U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0397 BLA

DANNY R. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 08/31/2015
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5984) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012) (the Act).[1] The administrative law judge found that claimant established over fifteen years of underground coal mine employment, and that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against him. Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement in his subsequent claim pursuant to 20 C.F.R. §725.309(c).[2] The administrative law judge also found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established a totally disabling respiratory impairment pursuant to Section 718.204(b),[4] and thereby erred in finding that a change in an applicable condition of entitlement and invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis were established. Specifically,

[1] Claimant's first application for benefits, filed on January 30, 1995, was denied on July 10, 1995, as he did not establish total respiratory or pulmonary disability. Claimant took no further action until filing the present subsequent claim on July 22, 2010. Director's Exhibits 2, 3; Decision and Order at 2, 4, 21.

[2] Where a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless "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); 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[3] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[4] The administrative law judge's finding that the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

employer asserts that the administrative law judge "misconstrued the opinions of Drs. Castle and Fino as assessing a disabling pulmonary or respiratory impairment." Employer's Brief at 11. Employer also asserts that the administrative law judge inadequately considered "the exertional rigors of [claimant's] previous coal mine work," and failed to resolve evidentiary inconsistencies as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Id*. Additionally, employer argues that the administrative law judge selectively analyzed and mischaracterized the evidence in finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, maintains that the administrative law judge properly found that the medical opinion evidence established total respiratory disability, and thereby correctly determined that claimant was entitled to invocation of the amended Section 411(c)(4) presumption.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

1. Invocation of the Presumption at Amended Section 411(c)(4) Total Respiratory Disability - 20 C.F.R. §718.204(b)

In considering the evidence relevant to total respiratory disability at Section 718.204(b), the administrative law judge found that all of the pulmonary function studies were qualifying, that none of the blood gas studies were qualifying, and that all of the medical opinions found that claimant had a totally disabling respiratory impairment. Consequently, on the basis of the pulmonary function study and medical opinion evidence, the administrative law judge found that total respiratory disability was

[5] The administrative law judge found that claimant worked for over twenty years in coal mine employment, of which fifteen or more years were in underground mines. This finding is affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4, 8-9, 30, 35; Hearing Transcript at 15; Employer's Brief at 11.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Response at 1 n.1; Hearing Transcript at 22; *see also* Decision and Order at 34.

established at Section 718.204(b). Decision and Order at 31. The administrative law judge also found that "[c]laimant's last position in the coal mines was that of a truck driver." Decision and Order at 4. Further, the administrative law judge found that, "as part of his duties, [claimant] was required to climb in and out of the truck approximately three times per shift where the first step was five feet above ground." *Id.* Additionally, the administrative law judge found that claimant "occasionally had to lift 75-pound oil cans to service the truck." *Id.* The administrative law judge, therefore, found that claimant's last coal mine employment[7] required "moderate labor." *Id.*

Employer contends that the administrative law judge "misconstrued the opinions of Drs. Castle and Fino as assessing a totally disabling pulmonary or respiratory impairment."[8] Employer's Brief at 11. In making this argument, employer relies upon the view of Drs. Fino and Castle that claimant's restrictive pulmonary disability results from the *extrinsic* factor of his obesity, and not from an *intrinsic* pulmonary or respiratory disease.[9] Employer's Exhibits 3 at 11, 6 at 4-5, 7 at 23, 30; Employer's Brief at 9-10; Decision and Order at 12, 13, 15.

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[7] We note that employer does not contend, nor does the evidence indicate, that claimant's last coal mine employment, as a truck driver, was not his usual coal mine employment.

[8] The administrative law judge credited the opinions of Drs. Al-Jaroushi, Al-Khasawneh and Gallai, who diagnosed claimant with a totally disabling respiratory impairment. Decision and Order at 11. This finding is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[9] Dr. Fino reviewed claimant's medical records, and found the absence of clinical or legal pneumoconiosis. Specifically, he stated: "[T]here is no actual respiratory impairment. There is an adverse effect on his lungs from his obesity, which prevents adequate expansion of his lung tissue." His deposition included the following exchange:

> Q. Could [the miner] go back and perform the work associated with his last coal mine job from strictly a pulmonary standpoint?
>
> A. No, he could not.
>
> Q. What's limiting his ability to perform work in that fashion?
>
> A. Extrinsic causes affecting the lungs.… He does not have any lung disease. He does not have chronic bronchitis [or clinical or legal pneumoconiosis]; however, he has obesity, which is secondarily affecting his lung function.

As the Director maintains, however, the issue at Section 718.204(b) is not whether a respiratory or pulmonary impairment is due to an *intrinsic*, or *extrinsic*, disease process, but rather, whether a totally disabling respiratory or pulmonary impairment is, or was, present. Director's Response at 1-2. Both Dr. Fino and Dr. Castle stated that claimant has a totally disabling respiratory impairment: Dr. Fino opined that claimant cannot perform his last coal mine employment from a pulmonary perspective; Dr. Castle opined that claimant is totally disabled as a result of restrictive lung disease. Decision and Order at 12, 15; Employer's Exhibits 3 at 11, 7 at 23, 8 at 23, 47, 11 at 23, 12 at 23; *see also* Director's Response at 2-3. Consequently, as both of these physicians found that claimant could not perform his last coal mine employment because of a totally disabling respiratory impairment, the administrative law judge properly found that the opinions of both Dr. Castle and Dr. Fino established a totally disabling respiratory impairment at Section 718.204(b). 20 C.F.R. §718.204(b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Next, employer contends that the administrative law judge erred in finding that claimant's last coal mine job as a truck driver required "moderate labor." Specifically, employer contends that the administrative law judge did not adequately explain how claimant's work as a truck driver constituted "moderate labor" and did not consider other work histories for claimant that conflicted with the administrative law judge's finding. Employer asserts that claimant's testimony regarding the lifting required in his job as a truck driver was, if fact, associated with his prior work in a preparation plant, and that his work as a truck driver required "little" lifting. Employer's Brief at 1.

> So, technically, there is a respiratory impairment because the lungs can't function properly, but it's not due to coal mine dust. It's due to the fact that he is overweight for his height.

Employer's Exhibits 6 at 2 and 4, 7 at 16 and 23, 12; *see* Decision and Order at 14-16, 31.

Dr. Castle examined claimant and diagnosed "an abnormality of his lung," specifically, a "restrictive problem of his lung due to obesity which is a nonrespiratory problem" and that "the degree of abnormality" would preclude him from performing his last coal mine work. Dr. Castle concluded that claimant "is disabled as a result of restrictive disease due to his exogenous obesity. This has resulted in at least a moderate restrictive process… [which is] a disease of the general public at large and totally unrelated to coal mine dust exposure and coal workers' pneumoconiosis." Employer's Exhibits 3 at 11, 8 at 35, 36, 47-48.

We disagree. The administrative law judge credited claimant's testimony that his last coal mine job was that of a truck driver, and that that job involved sporadic lifting. Claimant's testimony supports the administrative law judge's conclusion that "claimant's symptoms render him unable to climb in and out of the truck approximately three times per shift and occasionally lift 75-pound oil cans to service the truck."[10] Decision and Order at 30; Hearing Transcript at 14-17, 19-20. We therefore affirm the administrative law judge's finding that "[claimant's] last job consisted of moderate manual labor."[11]

[10] The relevant testimony was as follows:

Q. Did you have to do any heavy lifting driving a rock truck?

A. Not very much, no.

*****

Q. (Judge Morgan). Mr. Hall, did you have to service your own truck with oil and other service?

A. No, sir, not when I worked on the truck I didn't. I would help because I had worked as a mechanic when I worked around the preparation plant, but when I worked on the strip mine, I didn't have to. I would voluntarily offer my help or support.

Q. So did you have to carry around heavy oil cans?

A. Sometimes, yes, sir.

Q. And those weren't your normal quart cans that you get in a gas station?

A. No, no. Usually, five gallon buckets of oil or so to pick up and hold them up, you'd probably be looking at 75 pounds.

Hearing Transcript at 15, 19-20.

[11] Dr. Fino noted claimant's interrogatory response that his last coal mine job was as a rock truck driver, as well as his Department of Labor claim form reflecting that he last worked as a drill operator. Employer's Exhibit 6 at 1-2. Dr. Castle, who reviewed employment histories variously specifying claimant's last coal mining job as drill operator and rock truck operator, identified claimant's last coal mine work as a roof bolting machine operator involving "some heavy labor," or "significant heavy labor." Employer's Exhibits 3 at 2, 8 at 14, 40-41. Thus, employer fails to demonstrate that Dr. Fino's understanding is incompatible with the administrative law judge's finding that

Decision and Order at 4; *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984).

Consequently, we affirm the administrative law judge's finding that the pulmonary function study and medical opinion evidence established total respiratory disability pursuant to Section 718.204(b). As the administrative law judge properly found total respiratory disability established pursuant to Section 718.204(b), we affirm his finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(c), and that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

2. Rebuttal of the Amended Section 411(c)(4) Presumption

Because claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis,[12] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Under the implementing regulation,

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claimant last worked in the coal mines as a truck driver, and that his "last coal mining positions required moderate manual labor." Decision and Order at 30. Likewise, albeit Dr. Castle differently identified claimant's last coal mine job, his opinion that claimant is totally disabled based on his physiologic testing, does not demonstrate that claimant could perform coal mining jobs requiring moderate labor. *See Id*. at 4, 21, 30-31; Employer's Exhibits 3 at 2, 5-6, 10-11, 8 at 14, 40-42, 47, 11 at 23.

[12] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" is defined in 20 C.F.R. §718.201(a)(2) as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." "[A] disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

employer may rebut the presumption by establishing that claimant does not have clinical and legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), 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)(ii).

In finding that employer failed to rebut the presumption at amended Section 411(c)(4), the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 26-28. Additionally, the administrative law judge found that employer failed to rebut the presumption by showing that no part of claimant's totally disabling respiratory impairment was due to pneumoconiosis.

In challenging the administrative law judge's finding that it failed to disprove the existence of legal pneumoconiosis, employer argues that the administrative law judge gave only "minimal" scrutiny to the opinions of Drs. Al-Khawawneh, Gallai and Al-Jaroushi and the treatment records of Dr. Habre, which supported the existence of legal pneumoconiosis,[13] but applied "an increased level of scrutiny to [the opinions of] Drs. Castle and Fino, which did not." Employer's Brief at 18. Employer maintains that the administrative law judge "summarily" concluded that Drs. Castle and Fino failed to adequately explain "why 'claimant's dust exposure did not give rise' to legal pneumoconiosis," when both doctors provided "exhaustive explanations" as to why claimant's "specific presentation is not consistent with a dust-induced lung disease," and each "diagnosed an impairment due to obesity and ruled out coal mine dust exposure." *Id*. at 21.

As fact-finder, the administrative law judge determines the credibility of a medical expert and is not bound to accept any particular medical theory. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). After closely examining the reports and depositions of Drs. Fino and Castle, the administrative law judge discounted their opinions that claimant's respiratory impairment was due to his obesity, and not his coal mine employment, because of their failure to "affirmatively and convincingly explain" how they determined that claimant's respiratory impairment is not related to, or

[13] We reject employer's contention concerning the administrative law judge's consideration of the opinions of Drs. Al-Khasawneh, Gallai, Al-Jaroushi and Habre. Employer's Brief at 25-26. Because employer bears the burden of rebutting the statutorily presumed existence of legal pneumoconiosis, errors, if any, regarding the administrative law judge's evaluation of expert opinions that do not support rebuttal, would be harmless. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

aggravated by, his twenty years of coal dust exposure. Decision and Order at 27-28; *see* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lane*, 105 F.2d at 174, 21 BLR at 2-48. Additionally, the administrative law judge was unpersuaded by Dr. Fino's attribution of claimant's moderate to severe respiratory impairment to obesity, in light of Dr. Al-Jaroushi's opinion that obesity would cause only a mild respiratory impairment. Decision and Order at 17, 28; Claimant's Exhibits 6, 8. Hence, the administrative law judge acted within his discretion in discounting the opinions of Drs. Fino and Castle, that claimant's respiratory impairment was due to his obesity, and not to a lung condition related to coal dust exposure.

As the administrative law judge fully explained his reasons for discrediting the opinions of Drs. Fino and Castle, we reject employer's assertion that the administrative law judge substituted his own opinion for that of the medical experts or that his findings violated the APA. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-55 (4th Cir. 2013)(Traxler, C.J., dissenting); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Castle, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a finding of rebuttal under the first method of rebuttal pursuant to amended Section 411(c)(4).[14]

We next address employer's challenges regarding the remaining method of rebuttal, namely, whether employer has established that "no part" of claimant's totally disabling respiratory impairment is due to pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Employer contests the administrative law judge's finding that employer failed to establish that that "no part" of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 31-35. The United States Court of Appeals for the Fourth Circuit has held that medical opinions that erroneously fail to

[14] Because the administrative law judge properly found that employer failed to disprove the existence of legal pneumoconiosis, we need not address employer's challenges to the administrative law judge's finding that employer failed to disprove the presence of clinical pneumoconiosis. Employer's Brief at 13-23; *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015); *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

diagnose the existence of pneumoconiosis "may not be credited at all" on causation unless "specific and persuasive reasons" exist demonstrating that a physician's view of causation is independent from his diagnosis of no pneumoconiosis, and even then may carry only "little weight." *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

In this case, the administrative law judge reasonably discounted the opinions of Drs. Castle and Fino, that obesity fully accounted for claimant's moderate to severe respiratory impairment, and found that neither physician "affirmatively and convincingly explain[ed] why claimant's lung disease is not related to, or aggravated by, his approximate 20-year exposure to coal dust." Decision and Order at 28, 35. Hence, the same reasons that undercut their opinions on the issue of legal pneumoconiosis also undercut their opinions that "no part" of claimant's totally disabling respiratory impairment is due to pneumoconiosis. Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Castle, we affirm the administrative law judge's conclusion that employer failed to establish that no part of claimant's total disability is due to his pneumoconiosis. *Id*. at 27-28; *see Epling*, 783 F.3d at 504; *Scott*, 289 F.3d at 269-270, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. The administrative law judge's credibility determinations are supported by substantial evidence and his findings accord with the requirements of the APA. Consequently, we affirm the administrative law judge's finding that employer did not satisfy its burden to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge