U.S. Department of Labor

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

BRB No. 17-0602 BLA

JAMES H. NEELEY, JR. Claimant-Respondent v. CONSOLIDATION COAL CORPORATION and CONSOL ENERGY, INCORPORATED c/o HEALTHSMART CASUALTY CLAIM Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/15/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Tracy A. Daly, 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.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, rendered by Administrative Law Judge Tracy A. Daly on a claim filed on November 28, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established 23.5 years of coal mine employment either underground or in conditions substantially similar to an underground mine. He also determined that claimant has a totally disabling respiratory or pulmonary impairment and, therefore, invoked the Section 411(c)(4) presumption.[1] The administrative law judge found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the presumed existence of legal pneumoconiosis or total disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not 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 into the Act

[1] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be 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(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 23.5 years of coal mine employment, either underground or in conditions substantially similar to those in an underground coal mine; a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); and invocation of the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 19-20.

[3] Because claimant's coal mine employment was in Virginia, 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, 1-202 (1989) (en banc); Director's Exhibit 3.

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, 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 § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149 (2015) (Boggs, J., concurring and dissenting).

To disprove the existence of legal pneumoconiosis, employer must show by a preponderance of the evidence that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159.

In weighing Dr. Fino's opinion, the administrative law judge excluded from consideration the parts of his opinion that were based on a blood gas study dated October 24, 2013, that is not in evidence.[5] Decision and Order at 23. The administrative law judge explained that because Dr. Fino relied on an excluded blood gas study when discussing the cause of claimant's respiratory impairment, his opinion was entitled to little weight on the issue of legal pneumoconiosis. *Id*.

Employer argues that contrary to the administrative law judge's finding, Dr. Fino's conclusions are not premised solely on the excluded study, but rather are based on the

[4] Legal pneumoconiosis is defined as "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 restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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] Dr. Fino administered a blood gas study to claimant on October 24, 2013, which had non-qualifying resting values but qualifying values with exercise. Director's Exhibit 12. Claimant subsequently performed a blood gas study for Dr. Green on October 16, 2014, which produced non-qualifying values at rest and with exercise. Employer's Exhibit 8. Employer opted to substitute the October 16, 2014 study for the October 24, 2013 study, when designating its blood gas study evidence in compliance with the evidentiary limitations.

pattern of claimant's blood gas studies over time. Employer asserts that Dr. Fino's opinion would remain the same even if the excluded study was not considered, as "three of the four remaining studies showed results which were substantially similar to those obtained by Dr. Fino." Employer's Brief at 16. Employer also states that the administrative law judge did not comply with the Administrative Procedure Act (APA) because he failed to set forth the rationale underlying his discrediting of Dr. Fino's opinion.[6] Employer's contentions have merit.

In Dr. Fino's supplemental report, he considered six blood gas studies dated December 17, 2012, October 24, 2013, May 13, 2014, June 17, 2014, October 16, 2014, and January 12, 2016. Employer's Exhibit 10. Dr. Fino stated:

> On all of the blood gas testing – with the exception of one study[7] – I see significant drops in the pO2. There are also significant increases in the pCO2 on most studies.
>
> First, if coal workers pneumoconiosis were to cause a drop in pO2, it would be present all of the time. Therefore, the abnormality in pO2 with exertion is not consistent with coal dust inhalation because there is variability.
>
> In addition, I would not expect a rise in the pCO2 due to coal mine dust inhalation. That suggests a condition called hypoventilation. I still believe that everything that is occurring in terms of the pO2 and pCO2 is due to significant small airways inflammation due to [claimant's] excessive cigarette smoking.

Id. Because the administrative law judge did not address this part of Dr. Fino's opinion, and did not explain his determination that Dr. Fino relied "in significant part" on the excluded blood gas study from October 24, 2013, his rejection of Dr. Fino's opinion does

[6] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] Dr. Fino appears to be referring to the blood gas study obtained by Dr. Green on October 16, 2014, who reported an exercise pCO2 of 82 and exercise pO2s of 72, 74, and 76. Employer's Exhibits 8, 10.

not comply with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

We therefore vacate the administrative law judge's discrediting of Dr. Fino's opinion on the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). On remand, the administrative law judge must address the totality of Dr. Fino's opinion to determine whether it is sufficient to affirmatively establish that claimant does not have legal pneumoconiosis, and explain his findings in detail, as required by the APA. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer also contends that the administrative law judge erred in evaluating Dr. Rosenberg's comments as to latency and failed to consider the totality of his opinion. Employer's argument has merit.

The regulation at 20 C.F.R. §718.201(c) provides 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) (emphasis added). As employer alleges, the administrative law judge did not consider that Dr. Rosenberg acknowledged that both clinical and legal pneumoconiosis can be latent and progressive, and proffered an explanation of why, in this case, the latency of claimant's obstructive impairment is a factor that weighed in favor of a diagnosis of bronchospasm/asthma, with a related obstructive impairment, that was not caused by coal dust exposure. Employer's Exhibit 9 at 7-8, 19-20. Dr. Rosenberg testified:

> [H]is spirometries were normal up until 2014. After my evaluation . . . he had a moderate degree of obstruction with a marked bronchodilator response. He developed bronchospasm which almost totally normalized, so that really wouldn't be a coal mine dust-related situation. You're not going to get an *asthmatic reaction* from coal dust years after you left the mines. And then go on and continue to smoke and with Dr. Forehand['s pulmonary function study results], he has some more impairment, but that doesn't relate to coal dust exposure that ceased . . . ten years before.

Id. at 20 (emphasis added). Because the administrative law judge did not address the totality of Dr. Rosenberg's opinion, he did not comply with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Moreover, the administrative law judge did not consider the totality of the medical opinion evidence to resolve the conflict among the physicians as to whether claimant

suffers from legal pneumoconiosis. The administrative law judge discredited Dr. Rosenberg because he opined that claimant's abnormal pulmonary function study results appeared years after his coal mining ceased and further found that his opinion is "at odds" with Dr. Forehand's opinion. Decision and Order at 23-25. The administrative law judge did not acknowledge, however, that Dr. Forehand similarly did not diagnose claimant with legal pneumoconiosis based on the pulmonary function study results,[8] but instead based his diagnosis of legal pneumoconiosis on the blood gas studies which revealed "totally disabling exercise-induced arterial hypoxemia, which arose as a direct result of the effects of coal mine dust exposure on his lungs." Claimant's Exhibit 5 at 3. Thus, the administrative law judge's finding that "the physicians' reports are equally balanced on the question of whether or not the pulmonary function studies establish that [c]laimant suffers from legal pneumoconiosis" cannot be affirmed.[9] Decision and Order at 24.

The administrative law judge's analysis reflects that he may have conflated the pulmonary function studies and the arterial blood gas studies, and the results that the doctors attributed to them. As noted above, he discredited Dr. Rosenberg's analysis pertaining to the pulmonary function study testing by citing Dr. Forehand's conclusion as to the arterial blood gas study, despite the fact that Dr. Forehand did not identify coal dust exposure as a factor in claimant's pulmonary function study results. Additionally, he did not address Dr. Rosenberg's rationale with respect to claimant's oxygenation abnormality as shown by the exercise blood gas testing.[10]

[8] Dr. Forehand did not opine that claimant's pulmonary function studies evidence a coal dust-related impairment. Rather, he stated that the normal or mildly abnormal pulmonary function study results enabled him to conclude that cigarette smoking was not a cause of the coal dust-related impairment reflected on claimant's blood gas studies. Claimant's Exhibit 5 at 3.

[9] This finding appears to be based on a relative weighing of only the opinions of Drs. Forehand and Rosenberg, without also weighing the opinion of Dr. Cordasco that claimant's pulmonary function studies reflect a coal dust-related impairment. Claimant's Exhibit 1; Employer's Exhibit 7.

[10] The physicians discussed two types of possible impairments: impairment reflected by pulmonary function studies and impairment reflected by arterial blood gas studies. Drs. Forehand, Rosenberg, and Fino diagnosed an abnormality in claimant's oxygenation based on the arterial blood gas studies, but differed as to its etiology. Dr. Forehand opined that claimant has a totally disabling impairment of gas exchange related to coal-dust exposure; Dr. Rosenberg identified claimant's condition as oxygenation hypoventilation disorder caused by brain dysfunction and obesity; and Dr. Fino stated that

Consequently, we remand for the administrative law judge to consider and address all of the relevant evidence.

On remand, the administrative law judge must reconsider Dr. Rosenberg's opinion and determine whether it is sufficient to establish that claimant does not suffer from a pulmonary or respiratory impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159. If the administrative law judge resolves the issue of whether employer satisfied its burden to rebut legal pneumoconiosis by a relative weighing of the medical opinion evidence, he must consider the physicians' respective qualifications, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Finally, in light of the administrative law judge's reliance on his discrediting of the opinions of Drs. Fino and Rosenberg under 20 C.F.R. §718.305(d)(1)(i)(A) when addressing whether employer rebutted the presumed fact of disability causation, we must also vacate the administrative law judge's findings that employer failed to meet its burden under 20 C.F.R. §718.305(d)(1)(ii).[11] *See Bender*, 782 F.3d at 137; Decision and Order at 25. If the administrative law judge finds on remand that employer failed to rebut the

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the condition suggested hypoventilation but ultimately attributed the blood gas impairment to the effects of smoking. Director's Exhibits 11, 12; Claimant's Exhibit 5; Employer's Exhibits 2, 9, 10. In his written report, Dr. Cordasco diagnosed legal pneumoconiosis based in part on the results of claimant's pulmonary function studies; at deposition, he reiterated that diagnosis and stated further that the "gas exchange pattern, [reflected on claimant's blood gas study] at exercise, suggests significant lung disease." *See* Claimant's Exhibit 1 at 3-4; Employer's Exhibit 7 at 30-31, 35. In finding that employer did not rebut the presumption that claimant has legal pneumoconiosis, the administrative law judge did not analyze all of the relevant physician opinions pertaining to the type of impairment, if any, demonstrated by the pulmonary function studies as distinct from the type of impairment, if any, demonstrated by the arterial blood gas studies.

[11] In analyzing whether employer rebutted the presumption of disability causation, the administrative law judge credited Drs. Forehand and Cordasco specifically with respect to exercise-induced hypoxemia (an impairment tied to the blood gas study results). As noted above, however, he did so without first analyzing all of the relevant evidence to determine whether there was either a blood gas impairment, or an impairment reflected by pulmonary function studies, or both, which specifically constituted legal pneumoconiosis.

presumption at 20 C.F.R. §718.305(d)(1)(i),[12] the administrative law judge must determine whether employer rebutted the presumption at 20 C.F.R. §718.305(d)(1)(ii), with credible proof that no part of claimant's pulmonary or respiratory disability was caused by pneumoconiosis. *See Bender*, 782 F.3d at 137; *Minich*, 25 BLR at 1-154-56.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[12] The administrative law judge found that employer did not disprove the existence of clinical pneumoconiosis by either the analog or digital x-ray evidence because it is in equipoise. Decision and Order at 22, 23. He further found, however, that the preponderance of the medical opinion evidence is sufficient to rebut the existence of clinical pneumoconiosis, but did not explain why he credited the opinions excluding a diagnosis of clinical pneumoconiosis nor did he weigh the evidence supportive of employer's burden against the other relevant evidence, as is required. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order at 24. The administrative law judge must remedy these omissions on remand, as it is employer's burden to rebut both forms of the disease and such findings may be relevant to whether employer has rebutted disability causation under 20 C.F.R. §718.305(d)(1)(ii).