U.S. Department of Labor

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

BRB No. 20-0014 BLA

CHARLES BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 10/30/2020
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
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 on Remand Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Carrie Bland's Decision and Order on Remand Awarding Benefits (2014-BLA-05473) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 12, 2013.[1]

In her initial decision, the administrative law judge credited Claimant with at least twenty-two years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in the applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption and her finding that Claimant established a change in the applicable condition of entitlement. *Blankenship v. Mingo Logan Coal Co.*, BRB No. 17-0193 BLA (Feb. 28, 2018) (unpub.). The Board also affirmed her finding Employer did not disprove the existence of clinical pneumoconiosis but held she applied the wrong legal standard in considering whether the evidence was sufficient to establish that Claimant does not have legal pneumoconiosis.[4] *Id.* The Board therefore vacated the administrative law judge's

[1] Claimant filed three prior claims in 2004, 2007 and 2010. Director's Exhibits 1-3. The district director denied Claimant's most recent 2010 claim on May 16, 2011 because the evidence did not establish total disability. Director's Exhibit 3.

[2] The Benefits Review 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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) (2018); *see* 20 C.F.R. §718.305.

[4] The Board recognized that Employer's failure to disprove clinical pneumoconiosis precludes rebuttal under the first method. 20 C.F.R. §718.305(d)(1)(i). It noted, however, that the administrative law judge was required nonetheless to make a finding as to whether Employer disproved legal pneumoconiosis as that finding is relevant to whether Employer established the second method of rebuttal by proving 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).

finding that Employer failed to establish rebuttal of the Section 411(c)(4) presumption, and remanded the case for further consideration. *Id.*

On remand, the administrative law judge again found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the 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 administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] 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)(i), (ii). As instructed, the administrative law judge reconsidered whether Employer established that Claimant does not have legal pneumoconiosis. She accurately noted to disprove legal pneumoconiosis, Employer was required to establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order on Remand at 3; 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative considered the medical opinions of Drs. Rosenberg and Castle who opined that Claimant does not have legal pneumoconiosis. Employer's Exhibits 1-4.

[5] "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).

Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) due to smoking,[6] Employer's Exhibit 3, while Dr. Castle diagnosed airway obstruction due to smoking and asthma. Employer's Exhibits 1, 2, 4. 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 and/or asthma, to his pulmonary disease. Decision and Order on Remand at 3-7.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Castle. Employer's Brief at 7-27. We disagree. As the administrative law judge accurately noted, Drs. Rosenberg and Castle opined Claimant's COPD/airways disease is due to smoking because the pulmonary function studies showed a reduced FEV1/FVC ratio which is inconsistent with an impairment related to coal mine dust exposure. Employer's Exhibits 1 at 13; 3 at 8. The administrative law judge permissibly discounted the rationale relied upon by Drs. Rosenberg and Castle as inconsistent with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[7] *See* 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order on Remand at 4-6. Furthermore, she permissibly found Drs. Rosenberg and Castle did not adequately explain why Claimant's response to bronchodilators showing partial reversibility of his impairment necessarily eliminated coal mine dust exposure as a contributing factor for the *irreversible* portion of his impairment that remained even after bronchodilators were administered.[8] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order on Remand at 5-7; Employer's Exhibits 1, 3.

[6] Dr. Rosenberg also opined that any bronchitis Claimant has is not due to coal mine dust exposure. Employer's Exhibit 3.

[7] Employer notes Dr. Rosenberg relies on studies that post-date the preamble by more than 10 years. Employer's Brief at 12. Employer, however, does not assert it has submitted "the type and quality of medical evidence that would invalidate the DOL's position" that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

[8] The administrative law judge noted that the four new pulmonary function studies produced qualifying values before *and* after the administration of bronchodilators. Decision and Order at 21.

Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Castle,[9] the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm her finding Employer failed to disprove legal pneumoconiosis. *See Owens*, 724 F.3d at 558; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 3-7. Employer's failure to disprove legal pneumoconiosis precludes a finding it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 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 permissibly discredited the opinions of Drs. Rosenberg and Castle on disability causation because their conclusions were premised on a belief that Claimant did not have legal pneumoconiosis, contrary to her finding Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding that the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order on Remand at 8; Employer's Exhibit 1-4. We therefore affirm the administrative law judge's finding that Employer did not establish Claimant's respiratory disability is unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand 8. Thus, we affirm the administrative law judge's award of benefits.

[9] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Castle, we need not address Employer's arguments regarding the additional reasons the administrative law judge gave for rejecting their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 3-7.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge