U.S. Department of Labor

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

BRB No. 17-0663 BLA

DONALD RAY DUNN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED: 09/27/2018
	)	
and	)	
	)	
GATLIFF COAL COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Donald Ray Dunn, Vicco, Kentucky.

Lois A. Kitts and James M. Kennedy (Baird & Baird), P.S.C., Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05700) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on March 12, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that claimant established twenty-seven years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant demonstrated a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).[3] He further found that employer failed to rebut the presumption and awarded benefits accordingly.

[1] Claimant filed an initial claim for benefits on May 16, 2008. Director's Exhibit 1. The district director found that claimant established the existence of pneumoconiosis but failed to establish total disability. *Id*. Claimant took no action with regard to the denial until filing the current subsequent claim. Director's Exhibit 3.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish total disability, he had to establish that element in order to obtain a review of his claim on the merits. 20 C.F.R. §725.309(c).

[3] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled 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).

Employer appeals, asserting that the administrative law judge erred in finding the opinions of Drs. Rosenberg and Castle insufficient to rebut the Section 411(c)(4) presumption. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), has a filed a limited response, urging the Board to reject employer's arguments regarding the FEV1/FVC ratio.[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.[5] 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).

[4] On August 23, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge, based on the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's motion. Because employer first raised its Appointments Clause argument eight months after filing its Memorandum in Support of Petition for Review, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

Because claimant invoked the Section 411(c)(4) presumption,[6] the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] 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 Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *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 claimant has legal pneumoconiosis,[8] employer must establish that he does not suffer from 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(a)(2), (b), 718.305(d)(1)(i)(A). Employer relied on the opinions of Drs. Rosenberg and Castle, who attributed claimant's chronic obstructive pulmonary disease (COPD) entirely to smoking, with no contribution from his twenty-seven years of coal mine employment. Employer's Exhibits 2, 3, 10-11. The administrative law judge determined that their opinions were "inconsistent with the premises underlying the regulations" and entitled to "little probative weight." Decision and Order at 17.

Contrary to employer's assertion, we see no error in the administrative law judge's rejection of the opinions of Drs. Rosenberg and Castle, based, in part, on their shared view that claimant's markedly decreased FEV1 and severely reduced FEV1/FVC ratio

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established twenty-seven years of underground coal mine employment; a totally disabling respiratory or pulmonary impairment; a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] 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).

[8] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 16.

constituted a pattern of impairment that is not characteristic of obstruction related to coal dust exposure.[9] Decision and Order at 17; Employer's Exhibits 2, 3, 10-11. The administrative law judge permissibly discounted their rationales as being inconsistent with the position of the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions that coal miners have an increased risk of developing COPD, which may be shown by a reduced FEV1/FVC ratio.[10] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 17.

Further, while employer generally asserts that Dr. Rosenberg cited post-preamble studies in support of his opinion, it fails to identify how these studies are more reliable than the studies found credible by the DOL in formulating its position on the significance of the FEV1/FVC ratio.[11] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir.

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[9] Drs. Rosenberg and Castle opined that while coal dust may decrease the FEV1 value, it generally causes a parallel reduction in the FVC value, resulting in a preserved FEV1/FVC ratio. Employer's Exhibits 2, 11.

[10] In the preamble, the Department of Labor observed:

> [I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease (COPD)]. *COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC.*"

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* NIOSH Criteria Document 4.2.3.2 (citations omitted) (emphasis added); *see* Decision and Order at 17.

[11] There is no merit in employer's assertion that the NIOSH Criteria Document considered by the Department of Labor in the preamble "supports rather than undermines the assertions of Drs. Rosenberg and Castle that a reduced FEV1/FVC ratio is not typical of respiratory impairment due to coal mine employment." *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-74 (4th Cir. 2017) (court rejected the argument that Dr.

2013) (Traxler, C.J., dissenting); Employer's Memorandum in Support of Petition for Review at 13. A party may establish that the science credited by the DOL in the preamble is archaized or invalid only by laying the appropriate foundation. *See Cochran*, 718 F.3d at 323; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490 (7th Cir. 2004). Absent the type and quality of medical evidence that would invalidate the scientific studies found credible by the DOL in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See Sterling*, 762 F.3d at 491-492.

In addition to the FEV1/FVC ratio, the administrative law judge noted correctly that Drs. Rosenberg and Castle relied on studies to show that smoking was more likely to cause COPD than coal dust exposure.[12] Decision and Order at 18; Employer's Exhibits 2, 11. The administrative law judge rationally concluded that neither physician adequately explained why claimant's coal dust exposure did not significantly contribute to, or substantially aggravate, his COPD, given the DOL's position that the effects of smoking and coal mine dust exposure are additive. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 18-19. Thus, we affirm the administrative law judge's determination that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B), and is therefore unable to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i).[13]

II. Disability Causation

Employer generally asserts that the administrative law judge erred in finding that it did not establish the second method of rebuttal by disproving the presumed fact of disability causation. We disagree. The administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Castle 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. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505

Rosenberg's theory is consistent with the scientific material considered in the preamble, noting that Dr. Rosenberg relied on "selective quotations").

[12] Drs. Rosenberg and Castle noted that recent studies showed the prevalence of COPD in smokers to be over 30 percent. Employer's Exhibits 2, 11.

[13] 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.

(4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (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," in which case the opinion is entitled to at most "little weight"); Decision and Order at 20. 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). Decision and Order at 23.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge