U.S. Department of Labor

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

BRB No. 17-0603 BLA

GINGER HALSTEAD o/b/o JOHNNY M. HALSTEAD	)	
Claimant-Respondent	)	
v.	)	
MEADOW RIVER COAL COMPANY	)	DATE ISSUED: 09/12/2018
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2014-BLA-05280) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on March 14, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. The Board previously affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established 23.84 years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment, and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[2] *Halstead v. Meadow River Coal Co.*, BRB No. 16-0275 BLA, slip op. at 2, n.3 (Mar. 2, 2017) (unpub.). However, the Board held that the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3) in finding the opinions of Drs. Rosenberg and Zaldivar to be insufficient to rebut the presumption.[3] *Id*. at 4. Thus, the Board vacated the denial of benefits and remanded the case for further consideration of whether employer established rebuttal. *Id*. On remand, the administrative law judge again determined that employer failed to rebut the presumption and awarded benefits accordingly.

[1] Claimant, Ginger Halstead, is the widow of the miner, Johnny M. Halstead, who died on April 17, 2014, while his claim was pending. She is pursuing this claim on his behalf.

[2] Under Section 411(c)(4) of the Act, a miner is presumed to have been totally disabled due to pneumoconiosis if he had 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).

[3] In the earlier appeal, the Board explained that the regulation at 20 C.F.R. §718.305(d)(3) provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). Drs. Rosenberg and Zaldivar diagnosed the miner with an idiopathic *restrictive* lung disease, unrelated to coal dust exposure. Employer's Exhibits 4, 5. Because the physicians did not diagnose an obstructive respiratory or pulmonary lung disease, the Board held that 20 C.F.R. §718.305(d)(3) was not applicable. *Halstead v. Meadow River Coal Co.*, BRB No. 16-0275 BLA (Mar. 2, 2017) (unpub.).

On appeal, employer argues that the administrative law judge erred in concluding that Drs. Rosenberg and Zaldivar did not persuasively explain why the miner did not have legal pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] 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 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

I. Legal Pneumoconiosis

In order to disprove that the miner had legal pneumoconiosis,[6] employer was required to establish that he did not suffer from a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). The administrative

[4] Because the miner's coal mine employment was in West 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 Exhibits 4, 6, 8.

[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 proved that the miner did not have clinical pneumoconiosis. Decision and Order on Remand at 7; 20 C.F.R. §718.305(d)(1)(i)(B).

law judge noted that all of the physicians of record diagnosed interstitial fibrosis but disagree as to the etiology of that condition. Decision and Order on Remand at 10. Employer's physicians, Drs. Rosenberg and Zaldivar, opined that the miner did not have a coal dust related respiratory condition but instead suffered from idiopathic pulmonary fibrosis (IPF), the cause of which is unknown.[7] Employer's Exhibits 2, 4, 5. The administrative law judge found that neither physician adequately explained why the miner's interstitial fibrosis was idiopathic and did not constitute legal pneumoconiosis:

> While both Drs. Rosenberg and Zaldivar offered thorough reports, their opinions did not affirmatively establish that coal dust exposure did not significantly cause or substantially aggravate the miner's lung disease. The physicians discussed the differences in the *typical* radiographic appearance of IPF and pneumoconiosis, noting that the miner's x-rays and CT scans were more consistent with the former. While this may be true, neither physician explained why the radiographic evidence indicated that coal dust could not have also contributed in some way to the miner's fibrosis. Additionally, because legal pneumoconiosis can exist in the absence of positive radiographic evidence, the undersigned finds this argument entitled to little weight.

Decision and Order on Remand at 10. Thus, the administrative law judge found that employer failed to satisfy its burden of proof under the first method of rebuttal.

Employer contends that the administrative law judge should not have assigned less weight to Drs. Rosenberg's and Zaldivar's opinions based on their discussion of the x-ray evidence, since IPF is "the only diagnosis of record which might be the basis of legal pneumoconiosis" and it is specifically identified by x-ray. Employer's Brief in Support of Petition for Review at 16. Contrary to employers' contention, we see no error in the administrative law judge's finding that the opinions of Drs. Rosenberg and Zaldivar are insufficient to disprove that the miner had legal pneumoconiosis. Both physicians relied on the absence of radiographic findings consistent with clinical pneumoconiosis as one of

[7] Dr. Rasmussen opined that the miner had legal pneumoconiosis, attributing the miner's fibrosis to both coal dust exposure and smoking. Director's Exhibit 11. The administrative law judge found that Dr. Rasmussen's opinion was not sufficiently reasoned and gave it little weight. Decision and Order on Remand at 11. Dr. Rasmussen's opinion, however, does not support employer's burden on rebuttal. The administrative law judge also correctly observed that the miner's treatment records do not aid employer in establishing rebuttal as they included diagnoses of legal pneumoconiosis. *Id*. at 12; Director's Exhibit 21.

their bases for excluding coal dust exposure as a causative factor for the miner's fibrosis. Employer's Exhibits 4, 5. They each explained that when coal mine dust causes parenchymal changes, it presents radiographically as micronodular abnormalities in the upper lungs and not as linear changes in the lower lobes seen with IPF. *Id.* The administrative law judge permissibly found their discussion of the radiographic evidence to be unconvincing since the regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis by x-ray. *See* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

Moreover, the administrative law judge rationally found that neither Dr. Rosenberg nor Dr. Zaldivar persuasively explained why coal dust exposure did not significantly contribute to, or substantially aggravate, the miner's fibrosis, even if the miner had radiographic findings that were "typical" for IPF. Decision and Order on Remand at 33; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (an administrative law judge may permissibly discount a medical opinion that is based on generalities). Because the administrative law judge provided valid reasons for his credibility determinations, we affirm his finding that employer failed to disprove that the miner had legal pneumoconiosis.[8] *See Looney*, 678 F.3d at 314-16; *Hicks*, 138 F.3d at 533. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[9]

II. Disability Causation

The administrative law judge discredited the opinions of Drs. Rosenberg and Zaldivar on the cause of the miner's total disability as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the disease.[10] Decision and Order on Remand at 14*; see Hobet Mining, LLC v.*

[8] Employer's arguments regarding legal pneumoconiosis amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[9] Because employer must disprove both legal and clinical pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) is precluded based on our affirmance of the administrative law judge's findings on legal pneumoconiosis.

[10] Drs. Rosenberg and Zaldivar each opined that the miner was totally disabled by idiopathic pulmonary fibrosis. Employer's Exhibits 4, 5.

Epling, 783 F.3d 498, 504-505, 25 BLR 2-713, 2-721 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons"); *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994) (a medical opinion premised on an erroneous finding that a miner did not have pneumoconiosis is "not worthy of much, if any, weight" on the issue of disability causation); *see also Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002). Employer does not specifically challenge the administrative law judge's finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge