U.S. Department of Labor

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

BRB No. 14-0284 BLA

CHARLES B. HOOPS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/14/2015
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05961) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent claim[1] filed

[1] Claimant's initial claim, filed on October 26, 1998, was denied by Administrative Law Judge Robert J. Lesnick on June 22, 2000, because he determined that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 1. The Board affirmed the denial of benefits. *Hoops v. Elk Run Coal Co.*, BRB Nos. 00-0968 BLA and 00-0968 BLA-A (July 24, 2001) (unpub.). Claimant filed a request for modification on August 25, 2001,

which was denied by Administrative Law Judge Gerald M. Tierney on October 27, 2003, because he found that there was no mistake in a determination of fact in the previous denial and that the evidence was insufficient to prove a change in conditions. Director's Exhibit 1. The Board affirmed the denial. *Hoops v. Elk Run Coal Co.*, BRB No. 04-0199 BLA (July 29, 2004) (unpub.).

on April 7, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). In her decision, issued April 11, 2014, the administrative law judge determined that claimant established at least fifteen years of underground coal mine employment and that he has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. 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 applied the incorrect standard of proof concerning whether employer established the rebuttal of the presumption and erred in finding that the evidence failed to rebut the presumed existence of legal pneumoconiosis. Employer also asserts that the administrative law judge erred in not separately addressing whether employer rebutted the presumed causal connection between pneumoconiosis and claimant's totally disabling respiratory impairment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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 supported by substantial evidence, rational, 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, 362 (1965).

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[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the presumption at amended Section 411(c)(4) and that claimant established 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).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, 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).

I. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to affirmatively establish that claimant does not have legal or 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); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Company*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

In considering whether the evidence was sufficient to rebut the presumed existence of legal pneumoconiosis,[6] the administrative law judge indicated that, because Drs. Rasmussen and Ranavaya diagnosed claimant with legal pneumoconiosis, they did not "aid [e]mployer in rebutting the presumption that [c]laimant's disabling respiratory impairment is due to pneumoconiosis." Decision and Order at 17. The administrative law judge gave less weight to Dr. Zaldivar's opinion, that claimant's respiratory impairment is due to smoking, as she found that he did not adequately explain why coal dust could not also have contributed to claimant's impairment, or "how the lower lung zone location of [c]laimant's abnormality negates a finding of legal pneumoconiosis." *Id*. at 18. Similarly, the administrative law judge gave less weight to Dr. Castle's opinion, that claimant's respiratory impairment is due to interstitial pneumonitis, bronchial asthma and cigarette smoking, as she found that Dr. Castle did not explain why claimant's coal dust exposure was not also a contributing factor. *Id*. In making her findings, the administrative law judge noted, "it is [e]mployer's burden to 'rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.'" *Id*., *quoting Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339, 20 BLR 2-246, 2-250 (4th Cir. 1996).

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[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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] The administrative law judge determined that employer rebutted the presumed existence of clinical pneumoconiosis, based on the x-ray, CT scan and medical opinion evidence. Decision and Order at 18.

Employer contends that the administrative law judge erred by requiring it to "rule out" any contribution by coal dust exposure, as that standard applies to disability causation, rather than to the existence of pneumoconiosis. Employer states that it "is required only to demonstrate that the [c]laimant does not have pneumoconiosis by a preponderance of the evidence." Employer's Brief in Support of Petition for Review at 12. Further, employer argues that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle.[7] Employer alleges that, contrary to the administrative law judge's findings, Dr. Zaldivar explained the significance of the location of claimant's radiographic abnormalities. Employer maintains that Dr. Zaldivar indicated that, because coal dust is not initially deposited in the lower lungs, claimant's x-rays and biopsy showing fibrosis in the middle and lower lung zones were not consistent with a diagnosis of coal workers' pneumoconiosis. Employer's Exhibits 2, 8 at 17, 27. Employer further argues that Dr. Zaldivar provided a lengthy description of the factors that he relied on to exclude coal dust as a contributing factor to claimant's respiratory impairment. Employer also asserts that the administrative law judge substituted her judgment for that of the medical experts in giving no probative weight to the biopsy evidence on the basis that it was fifteen years old. Employer maintains that the biopsy evidence retained probative value because the biopsy took place ten years after claimant's last coal dust exposure, and it confirmed the presence of idiopathic pulmonary fibrosis. Finally, employer alleges that the administrative law judge made similar errors when discrediting Dr. Castle's opinion, as Dr. Castle conducted a review of medical records spanning almost two decades, and provided a sufficient explanation concerning why he excluded coal dust as a contributing factor.

We agree with employer that, in evaluating whether it rebutted the presumed existence of legal pneumoconiosis, the administrative law judge misstated the standard of proof. However, remand is not required on this basis. The administrative law judge permissibly determined that Dr. Zaldivar's opinion is entitled to little probative weight regarding the existence of legal pneumoconiosis, because his rationale is conclusory and

[7] Employer contends that the administrative law judge's failure to address the opinions of Drs. Rasmussen and Ranavaya, diagnosing clinical and legal pneumoconiosis, is contrary to the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932 (a) and asserts that, if the case is remanded, the administrative law judge should be instructed to discuss the weight she assigned to their opinions. Employer's Brief in Support of Petition for Review at 13 n.6. We reject this argument, as employer has not indicated how error, if any, in the administrative law judge's omission of their opinions from consideration would be harmful, as employer bears the burden of proof on rebuttal. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66.

he did not adequately explain why coal dust exposure was not a contributing factor in claimant's respiratory impairment.[8] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012).

In addition, contrary to employer's contention, because the regulations recognize that pneumoconiosis may be a latent and progressive disease, we conclude that the administrative law judge acted within her discretion in finding that Dr. Oesterling's biopsy report was less probative because it was obtained in 1999. *See* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,972, 79,975 (Dec. 20, 2000). Further, we affirm, as unchallenged by employer on appeal, the administrative law judge's determination that, "[w]hile negative biopsy evidence may establish that [c]laimant does not suffer from clinical pneumoconiosis, it falls short of establishing the [c]laimant's pneumoconiosis is unrelated to his coal mine employment history." Decision and Order at 18; 20 C.F.R. §718.106(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also affirm the administrative law judge's discrediting of Dr. Castle's opinion. Dr. Castle indicated that claimant "worked in or around the underground mining industry for a sufficient enough time to have developed coal workers' pneumoconiosis if he were a susceptible host." Employer's Exhibit 6. Dr. Castle then discussed other risk factors for the development of pulmonary disease including smoking, bronchial asthma, a paralyzed hemidiaphragm, and usual interstitial pneumonitis/interstitial pulmonary fibrosis. Dr. Castle concluded that these factors, not coal dust, contributed to claimant's respiratory impairment. Dr. Castle further stated that his conclusion was based on the lack of evidence of coal workers' pneumoconiosis on biopsy, and his determination that claimant's fixed degree of obstruction was due to bronchial asthma. However, as the administrative law judge observed, Dr. Castle did not explain why coal dust could not have also contributed to claimant's respiratory impairment. Decision and Order at 18, Employer's Exhibit 6. Therefore, the administrative law judge permissibly discredited Dr. Castle's opinion. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133.

[8] Dr. Zaldivar commented in his report "[t]hat smoking and interstitial pulmonary fibrosis are strongly linked is not [a] question. There is no need to add any inorganic dust . . . ." Employer's Exhibit 2. At his deposition, Dr. Zaldivar testified that claimant had no improvement in his respiratory condition after the administration of bronchodilators but attributed this to "a combination of emphysema and fibrosis." Employer's Exhibit 8 at 22-23. Dr. Zaldivar also stated that the miner's smoking damaged his lungs and caused an asthmatic condition, emphysema, and pulmonary fibrosis. *Id*. at 28. Dr. Zaldivar indicated that he was able to rule out a contribution by coal dust to the miner's emphysema because abnormalities on the x-rays were noted in the lower zones, which is not where coal dust is first deposited, and there was no evidence of pneumoconiosis in the previous 1999 lung biopsy. *Id*. at 33-34.

Based on the administrative law judge's rational determination that the opinions of Drs. Zaldivar and Castle were not adequately explained as to the extent to which coal dust exposure contributed to claimant's respiratory impairment, these opinions could not be credited for the purpose of rebutting the presumed existence of legal pneumoconiosis, regardless of the standard applied. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-447 (6th Cir. 2013). We affirm, therefore, the administrative law judge's determination that employer is unable to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

II. Rebuttal of the Presumed Causal Relationship

The administrative law judge stated, "I have found that the [c]laimant has established, due to the operation of [20 C.F.R.] §718.305, that his totally disabling respiratory impairment is due to pneumoconiosis. Consequently, I find that the [c]laimant has established, by a preponderance of the evidence, this element of entitlement." Decision and Order at 18. Although employer is correct that the administrative law judge did not address rebuttal of the presumed disability causation separately from rebuttal of the presumed existence of legal pneumoconiosis, remand is not required.

The administrative law judge permissibly concluded that "[e]mployer's physicians fail to sufficiently rule out coal mine employment as a cause of [c]laimant's disability."[9] Decision and Order at 18; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. We have affirmed the administrative law judge's finding that the opinions of Drs. Zaldivar and Castle were not adequately explained on the issue of whether employer rebutted the presumed existence of legal pneumoconiosis. Therefore, the administrative law judge's finding that employer failed to rebut the existence of legal pneumoconiosis subsumed a rational determination that the opinions of employer's experts did not establish that no part of claimant's totally disabling respiratory impairment was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Ogle*, 737 F.3d at 1074, 25 BLR at 2-

[9] Employer preserves for appeal the issue of the proper standard applicable to the disability causation method of rebuttal under 20 C.F.R. §718.305(d)(1)(ii). Employer's Brief in Support of Petition for Review at 10 n.5. We note that in *West Virginia CWP Fund v. Bender*, F.3d , No. 12-2034, 2015 WL 1475069 (4th Cir. Apr. 2, 2015), the Fourth Circuit recently held that "any 'party opposing entitlement' to black lung benefits, including coal mine operators, may rebut the statutory presumption of disability under subsection (d)(1)(ii) of the regulation only by proving that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.' 20 C.F.R. § 718.305(d)." Slip op. at 29.

452; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Consequently, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption under either method, and we further affirm the award of benefits. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge