U.S. Department of Labor

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

BRB No. 16-0285 BLA

PHILIP R. NEWTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG RIDGE COAL COMPANY	)	
	)	DATE ISSUED: 03/31/2017
Employer-Petitioner	)	
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey Swanson and Allman), Indianapolis, Indiana, for claimant.

Scott A. White (White & Risse, LLP), Arnold, Missouri, for employer.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05358) of Administrative Law Judge Larry S. Merck, rendered on a claim filed on June 25, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least thirty

years of underground coal mine employment,[1] and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, reiterating its contentions. The Director, Office of Workers' Compensation Programs, has not filed a response.[3]

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. 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor

[1] Claimant's coal mine employment was in Indiana. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the claimant establishes fifteen or more 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. *See* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty years of underground coal mine employment, the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that claimant does not have legal pneumoconiosis,[5] the administrative law judge considered the medical opinions of Drs. Tazbaz, Tuteur, and Rosenberg. Drs. Tuteur and Rosenberg provided the only opinions supportive of employer's burden on rebuttal.[6] Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) associated with physiologic impairment resulting in disability, a direct result of claimant's 100-pack-year smoking history, and unrelated to coal mine dust exposure. Decision and Order at 8-14; Director's Exhibit 62 at 11; Employer's Exhibit 1 at 5. In Dr. Tuteur's opinion, claimant's "clinical course and dataset presented" would be the same if claimant had never performed coal mine employment. Employer's Exhibit 1 at 5. Dr. Tuteur stated that "though it is statistically possible for an individual miner to develop [COPD] as a result of the inhalation of coal mine dust, it occurs relatively infrequently[.]" *Id*. He thus concluded that attributing the cause of COPD to coal mine dust "is not valid for a cigarette smoking miner at the level of reasonable medical certainty." *Id*. However, Dr. Tuteur also stated that it was not impossible for coal dust to have caused or contributed to claimant's COPD, and that "it cannot be ruled out." Employer's Exhibit 38 at 93-94; *see also* Decision and Order at 9-10, 12, 14; Employer's Exhibit 1 at 5.

[4] Legal pneumoconiosis refers to "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 is defined as "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 found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 21-22.

[6] Dr. Tazbaz concluded that claimant's coal dust exposure and smoking both contributed to his lung disease, but the administrative law judge discounted his opinion, finding it equivocal and unsupported by objective medical evidence. Decision and Order at 23.

Dr. Rosenberg also concluded that claimant is totally disabled by severe airflow obstruction, but opined that claimant does not have legal pneumoconiosis, noting that claimant's FEV1 was severely reduced at times, with a marked reduction of the FEV1/FVC ratio. Employer's Exhibits 28 at 13, 39 at 23-27. Dr. Rosenberg asserted that claimant's pattern of obstruction indicated "a smoking-related form of airways disease" unrelated to coal mine dust exposure, which in his view causes proportional reductions in FEV1 and FVC that preserve, rather than reduce, the FEV1/FVC ratio. Employer's Exhibits 28 at 9-13, 39 at 25-26. In addition, Dr. Rosenberg diagnosed claimant as having airflow variability, which he believed characterized disorders unrelated to coal dust exposure. Employer's Exhibit 39 at 26. Thus, Dr. Rosenberg concluded that he could exclude coal dust as a cause of claimant's impairment. Employer's Exhibits 28 at 13, 39 at 37.

The administrative law judge discredited Dr. Tuteur's and Dr. Rosenberg's opinions. He noted that Dr. Tuteur used statistics to state with "reasonable" certainty that claimant's COPD was due to smoking and not coal mine dust, but that Dr. Tuteur conceded that he could not rule out coal dust exposure as a factor in claimant's impairment. Decision and Order at 24-25. The administrative law judge determined that Dr. Tuteur "did not explain why [c]laimant could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure. Indeed, he acknowledged that this was a possibility, albeit a slim one." *Id*. at 25 (footnote omitted). As for Dr. Rosenberg, the administrative law judge reasoned that his opinion that claimant's sharply reduced FEV1/FVC ratio is characteristic of smoking-related COPD but not obstruction due to coal mine dust exposure "cannot be reconciled with 20 C.F.R. §718.204(b)(2)(i)(C), which allow[s] a claimant to establish disability on the basis of a qualifying FEV1 accompanied by an FEV1/FVC value equal to or less than 55 [percent]." *Id*. The administrative law judge determined that Dr. Rosenberg failed to adequately explain "why he entirely ruled out the possibility" that claimant's thirty years of underground coal mine dust exposure contributed to or aggravated claimant's lung disease. *Id*. at 26.

Having discredited the opinions of Drs. Tuteur and Rosenberg, the administrative law judge found that employer failed to present evidence "sufficient to sustain its burden" of establishing that claimant does not have legal pneumoconiosis. Decision and Order at 26. Consequently, the administrative law judge also determined that employer failed to establish that no part of claimant's totally disabling respiratory impairment is caused by pneumoconiosis. *Id*. at 27. Finding that employer failed to rebut the Section 411(c)(4) presumption, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred by relying on the preamble to the 2001 regulatory revisions to discount the medical opinions of Drs. Tuteur

and Rosenberg. Employer contends that the administrative law judge improperly used the preamble as evidence; that he improperly applied it as a rule, in violation of the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a); and that the preamble is based on scientific studies that have been misinterpreted and called into question by more recent studies. Employer's Brief at 2-3, 7-8, 10-11, 13-16, 21-22, 25-26.

Employer's arguments are immaterial, however, because the administrative law judge did not rely on the preamble to discredit either physician. The administrative law judge noted that even if he accepted Dr. Tuteur's conclusion that claimant's chances of developing his COPD from coal mine dust were "minimal," Dr. Tuteur himself acknowledged that claimant could be one of the rare individuals whose obstructive impairment was due to coal mine dust exposure. Decision and Order at 25; Employer's Exhibits 1 at 5, 38 at 93-94. Thus, the administrative law judge permissibly discounted Dr. Tuteur's opinion for relying on generalities, rather than addressing claimant's specific case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104 (7th Cir. 2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 25. In considering Dr. Rosenberg's opinion, although the administrative law judge referenced the preamble, he did not discredit Dr. Rosenberg's opinion on that basis. Decision and Order at 25-26. Instead, the administrative law judge permissibly discredited his opinion because, in asserting that claimant's reduced FEV1/FVC ratio is not characteristic of obstruction due to coal mine dust exposure, Dr. Rosenberg did not adequately explain why claimant's thirty years of underground coal mine dust exposure did not contribute to or aggravate his lung disease. *See* 20 C.F.R. §718.201(a)(2), (b); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 671-72, 22 BLR 2-483, 2-491-92 (7th Cir. 2002); Decision and Order at 26.

Employer also contends in its reply brief that the administrative law judge applied an incorrect standard in considering whether employer established that claimant does not have legal pneumoconiosis. Employer's Reply Brief at 7, 10-11. Employer argues that the administrative law judge improperly imposed a "rule out" standard that required Drs. Tuteur and Rosenberg to "eliminate all possibility of a connection" between claimant's coal mine dust exposure and his lung impairment. *Id*. at 10-11. Employer's argument lacks merit.

It is true that the administrative law judge used the phrase "rule out" at times in his analysis, and in evaluating Dr. Tuteur's opinion on the existence of legal pneumoconiosis stated that employer's burden was "to rule out exposure to coal mine dust as a factor in

[c]laimant's total respiratory disability." Decision and Order at 22-26.[7] However, even assuming that the administrative law judge incorrectly stated employer's rebuttal burden with respect to Dr. Tuteur's opinion, any such error was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). The administrative law judge did not find that Dr. Tuteur's opinion failed to rebut the existence of legal pneumoconiosis because it did not meet a rule-out standard. As explained above, the administrative law judge found that Dr. Tuteur's opinion was not credible because his conclusion that coal mine dust did not influence claimant's COPD was based on an analysis of general statistical probabilities rather than the specifics of claimant's case. Decision and Order at 24-25; Employer's Exhibit 1 at 5. Thus, the administrative law judge found that Dr. Tuteur's opinion was not sufficiently credible to rebut the existence of legal pneumoconiosis regardless of the standard.

As for Dr. Rosenberg, the record reflects that he himself "ruled out" coal dust as a cause or contributing or aggravating factor in claimant's impairment. Thus, the administrative law judge's use of the phrase "rule out" was an accurate summary of Dr. Rosenberg's own wording. As we discussed above, the administrative law judge discredited Dr. Rosenberg's opinion because he did not adequately explain why claimant's thirty years of coal mine dust exposure did not contribute to, or aggravate, his COPD, along with his smoking. Decision and Order at 25-26; Employer's Exhibit 39 at 37.

[7] Upon claimant's invocation of the Section 411(c)(4) presumption, it is employer's burden to establish that claimant does not have "[l]egal pneumoconiosis as defined in [20 C.F.R.] §718.201(a)(2)." 20 C.F.R. §718.305(d)(1)(i)(A). As defined in 20 C.F.R. §718.201(a)(2), legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," including "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). Thus, employer had to establish, by a preponderance of the evidence, that claimant does not have a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, his coal mine dust exposure. Even if the administrative law judge used the term "rule out" only to say that employer is required to disprove that coal dust exposure is a significantly related or substantially aggravating factor in claimant's impairment, the phrase "rule out" does not track the applicable regulatory language and may confuse a reader into thinking that the administrative law judge imposed a stricter "no part" standard, such as the standard at 20 C.F.R. §718.305(d)(1)(ii) for rebutting the presumption of disability causation.

Because the administrative law judge permissibly discounted the opinions of Drs. Tuteur and Rosenberg, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 26.

Finally, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because Drs. Tuteur and Rosenberg did not diagnose claimant with legal pneumoconiosis — contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease — and their analyses of disability causation were tied to their analyses of whether claimant has pneumoconiosis, the administrative law judge reasonably discounted their opinions on the issue of disability causation. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013); Decision and Order at 27. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge