U.S. Department of Labor

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

BRB No. 15-0290 BLA

MORRIS E. BLACKBURN Claimant-Respondent v. ENERGY WEST MINING COMPANY and WELLS FARGO DISABILITY MANAGEMENT Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/26/2016 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

William S. Mattingly and Kevin M. McGuire (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2011-BLA-05845) of Administrative Law Judge Paul C. Johnson, Jr., rendered on an initial claim filed on November 5, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In a Decision and Order Denying Living Miner's Benefits, issued on August 2, 2012, Administrative Law Judge Richard K. Malamphy found that claimant established twenty-three years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Based on these findings and the filing date of the claim, Judge Malamphy determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] However, Judge Malamphy also concluded that employer successfully rebutted the presumption by establishing that claimant did not have pneumoconiosis. Accordingly, benefits were denied.

In consideration of claimant's appeal, the Board affirmed, as unchallenged by the parties, Judge Malamphy's determinations that claimant established at least fifteen years of underground coal mine employment, total respiratory disability at 20 C.F.R. §718.204(b)(2), and invocation of the presumption at Section 411(c)(4). *Blackburn v. Energy West Mining Co.*, BRB No. 12-0607 BLA, slip op. at 2 n.3 (July 24, 2013) (Boggs, J., concurring) (unpub.). However, the Board held that the administrative law judge's "conclusory assessment" of the conflicting medical opinions, relevant to rebuttal of the Section 411(c)(4) presumption, failed to satisfy the Administrative Procedure Act

[1] Pursuant to Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

(APA).[2] *Id*. at 5. Thus, the Board vacated the denial of benefits and remanded the case for further consideration. *Id*.

On remand, because Judge Malamphy had retired, the case was reassigned to Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge). In his Decision and Order on Remand Awarding Benefits, issued on April 6, 2015, which is the subject of the current appeal, the administrative law judge determined that the opinions of employer's physicians, Drs. Farney and Tuteur, were not credible to establish rebuttal of the Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer contends that Judge Malamphy's 2012 Decision and Order Denying Living Miner's Benefits was supported by substantial evidence and should be reinstated by the Board. With respect to Judge Johnson's April 6, 2015 Decision and Order on Remand Awarding Benefits, employer argues that the administrative law judge exceeded the scope of the Board's remand instructions and improperly required employer to "rule out" the existence of legal pneumoconiosis. Employer further contends that the administrative law judge erred in finding the opinions of Drs. Farney and Tuteur not credible to disprove the existence of legal pneumoconiosis and establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response, asserting that the administrative law judge applied the correct legal standard and permissibly determined that employer failed to rebut the presumption. Employer filed a reply brief, reiterating its arguments.

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.[3] 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).

[2] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[3] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as claimant's last coal mine employment was in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

We reject employer's initial assertion that the Board exceeded its scope of review by vacating Judge Malamphy's denial of benefits. Because employer has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Relevant to employer's remaining arguments, to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have legal and clinical pneumoconiosis,[4] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-568 (10th Cir. 2014); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-213 (10th Cir. 1989). The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis, based on a preponderance of the x-ray, CT scan, and medical opinion evidence. Decision and Order at 15.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of Drs. Farney and Tuteur, that claimant has no respiratory impairment significantly related to, or substantially aggravated by, coal dust exposure. The administrative law judge specifically found that Dr. Farney's opinion excluding coal dust as a contributing factor to claimant's respiratory impairment was not sufficiently explained. Decision and Order at 15-16. The administrative law judge also found that Dr. Tuteur's opinion[5] on the issue of legal

[4] "'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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "'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).

[5] Dr. Tuteur reviewed evidence and prepared a report on May 20, 2011. Employer's Exhibit 4. He diagnosed "chronic obstructive pulmonary disease manifested by emphysema but not clearly chronic bronchitis and associated with a moderate

pneumoconiosis was based on generalities and did not adequately address claimant's specific impairment. *Id*. at 16. In contrast, the administrative law judge found that Dr. James offered a reasoned medical opinion, consistent with the preamble to the 2001 revised regulations, that claimant has legal pneumoconiosis. *Id*.

Employer challenges the administrative law judge's finding that it failed to disprove the existence of legal pneumoconiosis and states:

> Despite the Board's holding regarding the sufficiency of the rebuttal testimony of Drs. Farney and Tuteur, on remand [the administrative law judge] reversed the prior holdings of [Judge] Malamphy that credited the opinions of Drs. Farney and Tuteur over Dr. James on distinguishing disease causation. This exceeded the limited mandate of the Board's remand and is error.

Employer's Brief at 15.[6]

Contrary to employer's characterization, although the Board rejected claimant's argument in the prior appeal, that the opinions of Drs. Farney and Tuteur were legally insufficient to support rebuttal, the Board left the issue of whether the opinions satisfied

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obstructive abnormality, but no disproportionate limitation to exercise beyond that which would be expected based on his age." *Id*. at 5. Dr. Tuteur opined that claimant's pulmonary impairment is due to "the chronic inhalation of tobacco smoke" and is not attributable to coal dust exposure or coal workers' pneumoconiosis. *Id*. at 6. Dr. Tuteur based his opinion on the absence of a restrictive respiratory impairment, the absence of radiographic changes consistent with coal workers' pneumoconiosis, and statistics obtained from three medical studies, as discussed *infra*. *Id*. at 4-6.

[6] Employer relies on the following language from the Board's July 24, 2013 Decision and Order to support its argument:

> We find no merit, however, to claimant's contention that the opinions of Drs. Farney and Tuteur are insufficient to support a finding of rebuttal, as both doctors opined that claimant's respiratory impairment was not due, in whole or in part, to his coal mine employment.

Blackburn v. Energy West Mining Co., BRB No. 12-0607 BLA, slip op. at 5 (July 24, 2013) (Boggs, J., concurring) (unpub.) (citations omitted).

employer's burden of proof to the discretion of the administrative law judge, in his role as trier-of-fact. *Blackburn*, slip op. at 5. The Board specifically remanded the case for the administrative law judge to determine the weight to accord each of their opinions, based on an examination of the rationales they provided as to why claimant does not have legal pneumoconiosis, and to determine if they were sufficiently reasoned and documented to establish rebuttal.[7] *Id*. Because the Board vacated Judge Malamphy's denial of benefits, the administrative law judge had discretion on remand to render his own credibility findings and was not bound by Judge Malamphy's prior determinations on rebuttal. *See generally Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

Employer also contends that the administrative law judge misstated the findings of the Department of Labor (DOL) in the preamble and erred in finding that Dr. Farney's opinion was not sufficiently reasoned. We disagree. The administrative law judge rationally found that, although Dr. Farney "exhaustively discussed [claimant's] smoking history" as the cause of claimant's respiratory impairment, he "did not offer a credible explanation [for] why he excluded coal dust as a contributing factor to [claimant's] impairment." Decision and Order at 15-16; *see Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217, 24 BLR 2-155, 2-164 (10th Cir. 2009). The administrative law judge notedthat the DOL has recognized, in the preamble, scientific studies show that the effect of coal dust exposure is additive to the effect of smoking. Decision and Order at 15, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). We see no error in the administrative law judge's decision to assign less weight to Dr. Farney's conclusions because he did not address whether coal dust contributed to his emphysema. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1025, 24 BLR 2-297, 2-315 (10th Cir. 2010); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127, 25 BLR 2-581, 2-595 (9th Cir. 2014); Decision and Order at 16.

Furthermore, there is no merit to employer's argument that the administrative law judge improperly substituted his opinion for that of a medical expert in rejecting Dr. Tuteur's opinion. The administrative law judge acted within his discretion in finding that Dr. Tuteur's opinion "suffer[s] from over-reliance on statistics and a lack of individualized application of those data to [claimant]."[8] Decision and Order at 16; *see*

[7] The Board specifically instructed, "[o]n remand, the administrative law judge must discuss and weigh all of the relevant evidence, resolve any scientific dispute on scientific grounds, and set forth the specific bases for his findings." *Blackburn*, slip op. at 5, *citing Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1021-26, 24 BLR 2-297, 2-311-17 (10th Cir. 2010).

[8] The administrative law judge explained:

Goodin, 743 F.3d at 1345-46, 25 BLR at 2-567-68; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

As the administrative law judge followed the Board's remand instructions, and explained his credibility determinations in accordance with the APA, we affirm his findings that the opinions of Drs. Farney and Tuteur are not credible to disprove the existence of legal pneumoconiosis.[9] *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law

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> First, [Dr. Tuteur] stated that based on the statistics – that only 4% of North American coal miners develop pneumoconiosis, and the majority of that is clinical pneumoconiosis – it is not possible for "so-called" legal pneumoconiosis to develop in more than 2% of all coal miners. The flaw in this reasoning is that, even accepting the statistics as true, Dr. Tuteur has not explained why [claimant] is not one of the 2%. Second, Dr. Tuteur cited a study showing that only 3% of miners who had never smoked developed clinically meaningful airflow obstruction. Again, however, he has not explained why [claimant] is not one of that 3%. Third, Dr. Tuteur cited a different study showing that the reduction in FEV1 values for coal miners who never smoked was similar to non-coal miners who never smoked, and suggested that miners who developed a clinically meaningful coal-dust induced airflow obstruction were "perhaps 1% or less" of the population. Again, Dr. Tuteur has not explained why [claimant] is not one of those who did so; and his conclusion that "perhaps 1%" of coal miners developed airflow obstruction from coal-dust inhalation alone is unexplained and speculative.

Decision and Order at 16, *quoting* Employer's Exhibit 4 at 6.

[9] Because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's rejection of employer's evidence, it is not necessary that we address employer's argument that the administrative law judge erred in crediting Dr. James's opinion that claimant has legal pneumoconiosis. *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-568 (10th Cir. 2014).

judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10]

Because the administrative law judge permissibly determined that the opinions of Drs. Farney and Tuteur were not credible to establish that claimant's disabling emphysema does not constitute legal pneumoconiosis, we also affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's respiratory disability was not due to pneumoconiosis, as defined at 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(i)(A); *see Goodin*, 743 F.3d at 1345, 25 BLR at 2-568; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 268-69, 23 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption and we affirm the award of benefits.

As an additional matter, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board from August 24, 2012 to July 26, 2013, in conjunction with the prior appeal, designated BRB No. 12-0607 BLA. Claimant's counsel requests a fee of $8,010.00 for 35.6 hours of legal services at an hourly rate of $225.00. No objections to the fee petition have been received. The Board finds the requested fee to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Therefore, the Board approves the requested fee of $8,010.00.

[10] Employer also asserts that the administrative law judge applied the wrong standard of proof, in considering whether employer disproved the existence of legal pneumoconiosis, by requiring its physicians to "rule out" any contribution of coal dust to claimant's respiratory or pulmonary impairment. Employer's Brief at 27-29. Contrary to employer's argument, and as noted by the Director, Office of Workers' Compensation Programs, the administrative law judge properly considered whether Drs. Farney and Tuteur, "convincingly" explained why they did not believe coal dust exposure significantly contributed to claimant's disabling chronic obstructive pulmonary disease. Director's Brief at 2. The administrative law judge's finding that employer failed to rebut the presumption is based on the lack of credibility of its evidence, not on the application of the wrong rebuttal standard. *Id.* at 3.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of $8,010.00 to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge