U.S. Department of Labor

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

BRB No. 16-0512 BLA

GARY L. RICE Claimant-Respondent v. DUDE BRANCH MINING, INCORPORATED and AMERICAN INTERNATIONAL SOUTH Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/18/2017 DECISION and ORDER

Appeal of the Decision and Order of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

H. Brett Stonecipher (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-5477) of Administrative Law Judge Jonathan C. Calianos awarding benefits 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). This case involves a subsequent claim filed on December 22, 2010.[1]

The administrative law judge credited claimant with at least twenty years of underground coal mine employment,[2] and found that the evidence established that claimant suffers from 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 Section 411(c)(4) presumption.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant initially filed a claim for benefits on September 19, 2002. Director's Exhibit 1. An administrative law judge denied the claim because he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b). *Id.* Upon review of claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis. *Rice v. Dude Branch Mining Co.*, BRB No. 06-0676 BLA (May 9, 2007) (unpub.). The Board therefore affirmed the administrative law judge's denial of benefits. *Id.*

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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 & 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 clinical pneumoconiosis,[5] 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.

The administrative law judge found that employer established that claimant does not suffer from clinical pneumoconiosis. Decision and Order at 24. However, employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rosenberg and Dahhan. Dr. Rosenberg opined that claimant suffers from chronic obstructive pulmonary disease (COPD) due to cigarette smoking and not

[4] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this affirmance, claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[5] "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).

coal-mine dust exposure.[6] Employer's Exhibits 5, 9 at 24-26. Dr. Dahhan diagnosed a variable obstructive defect that was not due to coal-mine dust exposure, and exercise-induced hypoxemia cause by obesity. Director's Exhibit 13; Employer's Exhibit 8.

The administrative law judge discredited Dr. Rosenberg's opinion because he found that it is inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 25-26. The administrative law judge also discredited the opinions of both Drs. Rosenberg and Dahhan because he found that the doctors failed to adequately explain how they eliminated claimant's twenty years of coal-mine dust exposure as a contributor to claimant's disabling pulmonary impairment. Decision and Order at 26-28. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Dahhan. The administrative law judge correctly noted that Dr. Rosenberg eliminated coal-mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because he found a significant reduction in claimant's FEV1/FVC ratio which, in his opinion, was inconsistent with obstruction due to coal-mine dust exposure.[7] Decision and Order at 25-26; Employer's Exhibits 6, 9. The administrative law judge permissibly discredited Dr. Rosenberg's opinion because its reasoning for eliminating coal-mine dust exposure as a source of claimant's obstructive pulmonary disease is in conflict with the medical science accepted by the DOL, recognizing that coal-mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 25-26.

[6] Dr. Rosenberg opined that claimant's COPD also has "an asthmatic component." Employer's Exhibit 9 at 25-26.

[7] In attributing claimant's chronic obstructive pulmonary disease (COPD) to cigarette smoking instead of coal-mine dust exposure, Dr. Rosenberg explained that while the FEV1 decreases in relationship to coal-mine dust exposure, the FEV1/FVC ratio is preserved. Employer's Exhibit 6 at 6. Specific to claimant's situation, Dr. Rosenberg noted there was a marked reduction in the FEV1/FVC ratio. *Id.* at 9. Dr. Rosenberg opined that this pattern of impairment is inconsistent with one caused by coal-mine dust exposure, and is classic for a smoking-related form of COPD. *Id.*

The administrative law judge further noted that Drs. Rosenberg and Dahhan relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal-mine dust exposure was not a cause of claimant's obstructive impairment.[8] Decision and Order at 26-28. The administrative law judge permissibly found that Drs. Rosenberg and Dahhan did not adequately explain why the irreversible portion of claimant's obstructive pulmonary impairment[9] was not due, in part, to coal-mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 26-28.

The administrative law judge also permissibly questioned Dr. Dahhan's opinion because he found that the physician failed to adequately explain how he eliminated claimant's coal-mine dust exposure as a source of his exercise-induced hypoxemia.[10] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); Decision and Order at 28. Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Dahhan,[11] we

[8] Dr. Rosenberg opined that claimant's marked bronchodilator response is inconsistent with a coal-mine dust related disorder. Employer's Exhibit 6. Dr. Dahhan opined that an obstruction related to coal-mine dust exposure would not demonstrate the response to the administration of bronchodilators exhibited by claimant. Director's Exhibit 13.

[9] As the administrative law judge accurately noted, although Dr. Rosenberg relied upon the reversibility of claimant's results after administration of a bronchodilator to support his opinion, the post-bronchodilator results from the doctor's pulmonary function study remained qualifying. Decision and Order at 8, 26. The administrative law judge also noted that the post-bronchodilator values from Dr. Dahhan's pulmonary function study are also qualifying. *Id.* at 8, 27-28.

[10] The administrative law judge found that Dr. Dahhan "did not offer any adequate explanation" for why claimant's coal-mine dust exposure did not contribute to his exercise-induced hypoxemia. Decision and Order at 28.

[11] Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Rosenberg and Dahhan, any error he may have made in discrediting their opinions for other reasons would be harmless. *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 Dahhan.

affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(2)(i)(A).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Dahhan that claimant's pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *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, 2-452 (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 at 29-30. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

[12] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge