U.S. Department of Labor

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

BRB No. 17-0357 BLA

GARY WAYNE CARMICAL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE C COAL, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 04/27/2018
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Dan F. Partin, Harlan, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-5640) of Administrative Law Judge Adele Higgins Odegard, 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). This case involves a miner's subsequent claim filed on July 26, 2013.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with twenty-three years of underground coal mine employment, based on employer's concession, and found that the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[3]

[1] This is claimant's fourth claim for benefits. Director's Exhibits 1-3, 5. Claimant's most recent prior claim was filed on February 14, 2011. Director's Exhibit 3. On April 10, 2012, the district director denied claimant's request to withdraw the claim, as against claimant's interests. *Id.* Subsequently, on June 8, 2012, the district director denied the claim because claimant failed to establish total respiratory disability. *Id*. Claimant did not further pursue that claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-three years of underground coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 18-19. We also affirm, as unchallenged, the administrative law judge's findings that claimant invoked the rebuttable presumption of total disability due to

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.[4] 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 (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 rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] or by establishing 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)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.

Employer contends that the administrative law judge erred in concluding that employer "failed to rebut the presumptions of pneumoconiosis and disability due to pneumoconiosis." Employer's Brief at 2. Employer asserts that "[t]he most well-reasoned and documented opinion was that of Dr. Rosenberg who reviewed extensive medical documentation" and "explained that [c]laimant's pulmonary disability was due to asthma with airway remodeling and not due to coal mine dust exposure."[6] *Id*. at 4. Employer,

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pneumoconiosis at Section 411(c)(4) and established a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 3, 6; Hearing Tr. at 17.

[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).

[6] Dr. Rosenberg opined that claimant does not have clinical pneumoconiosis. Employer's Exhibit 1; Director's Exhibit 16. Relevant to whether claimant has legal pneumoconiosis, Dr. Rosenberg stated that claimant suffers from a disabling obstructive

however, has not identified any specific error of law or fact in the administrative law judge's weighing of Dr. Rosenberg's opinion, the only opinion relevant to whether employer can establish rebuttal.[7] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Anderson*, 12 BLR at 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, we affirm the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits. *See* 20 C.F.R. §718.305(d)(2)(i), (ii); Decision and Order at 19-30.

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impairment that is "likely" due to airway remodeling consequent to asthma. *Id.* Dr. Rosenberg concluded, however, that he would need to review claimant's earlier treatment records to characterize the etiology of claimant's impairment and the contribution, if any, by coal mine dust exposure. *Id*.

[7] The administrative law judge also considered the opinions of Drs. Ajjarapu and Alam. Decision and Order at 25-27. Dr. Ajjarapu diagnosed clinical and legal pneumoconiosis and opined that claimant has "occupationally - induced COPD" and that "the coal dust has [a] material adverse effect on his pulmonary function." Director's Exhibit 10. Dr. Alam also diagnosed clinical and legal pneumoconiosis, in the form of chronic bronchitis and emphysema related to coal dust exposure, and opined that claimant's coal workers' pneumoconiosis caused his disabling pulmonary impairment. Director's Exhibit 13. Employer asserts that "[t]he opinions of Drs. Ajjarapu and Alam are based on unidentified evidence not of record and do not consider [c]laimant's multitude of medical conditions." Employer's Brief at 4. As the administrative law judge correctly found, however, the opinions of Drs. Ajjarapu and Alam do not support employer's burden to rebut the Section 411(c)(4) presumption. Decision and Order at 26. We, therefore, need not address employer's challenges to the administrative law judge's evaluation of their opinions. *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge