

U.S. Department of Labor

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



BRB No. 18-0097 BLA

JIMMY D. GOAD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SELECT MINING, INCORPORATED)	DATE ISSUED: 03/19/2019
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand Denying Benefits (2013-BLA-05390), rendered by Administrative Law Judge Richard A. Morgan on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 6, 2012, and is before the Board for a third time.

In its most recent decision,¹ the Board vacated the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis and remanded the case to the administrative law judge for reconsideration of the medical opinions of Drs. Rasmussen and Rosenberg. *Goad v. Select Mining, Inc.*, BRB No. 16-0380 BLA, slip op. at 7-8 (June 21, 2017) (unpub.). On remand, the administrative law judge concluded that Dr. Rosenberg's opinion was sufficient to rebut the existence of legal pneumoconiosis. In light of the Board's prior affirmance of the administrative law judge's determination that employer rebutted the presumed existence of clinical pneumoconiosis, he found employer rebutted the Section 411(c)(4) presumption and denied benefits.

On appeal, claimant asserts the administrative law judge erred in determining that employer rebutted the presumed existence of legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

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.² 33 U.S.C. §921(b)(3), as incorporated into the Act

¹ In its initial Decision and Order, the Board affirmed the administrative law judge's findings that claimant established thirty-four years of underground mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv) and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012). *Goad v. Select Mining, Inc.*, BRB No. 15-0041 BLA, slip op. at 2 n.1, 3 (Sept. 30, 2015) (unpub.). The Board also affirmed the administrative law judge's determination that employer disproved the existence of clinical pneumoconiosis, but vacated his finding that employer disproved the existence of legal pneumoconiosis. *Id.* at 2 n.1, 4-5. Accordingly, the Board vacated the denial of benefits and remanded the case to the administrative law judge for reconsideration. *Id.* at 5-6.

² Because claimant's last coal mine employment was in West Virginia, we will apply the law 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); Director's Exhibits 3, 6.

by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,³ or by establishing 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 W. Va. CWP Fund v. Director, OWCP [Smith]*, 880 F.3d 691, 699 (4th Cir. 2018); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer rebutted the presumed existence of legal and clinical pneumoconiosis and therefore rebutted the Section 411(c)(4) presumption. 2014 Decision and Order at 18-20; Decision and Order on Second Remand at 8-11.

To disprove the existence of legal pneumoconiosis, employer must demonstrate with affirmative proof that it is more likely than not the impairment is not “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(2), (b); *see Smith*, 880 F.3d at 699; *Minich*, 25 BLR at 1-159. In accordance with the Board’s remand instructions, the administrative law judge

³ Legal pneumoconiosis is defined as “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 “includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” *Id.* 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).

reconsidered the opinions of Drs. Rasmussen and Rosenberg.⁴ Dr. Rasmussen⁵ diagnosed legal pneumoconiosis in the form of a moderate, irreversible restrictive ventilatory impairment due to a combination of factors, including coal dust exposure, mild elevation of the right hemidiaphragm, potential asbestos exposure, and obesity.⁶ Director's Exhibit 12; Claimant's Exhibits 1, 2. Dr. Rosenberg agreed that claimant has a restrictive impairment, but he attributed it to obesity and an elevated diaphragm, not coal dust exposure.⁷ Director's Exhibit 21; Employer's Exhibit 11. The administrative law judge

⁴ The administrative law judge correctly observed that the Board did not instruct him to reconsider Dr. Zaldivar's opinion on remand. Decision and Order on Second Remand at 3 n.2. He further stated: "I reaffirm that Dr. Zaldivar's opinion is reduced in weight as inconsistent with the regulations. Dr. Zaldivar opined that the only case in which restriction would occur is when a miner shows radiographic change, thus his opinion is inconsistent with 20 C.F.R. § 718.202(b), which states that a claim 'must not be denied solely on the basis of a negative chest x-ray.'" *Id.* We affirm the administrative law judge's finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ Dr. Rasmussen examined claimant at the request of the Department of Labor and prepared a report dated May 1, 2012. Director's Exhibit 12. He examined claimant a second time on April 1, 2014. Claimant's Exhibit 2. He was also deposed on April 4, 2014. In preparation for his deposition, Dr. Rasmussen reviewed additional medical records, including the medical reports of Drs. Rosenberg and Zaldivar; interpretations of chest x-rays dated March 15, 2012, August 6, 2012, and April 3, 2013; interpretations of CT scans dated July 14, 2010 and June 24, 2013, and claimant's treatment records. Claimant's Exhibit 1.

⁶ In the most recent prior decision, the Board emphasized that whether Dr. Rasmussen's opinion is sufficient to establish the existence of legal pneumoconiosis is not the proper inquiry in the instant case, where it is employer's burden to disprove the existence of the disease. *Goad v. Select Mining, Inc.*, BRB No. 16-0380 BLA, slip op. at 7 (June 21, 2017) (unpub.). The Board further indicated, however, "[i]f Dr. Rasmussen's opinion that coal dust exposure was a contributor to claimant's restrictive pulmonary impairment is well documented and reasoned, as the administrative law judge explicitly found, then he must reconcile that position with Dr. Rosenberg's contrary position that he was able to completely eliminate coal dust exposure as a cause of the impairment." *Id.*

⁷ Dr. Rosenberg examined claimant and prepared a report dated August 22, 2012. Director's Exhibit 21. He also testified by deposition on April 29, 2014. Employer's Exhibit 11 at 25.

found Dr. Rosenberg's opinion better documented and more persuasive than Dr. Rasmussen's opinion and, therefore, found that employer disproved the existence of legal pneumoconiosis.

Claimant argues that the administrative law judge again erred in finding Dr. Rosenberg's opinion not inconsistent with the regulations, asserting he essentially stated that clinical pneumoconiosis must be present radiologically for coal dust exposure to have played a role in causing a restrictive impairment. We disagree. In excluding coal mine dust as a cause of claimant's disabling restrictive impairment, Dr. Rosenberg explained that restrictive impairments, which result when the lungs become smaller, are caused by either intrinsic or extrinsic factors. Employer's Exhibit 11 at 19-20. He explained that intrinsic restriction occurs when scarring and fibrosis within the lungs stiffens and shrinks the lungs. *Id.* Extrinsic restriction occurs when something outside of the lungs, such as an elevated hemidiaphragm or obese abdomen, pushes against the lungs or prevents expansion. Employer's Exhibit 11 at 19, 21-22.

Contrary to claimant's contention, Dr. Rosenberg agreed that individuals "can have interstitial lung disease with a negative chest x-ray" but explained that if claimant's significant restrictive impairment was related to coal dust exposure, "more likely than not, it would be evident on a plain x-ray." *Id.* at 23. He further noted that, here, "you have the benefit of the CT scan, and CT scans are much more accurate than chest x-rays for determining fibrotic disease, and his CT scans don't show it." *Id.* Additionally, Dr. Rosenberg explained, intrinsic fibrotic lung disease would cause a significant drop in pO₂ with exercise, which also was not demonstrated on the objective testing. *Id.* at 20-22. Finally, he stated that claimant's normal diffusion capacity, which demonstrated that the alveolar capillary bed within his lungs is intact, also supported the conclusion that claimant's restrictive impairment is not due to intrinsic scarring or fibrosis within the lungs. Director's Exhibit 21; Employer's Exhibit 11 at 20-21. Thus, "look[ing] at all the factors here," Dr. Rosenberg concluded that claimant's restrictive impairment is not due to coal mine dust exposure. *Id.* at 25. Based on the administrative law judge's review of this reasoning, he rationally found that Dr. Rosenberg did not rely on the absence of clinical pneumoconiosis to opine that claimant's restrictive impairment is not related to coal dust exposure.⁸ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order on Second Remand at 10.

⁸ Addressing the opinions of Drs. Rasmussen and Rosenberg on the issue of whether they required x-ray evidence of clinical pneumoconiosis to identify coal dust as a cause of claimant's restrictive impairment, the administrative law judge stated:

Nor is there merit to claimant's assertion that Dr. Rosenberg's opinion is speculative because the record does not reveal the extent of the elevation of claimant's diaphragm, or whether it is actually paralyzed. Claimant's Brief at 19-20. The administrative law judge reasonably rejected this contention, noting Dr. Rasmussen's agreement that claimant's elevated diaphragm and obesity are not only contributing factors to claimant's impairment, but are severe enough that they could be the only factors, supported Dr. Rosenberg's conclusions.⁹ See *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Second Remand at 11 n.5. Because he permissibly found Dr. Rosenberg "thoroughly explain[ed] why he was able to exclude coal mine dust as a factor in the claimant's pulmonary disability," based on claimant's symptoms, objective studies, and the other evidence of record, we affirm the administrative law judge's decision to credit Dr. Rosenberg's opinion as well-reasoned and well-documented. See *Hicks*, 138 F.3d at 533; Decision and Order on Second Remand at 10-11.

Because both Dr. Rasmussen and Dr. Rosenberg agree that the claimant does not have clinical pneumoconiosis, opine that legal pneumoconiosis as restriction is often caused by interstitial fibrosis that may not be visible on x-ray, use that definition here to discuss the claimant's pulmonary condition, and thoroughly discuss their reasoning, I find that their opinions that interstitial fibrosis can cause legal pneumoconiosis as restriction to be well reasoned. I further find that because they both distinguish their diagnoses of clinical [coal workers' pneumoconiosis] from legal [coal workers' pneumoconiosis] as restriction, their reliance on interstitial fibrosis as an explanation for legal pneumoconiosis in the form of restriction is consistent with "the [Department of Labor's] recognition that legal and clinical pneumoconiosis are distinct diseases, and that coal mine dust exposure can cause a disabling obstructive or restrictive impairment even where no clinical pneumoconiosis is present."

Decision and Order on Second Remand at 10, *quoting Goad*, BRB No. 16-0380 BLA, slip op. at 7.

⁹ Dr. Rasmussen testified in relation to claimant's elevated diaphragm that "I'm sure [it] is a contributing factor." Claimant's Exhibit 1 at 13. In response to a question concerning whether he believed that claimant's elevated diaphragm and obesity were no more than contributing factors, Dr. Rasmussen stated, "I can't exclude that as the sole factor, let me put it that way, those as factors." *Id.* at 14. He also explained, "you don't need to have it paralyzed to help explain that restriction, just simply an elevated diaphragm." *Id.* at 36.

We therefore affirm the administrative law judge's finding that Dr. Rosenberg's opinion was sufficient to rebut legal pneumoconiosis by persuasively establishing it is more likely than not the impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see Smith*, 880 F.3d at 699; *Minich*, 25 BLR at 1-159.

Claimant next challenges the administrative law judge's determination to accord diminished weight to Dr. Rasmussen's opinion. Dr. Rasmussen testified that he diagnosed legal pneumoconiosis "based on the fact that coal mine dust can cause a restrictive lung disease." Claimant's Exhibit 1 at 11. He added that "the principal means by which [coal dust causes a restrictive impairment] is by causing interstitial fibrosis" which is not always detectable by radiographs.¹⁰ *Id.* at 11-12. On cross-examination, Dr. Rasmussen indicated that because each of the potential causal factors could be the sole cause of claimant's respiratory impairment, he could not exclude any one factor as the source of claimant's impairment.¹¹ *Id.* at 38.

¹⁰ Dr. Rasmussen stated that despite the absence of interstitial fibrosis on x-rays, the fact that he, Dr. Rosenberg, and Dr. Zaldivar all heard crackles in claimant's lung bases constituted "some possible evidence" that it is present. Claimant's Exhibit 1 at 15. Dr. Rasmussen did not discuss, however, the fact that claimant's CT scans, which Dr. Rosenberg stated are more sensitive than x-rays, did not reveal evidence of fibrosis.

¹¹ Dr. Rasmussen testified at his deposition:

. . . I can't exclude a diaphragm effect, I can't exclude a coal mine dust effect, because, after all, he's had . . . coal mine dust and asbestos exposures. And so what you'd end up with is you'd have to conclude that it's a combination of all those factors so you can't exclude one or the other, that's the point.

...

In other words, if you can't rule this one out or can't rule that one out, they could both – they could each be the total cause or no cause.

...

[I]t's most likely a combination. So . . . very often you talk about smoking and coal mine dust, they both do the same thing. It could all be one or all be the other. The same here . . . it's all related to, say, the diaphragm and obesity or it's all related to coal mine dust. He's not all that obese, so you could have – one or the other could be the sole cause, but you can't demonstrate that it's one or the other.

Claimant's Exhibit 1 at 37-38.

While a physician need not attribute a certain percentage of a miner's impairment to coal dust exposure to diagnose legal pneumoconiosis, he or she must still identify a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). The administrative law judge permissibly found Dr. Rasmussen's "reasoning of essentially, 'the claimant had several different exposures, so each must contribute,'" rendered his diagnosis of legal pneumoconiosis "less sophisticated and less well reasoned than Dr. Rosenberg's analysis."¹² Decision and Order on Second Remand at 10; *see Williams*, 453 F.3d at 622. We therefore affirm the administrative law judge's determination that Dr. Rasmussen's opinion was "entitled to less determinative weight and remain[ed] less persuasive" than Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis.¹³ Decision and Order on Second Remand at 10; *see Akers*, 131 F.3d at 441 (holding an administrative law judge must address the "qualifications of the respective physicians, the explanation of their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.").

As we previously affirmed the administrative law judge's determination that employer rebutted the presumed existence of clinical pneumoconiosis, we also affirm his

¹² Notably, the administrative law judge did not use an incorrect standard of review in weighing Dr. Rasmussen's opinion. Instead, he evaluated its persuasive value in light of the support Dr. Rasmussen provided for his conclusion that claimant suffers from legal pneumoconiosis. Nor did the administrative law judge refuse to credit Dr. Rasmussen's opinion because he found it equivocal, as employer argues. The administrative law judge instead correctly recognized that Dr. Rasmussen specifically identified the contributing factors he believed caused claimant's impairment without equivocation. He then weighed the credible competing physician views and found Dr. Rosenberg provided the more thorough and persuasive opinion.

¹³ There is merit to claimant's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion is not well documented because he relied on "a smaller bank of information than Dr. Rosenberg." Decision and Order on Second Remand at 10; Claimant's Brief at 16-17. As claimant correctly asserts, both Dr. Rasmussen and Dr. Rosenberg reviewed all of the medical evidence of record. Moreover, employer agrees "the [administrative law judge] incorrectly suggested that Dr. Rasmussen did not review all the medical evidence[.]" Employer's Brief at 5. This error is harmless, however, as the administrative law judge gave a valid alternative rationale for discrediting Dr. Rasmussen's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

finding employer rebutted the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Goad v. Select Mining, Inc.*, BRB No. 15-0041 BLA, slip op. at 2 n.1 (Sept. 30, 2015) (unpub.).

Accordingly, the administrative law judge's Decision and Order on Second Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge