U.S. Department of Labor

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

BRB No. 17-0003 BLA

EDDIE DEAN COMBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAVE SPUR COAL COMPANY	)	
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 10/18/2017
	)	
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 Awarding Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05744) of Administrative Law Judge William J. King rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on July 16, 2012.

Considering Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 20.185 years of underground coal mine employment and found that the new evidence established the existence of 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 at Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a brief in this appeal.[3]

[1] This is claimant's second claim. Director's Exhibit 3. Claimant filed his first claim on February 25, 1994. Director's Exhibit 1. It was finally denied by the district director on January 12, 1996, because claimant failed to establish any of the elements of entitlement. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a 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] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 20.185 years of underground coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11, 16-17, 22.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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 claimant has neither legal nor clinical pneumoconiosis,[5] 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). The administrative law judge found that employer failed to rebut the presumption at Section 411(c)(4) by either method.[6]

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Seaman and Rosenberg.[7] Dr. Seaman indicated that her review of the evidence did not reflect any

[4] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 1 at 243-244; Decision and Order at 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[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).

[6] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 27.

[7] The administrative law judge also considered the opinions of Drs. Alam and Green, that claimant suffers from legal pneumoconiosis. Director's Exhibit 14; Claimant's Exhibits 1, 2; Employer's Exhibit 6. The administrative law judge discredited the opinion of Dr. Alam, as inadequately explained, but found Dr. Green's opinion to be probative on the issue of legal pneumoconiosis. Decision and Order at 23, 27. We need

condition that could be caused by coal mine dust. Decision and Order at 26; Employer's Exhibit 8 at 6, 9. Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from pulmonary impairments that are due solely to obesity and to smoking-related asthmatic bronchitis. Employer's Exhibits 2, 7. Noting that Dr. Seaman's opinion is primarily based on her review of x-ray evidence, the administrative law judge found Dr. Seaman's opinion to be inadequately specific, explained or supported, and entitled to "no weight."[8] Decision and Order at 25-26. The administrative law judge also accorded "no probative weight" to Dr. Rosenberg's opinion, finding it to be internally inconsistent and inadequately explained. Decision and Order at 25. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id*.

Employer contends that the administrative law judge erred in discounting Dr. Rosenberg's opinion as unexplained. Employer contends that, "[o]n the contrary, Dr. Rosenberg explained that the overall pattern of claimant's impairment – decline in the FEV1/FVC ratio with marked bronchodilator response – was consistent with Claimant's obesity and not with a coal mine dust-induced disease." Employer's Brief at 5.

The administrative law judge examined Dr. Rosenberg's rationale and found it deficient. Specifically, the administrative law judge noted that Dr. Rosenberg relied, in part, on the partial reversibility of claimant's impairment as a reason for eliminating coal mine dust exposure as a cause. Decision and Order at 25. Dr. Rosenberg opined that when coal mine dust exposure causes a respiratory impairment in which the FEV1/FVC ratio is decreased, such as exhibited by claimant, "one would not expect [a] marked bronchodilator response."[9] Employer's Exhibit 2 at 3. Because claimant's test results

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not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Green's opinion, however, because the administrative law judge ultimately concluded that whether the opinions are credible is immaterial, as they do not assist employer in meeting its burden on rebuttal. *See* 20 C.F.R. §718.305(d)(1)(i); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 27.

[8] As employer does not challenge the administrative law judge's characterization and weighing of Dr. Seaman's opinion, those findings are affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-26.

[9] Dr. Rosenberg stated that claimant "has a severe reduction of his FVC and FEV1 associated with a marked bronchodilator response." Employer's Exhibit 2 at 3. His

reflected a bronchodilator response of 22%, Dr. Rosenberg opined that claimant's impairment was due to obesity and smoking-related asthmatic bronchitis, rather than coal mine dust exposure. *Id.*

The administrative law judge noted, however, that Dr. Rosenberg acknowledged that claimant's impairment remained totally disabling even after the administration of bronchodilators.[10] Decision and Order at 25; Employer's Exhibit 2 at 3. In light of this factor, the administrative law judge permissibly concluded that Dr. Rosenberg did not adequately explain why claimant's pulmonary impairment was not significantly related to or substantially aggravated by his coal mine dust exposure or why claimant's marked response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 25. As the administrative law judge provided a valid reason for discrediting the opinion of Dr. Rosenberg, it is affirmed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). The administrative law judge thus permissibly discredited the opinion of Dr. Rosenberg, and his discrediting of the opinion of Dr. Seaman is unchallenged. As these are the only opinions supportive of employer's burden, and employer makes no other allegations of error, we affirm the administrative law judge's

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pattern of impairment is "a generally symmetric reduction of FVC and FEV1 such that there is preservation of the FEV1/FVC ratio and a normal TLC . . . ." *Id.* Dr. Rosenberg stated that this pattern which is associated with a variety of disorders including obesity, obstructive lung disease, and pleural disease, can also be seen in legal coal workers' pneumoconiosis, but "in such a situation one would not expect [claimant's] marked bronchodilator response . . . ." *Id.*

[10] As the administrative law judge accurately noted, the post-bronchodilator results from Dr. Rosenberg's pulmonary function study remained qualifying. Decision and Order at 9-10, 25. The administrative law judge also noted that the post-bronchodilator values from the pulmonary function studies of Drs. Alam and Green are also qualifying. *Id.* at 9-10.

finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(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. Seaman and Rosenberg 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.[12] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 28. 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).

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[12] Employer does not contest the administrative law judge's determination that there were no "specific and persuasive reasons" for granting weight to the opinions of Drs. Rosenberg and Seaman as to the cause of the miner's respiratory or pulmonary disability despite their conclusions as to the existence of legal pneumoconiosis. Decision and Order at 28, *quoting Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge