U.S. Department of Labor

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

BRB No. 18-0187 BLA

AUBRY L. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 04/24/2019
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05900) of Administrative Law Judge Patrick M. Rosenow, rendered 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 October 29, 2013.[1]

The administrative law judge credited claimant with twenty-seven years of underground coal mine employment, as stipulated by the parties, and found he has a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends 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, did not file a response brief in this appeal.[4]

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[1] This is claimant's second claim for benefits. His first claim, filed on August 9, 2005, was denied by the district director on September 29, 2006, because he did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action on that claim.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As claimant's previous claim was denied for failure to establish any element of entitlement, he had to establish at least one element to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant established twenty-seven years of underground coal mine employment; a totally

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.[5] 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, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis,[6] or "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). The administrative law judge found employer failed to establish rebuttal by either method.[7]

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disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 6, 29.

[5] The administrative law judge found claimant's last coal mine employment was in Virginia. Decision and Order at 5 n.35; Director's Exhibits 4, 10; Claimant's Exhibits 2, 3. Therefore, 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).

[6] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

[7] Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined that employer rebutted clinical pneumoconiosis, but did not rebut legal pneumoconiosis. Decision and Order at 34.

Legal Pneumoconiosis

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, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Rosenberg and Zaldivar, who opined claimant does not have legal pneumoconiosis but suffers from a restrictive impairment caused by a paralyzed right hemidiaphragm and an obstructive impairment due to asthma, unrelated to coal dust exposure.[8] Decision and Order at 34-38; Director's Exhibit 11; Employer's Exhibits 4, 9, 10. Employer argues the administrative law judge erred in finding their opinions not well reasoned. Employer's Brief at 5-23. We disagree.

As the administrative law judge accurately observed, Dr. Rosenberg examined claimant on May 12, 2014 and acknowledged the pattern of claimant's impairment, with "a moderate reduction of his FVC and FEV_1 in a symmetrical fashion with the values being qualifying," is consistent with legal pneumoconiosis. Director's Exhibit 11 at 4; Employer's Exhibit 10 at 28-29. He also acknowledged a person can be disabled due to a combination of a paralyzed hemidiaphragm, asthma, and pneumoconiosis. He then stated, however, that "in differential diagnoses you need to look at all possibilities . . . [but] when your right diaphragm is halfway up into your mid-chest, that's going to exclude the

[8] The administrative law judge also considered the opinions of Drs. Al-Jaroushi, Cordasco, and Green, who diagnosed legal pneumoconiosis. Dr. Al-Jaroushi diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal dust. Dr. Al-Jaroushi acknowledged claimant's hemidiaphragm paralysis could be a contributing cause to his dyspnea on exertion, and noted difficulty in estimating its relative contribution along with the chronic bronchitis. Director's Exhibits 10, 12. Dr. Cordasco diagnosed chronic obstructive pulmonary disease (COPD) with bronchitic clinical features due to coal dust exposure. Claimant's Exhibit 2. Dr. Green diagnosed COPD and hypoxemia due to coal dust exposure. Claimant's Exhibit 3. The administrative law judge discounted the opinions of Drs. Cordasco and Green as not well-documented, but found the opinion of Dr. Al-Jaroushi entitled to probative weight. Decision and Order at 36, 38.

potential to make a diagnosis of legal [coal workers' pneumoconiosis]."[9] Decision and Order at 35; Employer's Exhibit 10 at 39.

The administrative law judge permissibly found Dr. Rosenberg's opinion internally inconsistent and inadequately explained, as he allows for the possibility of co-existent causal factors for claimant's pulmonary condition, but appears to state that he must rule out all other causal factors before he can diagnose legal pneumoconiosis.[10] *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 35-36; Employer's Exhibit 10 at 38-39. Consequently, the administrative law judge permissibly determined Dr. Rosenberg's opinion is insufficiently reasoned and entitled to diminished weight. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

Dr. Zaldivar similarly opined patients with airway obstruction can have a combination of diseases, but attributed claimant's obstruction entirely to asthma, unrelated to coal mine dust exposure. Employer's Exhibits 4, 9 at 19, 46. He acknowledged claimant's impairment is not completely reversible, but stated this factor supports his diagnosis because long-untreated asthma, such as claimant's, eventually results in irreversible airway obstruction through the process of airway remodeling. Employer's Exhibits 4; 9 at 3-24. The administrative law judge noted, however, claimant's treatment records, which Dr. Zaldivar reviewed, reflect a history of a chronic obstructive pulmonary disease due to chronic bronchitis as early as 1998. Employer's Exhibit 8. And, while Dr. Zaldivar believed claimant's asthma was not treated until 2014, Dr. Habre's treatment notes indicate claimant was using bronchodilators in 2009. Decision and Order at 37; Claimant's Exhibit 6; Employer's Exhibit 4.

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[9] Dr. Rosenberg stated, ". . . if [claimant] didn't have an elevated diaphragm and had the impairment pattern that he does have and was disabled, then I would say that he has disabling legal coal workers' pneumoconiosis." Employer's Exhibit 10 at 38.

[10] Dr. Rosenberg stated: "Well, you can't just establish legal [coal workers' pneumoconiosis] in the setting of a paralyzed right diaphragm or the right diaphragm is completely wiped out. You can't . . . attribute a reduction of the FVC and FEV_1 to legal coal workers' pneumoconiosis. It's just not logical because [the paralyzed hemidiaphragm] is totally going to be causing these kinds of changes." Employer's Exhibit 10 at 39.

In light of these factors, the administrative law judge permissibly found Dr. Zaldivar did not adequately explain why he attributed claimant's obstructive impairment entirely to asthma, and why claimant's twenty-seven years of underground coal mine dust exposure did not contribute, along with asthma, to his obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); Decision and Order at 37-38.

Substantial evidence supports the administrative law judge's credibility determinations; the Board is not empowered to reweigh the evidence. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000)*; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge permissibly discredited the only opinions supportive of a finding claimant does not have legal pneumoconiosis,[11] we affirm his finding employer failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether employer established rebuttal by proving "no part of the miner'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). He permissibly found that the same reasons for which he discredited the opinions of Drs. Rosenberg and Zaldivar that claimant does not have legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 39. We therefore affirm the administrative law judge's

[11] Employer asserts the administrative law judge erred in according probative weight to Dr. Al-Jaroushi's opinion claimant has legal pneumoconiosis. Employer's Brief at 21-22. We decline to address this argument as Dr. Al-Jaroushi's opinion does not assist employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Zaldivar, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge