that

it is insufficient to disprove that claimant has legal pneumoconiosis.[5] *See* 20 C.F.R. §718.305(d)(1)(i); *Minich*, 25 BLR at 1-159.

The administrative law judge likewise did not apply the wrong legal standard to Dr. Basheda's opinion. The administrative law judge accurately found that Dr. Basheda is the only physician in the record "to opine that coal dust could be excluded as a contributing cause of [c]laimant's undisputed emphysema."[6] Decision and Order on Remand at 12. The administrative law judge noted correctly that Dr. Basheda completely eliminated coal dust exposure as a causative factor for claimant's chronic obstructive pulmonary disease based, in part, on claimant's "demonstrated improvement with bronchodilators during pulmonary function testing."[7] *Id*. In determining the weight to accord Dr. Basheda's opinion, the administrative law judge observed that "a physician may be discredited for relying on the reversibility of an individual's obstructive impairment to exclude coal dust as a contributing factor." *Id*. at 15, *citing Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).[8] The

[5] Dr. Fino indicated in his report that claimant smoked one pack a day for twenty years. Employer's Exhibit 10. Employer alleges that when presented with a more accurate smoking history of forty to eighty pack years, as described in claimant's treatment record, Dr. Fino testified that smoking was the cause of claimant's respiratory condition and not coal dust exposure. Employer's Brief in Support of Petition for Review at 24. Employer's characterization of Dr. Fino's deposition testimony, however, is inaccurate. Dr. Fino agreed that with a more significant smoking history he would opine that smoking was the *primary* cause of claimant's emphysema, but reiterated that he could not rule out a contribution from coal dust exposure to claimant's respiratory condition. Employer's Exhibit 16 at 21.

[6] The record also includes the opinions of Drs. Jaworski and Begley who opined that claimant has chronic obstructive pulmonary disease (COPD) caused by smoking and coal dust exposure. Director's Exhibit 11; Claimant's Exhibit 1.

[7] Dr. Basheda reported that claimant's obstructive respiratory impairment went from severe to mild after use of a bronchodilator. Employer's Exhibit 1.

[8] In the cases cited by the administrative law judge, the circuit courts held that a partial response to bronchodilators does not necessarily explain why the miner's residual and non-reversible respiratory impairment is unrelated to coal dust exposure. *Cumberland River Coal Co., v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th

administrative law judge determined that Dr. Basheda's opinion was not persuasive because "nowhere in his report or during his deposition did Dr. Basheda provide any reference to medical literature or studies to support [his] contentions." Decision and Order on Remand Awarding Benefits at 15. Thus, contrary to employer's contention, the administrative law judge's analysis reflects that he rejected Dr. Basheda's opinion on the grounds that it was not adequately explained and not because the administrative law judge applied an incorrect legal standard. *Id*.

Employer next argues that, contrary to the administrative law judge's finding, Dr. Basheda "cited a number of references to medical literature to support his conclusions" regarding the significance of partial bronchodilator response. Employer's Brief in Support of Petition for Review at 18, *citing* Employer's Exhibit 1 at 11-12.[9] However, the portion of Dr. Basheda's report cited by employer discusses estimated losses of lung function in active smokers versus coal miners and does not mention bronchodilator response. Employer's Exhibit 1. We therefore see no error in the administrative law judge's characterization of Dr. Basheda's opinion or his conclusion that Dr. Basheda's opinion is not adequately explained. *See Hicks*, 138 F.3d at 533, 21 BLR at2-335; *Akers*, 131 at 441, 21 BLR at 2-275-276. As employer raises no other challenge regarding the administrative law judge's rejection of Dr. Basheda's rationale based on the bronchodilator response,[10] we affirm the administrative law judge's finding that Dr.

Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

[9] Employer appears to rely on the following paragraph in Dr. Basheda's report:

> Approximately 15 percent of smokers in American longitudinal studies can develop tobacco-induced COPD. The loss of lung function has been estimated between 50 to 75 cc's per year in active smokers. The loss of lung function in coal dust-induced obstructive lung disease, especially after dust regulation in the early 1970's is minimal (two to three cc's per year) as described by Cohen.

Employer's Exhibit 1 at 12.

[10] Employer contends that the administrative law judge erred in not making a specific finding regarding the length of claimant's smoking history. It is not necessary that we resolve this issue. The administrative law judge reported the smoking histories relied on by all four physicians in the record and his rejection of Dr. Basheda's opinion was not based on a finding that Dr. Basheda had an inaccurate understanding of

Basheda's opinion is insufficient to disprove the existence of legal pneumoconiosis.[11] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We therefore affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption pursuant 20 C.F.R. §718.305(d)(1)(i).[12] *See Bender*, 782 F.3d at 137, 25 BLR at 2-699.

II. Rebuttal of the Section 411(c)(4) Presumption - Disability Causation

Employer argues that because the administrative law judge erred in weighing the medical opinions on the issue of legal pneumoconiosis, his findings under 20 C.F.R. §718.305(d)(1)(ii) should be vacated. Because we have affirmed the administrative law judge's determination that employer failed to disprove legal pneumoconiosis, employer's argument is without merit. Furthermore, we see no error in the administrative law judge's finding that Dr. Basheda's opinion was not credible on the issue of disability causation, as Dr. Basheda did not diagnose either legal pneumoconiosis or total respiratory disability. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order on Remand at 18. We therefore affirm the administrative law judge's determination that employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of the claimant's

---

claimant's smoking history. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference").

[11] Employer argues that the administrative law judge erred in rejecting Dr. Basheda's opinion regarding the etiology of claimant's asthma as contrary to the preamble to the 2001 revised regulations. Because we have affirmed the administrative law judge's finding that Dr. Basheda's opinion is insufficient to establish that claimant's emphysema is not legal pneumoconiosis, we consider any error by the administrative law judge in relation to Dr. Basheda's opinion on asthma to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[12] As employer must disprove both legal and clinical pneumoconiosis under the first rebuttal method, employer's failure to disprove legal pneumoconiosis precludes rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i).

total respiratory or pulmonary disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 18.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge