U.S. Department of Labor

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

BRB No. 14-0146 BLA

STEVE J. EZARIK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	DATE ISSUED: 03/26/2015
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Margaret M. Scully (Thompson, Calkins & Sutter LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5674) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim[1] filed on July 7, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

[1] Claimant filed an initial claim for benefits on September 19, 1994, which was denied by the district director on February 9, 1995, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action until filing the current subsequent claim on July 7, 2010. Director's Exhibit 3.

U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant worked as a coal miner for 19.42 years, and found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Based on the filing date of the claim, and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, 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] The administrative law judge also found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In considering rebuttal of the presumption, the administrative law judge determined that employer's evidence was not persuasive and failed to establish either that claimant "does not . . . suffer from pneumoconiosis" or that his "disability does not . . . arise out of coal mine employment." Decision and Order at 16. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis, based on his consideration of the analog evidence at 20 C.F.R. §718.202(a)(1). Employer maintains that the administrative law judge erred by not weighing together the digital x-rays, CT scans, biopsy evidence and medical opinion evidence relevant to whether claimant has clinical pneumoconiosis. Employer also asserts that the administrative law judge erred by failing to consider whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner did not have clinical and legal pneumoconiosis. Further, employer argues that the administrative law judge erred in rejecting the opinions of Drs. Renn and Jarboe, that claimant's disabling respiratory impairment is unrelated to coal dust exposure and caused entirely by smoking.[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's appeal.

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[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is 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 impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, that he invoked the presumption at amended Section 411(c)(4), and demonstrated 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); Decision and Order at 4, 10, 16.

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, is rational, and is in accordance with applicable law.[4] 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).

In order to rebut the presumption, employer is required to *affirmatively* establish that claimant does not have both clinical and legal pneumoconiosis, or that claimant's pulmonary or respiratory disability was not caused by pneumoconiosis, as defined at 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). In this case, the administrative law judge observed that, because claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), "the single issue to be determined is whether the [c]laimant's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 16. The administrative law judge noted that employer relied on the opinions of Dr. Renn and Dr. Jarboe to rebut the presumption. However, he determined that their explanations for excluding coal dust exposure as a significantly contributing factor in claimant's respiratory disability were "unpersuasive." *Id*. at 22. Additionally, the administrative law judge gave little weight to their opinions because neither Dr. Renn, nor Dr. Jarboe, diagnosed clinical pneumoconiosis, contrary to his finding with regard to the analog x-ray evidence.

Employer contends that the administrative law judge erred in weighing the opinions of Drs. Renn and Jarboe, and states that "without contrary evidence in the record which the [administrative law judge] determines is more credible than the opinions of Dr. Renn and Dr. Jarboe, there is no reasonable basis for the [administrative law judge] to reject their opinions."[5] Employer's Brief in Support of Petition for Review at 23. Employer's assertions of error are without merit.

[4] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 4, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The administrative law judge discredited all of the medical opinions in this case. The administrative law judge determined that Dr. Rasmussen's opinion was entitled to little weight because he "appears unable to decide whether he believes cigarette smoking to have been the primary cause of [c]laimant's disabling lung disease or if he believes there was any significant contribution of [c]laimant's condition from his coal dust exposure." Decision and Order at 23. The administrative law judge also found that Dr.

The record reflects that claimant suffers from lung cancer and underwent a lung resection on March 28, 2006.[6] Dr. Renn examined claimant on October 26, 2011, at which time he obtained a smoking history, ranging from twenty-nine pack years to forty-five pack years, ending in 1979. Dr. Renn noted that claimant provided a coal mine work history of twenty years, ending in 1994. Employer's Exhibit 1a. Dr. Renn read a chest x-ray as negative for pneumoconiosis but found emphysema present. *Id*. He interpreted a pulmonary function test as showing a "severely reduced" diffusion capacity and a resting arterial blood gas study as showing "acute respiratory alkalosis." *Id*. Dr. Renn attributed claimant's respiratory impairment to "bullous emphysema owing to tobacco smoking" and opined that claimant is totally disabled as a result of his emphysema, and due to the lung resection and severe heart disease. *Id*. During a deposition conducted on April 25, 2013, Dr. Renn maintained that coal mine dust exposure was not a significant contributing factor in claimant's respiratory impairment on the ground that coal dust exposure generally does not cause a severe reduction in diffusing capacity. Employer's Exhibit 8 at 24. Dr. Renn surmised that claimant may have developed emphysema prior to quitting smoking and that this emphysema continued to progress after claimant stopped smoking. *Id*. at 30-31.

Contrary to employer's argument, the administrative law judge acted within his discretion in finding that Dr. Renn did not "persuasively" explain why claimant's 19.42 years of coal mine dust exposure did not significantly contribute to claimant's respiratory impairment, as Dr. Renn acknowledged that coal dust exposure can cause emphysema and claimant had "continued exposure to coal mine dust for approximately [fifteen] years after he quit smoking." Decision and Order at 21; Employer's Exhibit 8; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge also permissibly concluded that Dr. Renn's opinion did not adequately address "[c]laimant's particular case." Decision and Order at 21; *see Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Mancia v.*

Houser did not persuasively explain why claimant's impairment was due to both smoking and coal dust exposure, and that Dr. Celko's opinion, attributing claimant's disabling respiratory disease to coal dust exposure, was "diminished by the limited evidentiary record" that he reviewed in rendering his findings. *Id*.

[6] Employer asserts that the administrative law judge did not discuss claimant's smoking history. However, the administrative law judge specifically noted that claimant testified that he began "to smoke cigarettes in his early [twenties] at the rate of one pack per day and smoked up to two packs per day 'once in a while . . . . on the weekends if [he] went to play cards[,]' and continued to smoke until quitting in 1976." Decision and Order at 6, *quoting* Hearing Transcript at 25-26.

Director, OWCP, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

With regard to Dr. Jarboe's opinion, the administrative law judge noted that Dr. Jarboe provided a "detailed and thorough review" of claimant's medical records, but did not have the opportunity to examine claimant. Decision and Order at 17, 22. Dr. Jarboe specifically excluded coal mine dust exposure as a causative factor for claimant's disabling emphysema on the following ground:

> [Claimant] demonstrated completely normal FVC and FEV1 [twelve] years after leaving the mining industry. Were his emphysematous changes related to the inhalation of coal mine dust, I would have expected some reduction of the FVC and FEV1 by this time. The finding of completely normal ventilatory function after [twenty] years of coal mine dust exposure would indicate that [claimant] does not and did not have an innate susceptibility to the ill-effects of breathing coal dust. There is firm evidence in the medical literature that when a coal miner develops impairment due to the inhalation of coal mine dust this impairment begins during his working life. . . . It is my reasoned opinion that the fact [that claimant] had completely normal ventilatory function [twelve] years after leaving the mining industry provides compelling evidence that his eventual impairment was not the result of his occupation as a coal miner.

Employer's Exhibit 2 at 25. We affirm the administrative law judge's permissible finding that Dr. Jarboe's opinion is contrary to the regulation at 20 C.F.R. 718.201, which he noted, recognizes that "coal workers' pneumoconiosis is a latent and progressive condition." Decision and Order at 22; 20 C.F.R. §718.201(c) (recognizing that pneumoconiosis can be "a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure"); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012). The administrative law judge also permissibly found that Dr. Jarboe's opinion was "unpersuasive" because he relied on medical statistics and not the specifics of claimant's case.[7] *See Mancia*, 130 F.3d at 584, 21 BLR at 2-234.

[7] Dr. Jarboe cited medical literature indicating that it is "unusual" for a coal miner to have a severe reduction in diffusion capacity in the absence of massive pulmonary fibrosis. Employer's Exhibit 2 at 25-26. The administrative law judge observed, however, that even if the statistics are valid, "it does not mean that it is impossible for such a reduction in diffusion capacity to occur" and "does not mean necessarily that [c]laimant's respiratory impairment is not related to coal dust exposure." Decision and Order at 22.

As the trier-of-fact, the administrative law judge has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396, 22 BLR at 394-95; *Clark*, 12 BLR at 1-155. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). We conclude that the administrative law judge acted within his discretion in determining the credibility of employer's evidence, and employer cannot, therefore, rebut the presumption by proving the absence of legal pneumoconiosis or that no part of claimant's totally disabling impairment was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(i)(A), (ii); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). As employer bears the burden of proof on rebuttal, and its evidence was deemed insufficient by the administrative law judge, it is not necessary that we consider the weight accorded claimant's evidence on rebuttal. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we further affirm his finding that claimant is entitled to benefits.[8]

[8] In light of our holding that employer has not rebutted the presumed fact of legal pneumoconiosis, it is not necessary to address employer's allegations of error with regard to the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge