U.S. Department of Labor

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

BRB No. 14-0377 BLA

EARL HAGY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 07/10/2015
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Sharon McDevitt (Stone Mountain Health Services), St. Charles, Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charlestown, West Virginia, for employer/carrier.

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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-5688) of Administrative Law Judge Pamela J. Lakes (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-four years of underground coal mine employment and adjudicated this miner's claim, filed on September 17, 2010, pursuant to the regulatory provisions at 20 C.F.R. Part 718. As employer conceded that claimant suffers from a totally disabling respiratory impairment, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in her weighing of the evidence relevant to rebuttal. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's rebuttal findings.[2]

[1] Congress enacted amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-four years of underground coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge applied an incorrect legal standard in finding that rebuttal was not established under amended Section 411(c)(4), arguing that the administrative law judge held employer to an "absolute degree of certainty" standard, rather than to a "reasonable degree of medical certainty" standard. As set forth *infra*, however, employer's contention is unsupported by the record. Employer also submits that the regulatory language for establishing rebuttal at 20 C.F.R. §718.305(d)(1)(ii), *i.e.*, with a showing that "no part" of a miner's disability was caused by pneumoconiosis, should be construed as requiring proof that pneumoconiosis is not a "substantially contributing cause" of the miner's disabling impairment because employer's burden on rebuttal can be no greater than claimant's burden of proof in the absence of a presumption. Employer maintains, therefore, that medical opinions supportive of rebuttal need not rule out any minimal contribution from either coal dust exposure or pneumoconiosis to the miner's disability. The Board, however, has addressed and rejected this argument in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015), as has the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015). For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

Employer next challenges the administrative law judge's weighing of the opinions of Drs. Rosenberg and Zaldivar in finding them insufficient to rebut the presumed fact of legal pneumoconiosis[4] pursuant to amended Section 411(c)(4).[5] Employer's Brief at 12-18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[4] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] We reject employer's argument that this case must be remanded for the administrative law judge to consider all relevant evidence of record relating to claimant's smoking history, make a specific determination as to the quantity of cigarettes and length of time that claimant smoked, and state the effect that this determination has on the credibility of the various medical opinions. Employer's Brief at 6. Based on claimant's

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge provided a comprehensive discussion of the opinions of Drs. Rosenberg and Zaldivar, and fully delineated the doctors' findings and the bases supporting their conclusion that claimant does not have legal pneumoconiosis and that smoking caused claimant's disabling chronic obstructive pulmonary disease (COPD)/emphysema. Decision and Order at 10-15; Director's Exhibit 20; Employer's Exhibits 2, 5, 6. Specifically, Dr. Rosenberg explained that he ruled out a diagnosis of legal pneumoconiosis because claimant's emphysema is diffuse and is accompanied by a reduction in diffusing capacity, typical of smoking-induced emphysema, whereas emphysema caused by coal dust exposure is more localized. Further, Dr. Rosenberg indicated that the effects of smoking were greater than the effects of coal dust exposure, and that claimant's pattern of impairment, with a reduced FEV_1/FVC ratio and a response to bronchodilation, was consistent with smoking and not coal dust exposure. Employer's Exhibits 2, 6. Similarly, Dr. Zaldivar noted a response to bronchodilation and indicated that claimant's emphysema was typical of damage caused by smoking, whereas coal dust exposure causes damage to the lungs through local reaction to the dust. Director's Exhibit 20. Dr. Zaldivar also diagnosed "longstanding asthma worsened by smoking." Employer's Exhibit 5 at 11. However, as the administrative law judge determined that Drs. Rosenberg and Zaldivar failed to explain why coal dust exposure was not a contributing or aggravating factor to claimant's condition, even if it was primarily due to smoking and/or asthma, the administrative law judge acted within her discretion in concluding that their opinions were not well-reasoned. Decision and Order at 13-14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Contrary to employer's arguments, the administrative law judge did not apply an incorrect legal standard on rebuttal; rather, she determined that the opinions of Drs. Rosenberg and Zaldivar were not credible. Decision and Order at 14-15. As substantial evidence supports the administrative law judge's determination, we affirm her finding that employer failed to establish rebuttal of the presumed fact of legal

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testimony, the administrative law judge found that claimant had "a significant smoking history of up to 38-pack-years." Decision and Order at 5, 13. While the administrative law judge did not credit any of the medical opinions of record on the issues of pneumoconiosis and disability causation, she did not discount any opinion on the basis of an inaccurate smoking history. Thus, the administrative law judge's failure to weigh all relevant evidence and determine claimant's actual smoking history constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumoconiosis.[6] Because employer has failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(i)(A), we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

Lastly, the administrative law judge properly found that the same reasons that she provided for discrediting the opinions of Drs. Rosenberg and Zaldivar on the issue of pneumoconiosis also undercut their opinions that no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Decision and Order at 15; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLRL 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm her conclusion that the opinions of Drs. Rosenberg and Zaldivar were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii). Consequently, we affirm the administrative law judge's award of benefits.

[6] Because the administrative law judge provided at least one valid reason for according less weight to the opinions of Drs. Rosenberg and Zaldivar, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Zaldivar.

Accordingly, the Decision and Order Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge