U.S. Department of Labor

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

BRB No. 19-0296 BLA

CURTIS W. SLUSS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL CORPORATION	)	
	)	DATE ISSUED: 06/25/2020
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin, (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kendra R. Prince, (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05133) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case

involves a subsequent claim filed on February 3, 2015.[1]

After accepting the parties' stipulation to 22.03 years of coal mine employment,[2] the administrative law judge found that claimant's coal mine employment occurred in conditions substantially similar to those in an underground mine. She also found claimant has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, and established a change in the applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

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

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[1] Claimant filed two prior claims. Director's Exhibits 1. The district director denied his most recent prior claim, filed on September 14, 2012, based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-13.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. We affirm, as unchallenged, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

claimant has neither legal nor clinical pneumoconiosis,[4] 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). The administrative law judge found employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. McSharry and Sargent that claimant does not have legal pneumoconiosis, but has an obstructive pulmonary disease (emphysema) due solely to cigarette smoking.[5] Director's Exhibit 16; Employer's Exhibits 1, 4-6.

The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined claimant's years of coal mine dust exposure did not contribute, along with his smoking, to his obstructive pulmonary disease. Decision and Order at 34-36. She therefore found that employer failed to disprove legal pneumoconiosis.

Employer initially argues that the administrative law judge applied an improper standard by requiring Drs. McSharry and Sargent to establish that claimant's coal mine dust exposure played no part in causing his obstructive lung disease in order to disprove legal pneumoconiosis. Employer's Brief at 13-14, 18. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing that claimant does not have legal pneumoconiosis, i.e., a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 21, 33; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, as discussed, *infra*, she did not reject

[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). "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] The administrative law judge also considered the opinions of Drs. Green and Nader, but accurately found their opinions do not assist employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 33; Director's Exhibits 14, 20; Claimant's Exhibits 1, 2.

the opinions of Drs. McSharry and Sargent because they were insufficient to establish that coal mine dust exposure played no part in claimant's obstructive pulmonary disease. Rather, she found their opinions not credible because they were not adequately explained. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012) (administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

Employer next contends that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. McSharry and Sargent. Employer's Brief at 11-18. We disagree. The administrative law judge accurately found Dr. McSharry relied in part on the absence of radiographic evidence of pneumoconiosis in opining that claimant's pulmonary condition is not related to his coal mine dust exposure. Decision and Order at 35. The administrative law judge permissibly found this reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

The administrative law judge noted Dr. Sargent's opinion that claimant's emphysema was not caused by coal dust exposure was based in part on his view emphysema caused by coal dust exposure is "generally focal." Decision and Order at 35; Employer's Exhibit 4 at 2. She also noted Dr. Sargent explained claimant's hypercardia is a symptom not "normally associated with coal workers' pneumoconiosis." Decision and Order at 35; Employer's Exhibit 5 at 10. She noted Dr. Sargent, based in part on these generalities, found claimant's pattern of impairment to be more consistent with smoking-induced lung disease than with coal mine dust-induced lung disease. Decision and Order at 35. The administrative law judge permissibly found Dr. Sargent's reliance on generalizations to exclude legal pneumoconiosis was "unpersuasive." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 35.

The administrative law judge also permissibly rejected the opinions of Drs. McSharry and Sargent because the doctors did not adequately explain why claimant's coal mine dust exposure was not an additive factor, along with smoking, in causing his emphysema.[6] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000);

[6] Although the administrative law judge noted that Dr. McSharry attributed claimant's obstructive pulmonary disease to smoking, she found that he "did not satisfactorily explain why coal dust exposure could not *also* be a substantially contributing

Westmoreland Coal Co. v. Stallard, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 34-36. We affirm the administrative law judge's determination employer did not disprove legal pneumoconiosis[7] and therefore did not rebut the presumption by establishing claimant does not have pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of [claimant's] 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)(ii). She rationally discounted Drs. McSharry's and Sargent's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 37-38. Therefore, we affirm the administrative law judge's determination that employer failed to rebut legal pneumoconiosis as a cause of claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

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factor." Decision and Order at 34. Similarly, the administrative law judge found that Dr. Sargent failed to adequately explain why claimant's emphysema could not have been exacerbated by his coal dust exposure. *Id.* at 36. The administrative law judge noted that "[s]imply identifying the characteristics and genesis of smoking-induced emphysema does not preclude the additive effect of coal dust exposure." *Id.*

[7] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. McSharry and Sargent, we need not address employer's additional arguments concerning the administrative law judge's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[8] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-10.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge