U.S. Department of Labor

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

BRB No. 17-0101 BLA

FREDERICK R. LINKOUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & L COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/18/2017
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05860) of Administrative Law Judge Larry W. Price, awarding benefits on a miner's claim filed on January 7, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with nineteen years of qualifying coal mine employment[1] and found that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer failed to establish that claimant has neither clinical nor legal pneumoconiosis, or that no part of his totally disabling respiratory impairment is due to pneumoconiosis, and therefore failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge failed to address its challenge to its designation as the responsible operator, and contends that the case should be remanded for the administrative law judge to make a finding on that issue. Employer

[1] Claimant's last coal mine employment was in Virginia. Hearing Tr. at 24; Director's Exhibit 3. Accordingly, the Board 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).

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

also contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, agreeing with employer that the case should be remanded for the administrative law judge to determine whether employer is the responsible operator.[3]

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. 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).

Responsible Operator

Employer argues that the administrative law judge failed to address its challenge to its designation as the responsible operator.[4] Employer's Brief at 12-14. The district director issued a Proposed Decision and Order on July 1, 2014, designating employer as the responsible operator after determining that claimant worked for employer from the first quarter of 1976 through the third quarter of 1977. *See* 20 C.F.R. §725.418(d); Director's Exhibit 33. The district director dismissed claimant's subsequent employers from the claim, having found that none of them qualified as a potentially liable operator.[5]

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has at least nineteen years of qualifying coal mine employment, suffers from a totally disabling respiratory or pulmonary impairment, and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-13.

[4] The responsible operator is the "potentially liable operator" that most recently employed the miner for at least one year. 20 C.F.R. §725.495(a)(1). An employer must meet five criteria to be considered a potentially liable operator: The miner must have worked for the operator for a cumulative period of at least one year; the miner's employment must have included at least one working day after December 31, 1969; the miner's disability or death must have arisen out of his or her employment with the operator; the operator must have been an operator after June 30, 1973; and the operator must be capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[5] Employer maintained before the district director that it is not the responsible operator. The district director issued a Notice of Claim to employer on May 22, 2013, identifying it as a potentially liable operator. *See* 20 C.F.R. §725.407; Director's Exhibit

See 20 C.F.R. §725.418(d); Director's Exhibit 33. Upon employer's request for a formal hearing, the district director referred the case to the Office of Administrative Law Judges. Director's Exhibits 34, 37. Employer and the Director both note that, in so doing, the district director indicated that employer contested the issue of whether it is the responsible operator. *See* 20 C.F.R. §725.421(b)(7); Director's Exhibit 37; Employer's Brief at 12; Director's Brief at 1. Consequently, the designation of the responsible operator was an issue for the administrative law judge to resolve. *See* 20 C.F.R. §725.463(a). Employer and the Director agree that employer did not stipulate to being the responsible operator at the hearing.[6] Hearing Transcript at 34; Employer's Brief at 12; Director's Brief at 1. The administrative law judge, however, failed to address in his Decision and Order whether employer was properly designated as the responsible operator.

Accordingly, we agree with employer and the Director that the case must be remanded for the administrative law judge to consider the responsible operator issue in the first instance. We note that, as the designated responsible operator, employer has the burden of proving that it is not the potentially liable operator that most recently employed claimant. *See* 20 C.F.R. §725.495(c)(2); *RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

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

In the interest of judicial economy, we address employer's contention that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Upon invocation of the presumption, the burden shifts to

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26. Employer timely responded, indicating that it would contest its designation. *See* 20 C.F.R. §725.408; Director's Exhibits 27, 28. The district director issued a schedule for the submission of additional evidence on October 3, 2013, with its preliminary conclusion that employer is the responsible operator. *See* 20 C.F.R. §725.410; Director's Exhibit 29. Employer timely responded, denying that it is the responsible operator. *See* 20 C.F.R. §725.412(a)(1); Director's Exhibit 30.

[6] When asked specifically by the administrative law judge if employer still contested its designation as the responsible operator, employer's counsel said, "I believe it's been resolved by testimony, but I'm not going to be able to stipulate to it." Hearing Transcript at 34. Employer, however, did not elaborate on its contention that the testimony resolves the responsible operator issue in its post-hearing brief submitted to the administrative law judge. *See* Employer's Brief dated September 28, 2016.

employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that "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)(i)-(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In finding that employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Klayton, Green, Cordasco, Fino, and McSharry. Decision and Order at 5-8, 15-18. Drs. Klayton, Green, and Cordasco diagnosed chronic obstructive pulmonary disease (COPD) related to coal dust exposure and smoking. Director's Exhibit 15; Claimant's Exhibits 3, 4. Drs. Fino and McSharry diagnosed COPD attributable only to smoking. Director's Exhibit 20; Employer's Exhibits 1, 4, 7.

The administrative law judge discredited the opinions of Drs. Fino and McSharry, finding that, in light of the definition of legal pneumoconiosis, they failed to adequately explain how they excluded claimant's nineteen years of coal mine dust exposure as a contributing or aggravating factor in his pulmonary impairment. Decision and Order at 16; *see* 20 C.F.R. §718.201(a)(2), (b). The administrative law judge also discredited their opinions because he determined that neither physician "fully considered the additive effects of smoking and coal dust exposure in causing COPD." Decision and Order at 16. Instead, the administrative law judge determined that Drs. Fino and McSharry both concluded that "because [c]laimant's smoking history could account for his disabling COPD, coal dust could not have caused, contributed to, or aggravated the COPD in any way."[8] *Id*. at 16-17. The administrative law judge gave more weight to the opinions of

[7] "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). This definition encompasses 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). "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).

[8] The administrative law judge also discounted Dr. Fino's opinion because Dr. Fino "determined Claimant would not have a significant risk of obstruction due to coal mine dust as a surface worker," without "fully appreciat[ing]" that claimant's working conditions were substantially similar to those in underground mines. Decision and Order at 17. The administrative law judge further discredited Dr. Fino's opinion as "internally

Drs. Klayton, Green, and Cordasco that coal dust exposure contributed substantially to claimant's COPD, and therefore determined that claimant has legal pneumoconiosis. *Id*. at 17. Accordingly, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id*. at 18.

We reject employer's argument that the administrative law judge erred by referencing the preamble to the 2001 regulatory revisions to discredit the opinions of Drs. Fino and McSharry. Employer's Brief at 17-18. In assessing the medical evidence, an administrative law judge may consider the preamble as a statement of the science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Employer also contends that Drs. Fino and McSharry did not express views contrary to those in the preamble, but instead explained that "based on the extent, character and timing of [claimant's] coal mine employment compared to his cigarette smoking, his impairment was due . . . solely to cigarette smoking." Employer's Brief at 18. This argument also lacks merit.

Dr. Fino noted in his report that claimant has a "clinically significant coal mine dust exposure history" in addition to a "significant smoking history that would cause obstruction,"[9] and acknowledged that "[c]ertainly above ground workers can be

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inconsistent," pointing out that Dr. Fino opined that surface coal mine workers are less likely to suffer COPD, while at the same time acknowledging that "Claimant's 25 years of surface dust exposure is a clinically significant coal mine dust exposure history." *Id*.; Director's Exhibit 20 at 2, 9-10.

[9] Dr. Fino's report states that claimant "says he smoked anywhere from one-half pack of cigarettes per day to 1 pack per day for 45 years." Director's Exhibit 20 at 9. The administrative law judge found that claimant has a smoking history of thirty-four pack years, "which is generally consistent with Claimant's testimony and his several reports that he smoked ½ to 1 pack per day for approximately 46 years but did not smoke an entire cigarette." Decision and Order at 9.

diagnosed with significant coal mine dust related disease[.]" Director's Exhibit 20 at 9-10. But Dr. Fino opined that surface workers usually do not suffer significant obstruction, which in his view "is much more common in individuals who worked underground." *Id*. at 10. He determined that claimant's smoking history "certainly can account for all of his disability," and concluded that claimant's coal mine employment has not played a significant role in claimant's disability. *Id*. In a supplemental report, Dr. Fino clarified that surface workers can get obstructive impairments, but explained his position that "from a coal content standpoint," claimant's surface mining jobs as a front-end loader, driller, and truck driver "are not the type of exposures that would result in significant obstruction and emphysema." Employer's Exhibit 4 at 2. Dr. Fino reiterated his conclusion that, in light of claimant's surface work and smoking history, "I do not believe that coal mine dust was a clinically significant contributing factor in this man's disabling obstruction." *Id*. at 4.

Dr. McSharry accepted that claimant had twenty-seven to thirty years of coal mine employment with "significant coal dust exposure," but saw "no evidence of a lung disease caused by or aggravated by coal dust exposure." Employer's Exhibit 1 at 2, 5. He wrote that severe obstructive lung disease, without restrictive impairment, is "extremely common" in long-time smokers, usually occurring with no changes seen on lung x-rays, but that such an impairment would be "unusual" in a miner with evidence of advanced coal workers' pneumoconiosis and "extremely unusual" in a miner whose x-rays show only "low profusion" pneumoconiosis. *Id*. In this case, "with a claimant having *no* evidence radiologically of pneumoconiosis and a compelling alternate explanation for the obstructive lung disease (a long smoking history)," Dr. McSharry opined that claimant's impairment is "a result of the long-time smoking history rather than coal dust exposure." *Id*. (emphasis in original).

Contrary to employer's contention, the administrative law judge did not discount the opinions of Drs. Fino and McSharry as inconsistent with the preamble. Instead, the administrative law judge considered the scientific conclusions DOL adopted in the preamble and determined that Drs. Fino and McSharry failed to adequately consider them. Decision and Order at 16. As the administrative law judge observed, DOL reviewed the medical and scientific evidence and acknowledged the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive. *Id*. at 16-17; *see* 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000). Dr. Fino thought claimant's smoking history could account for all of his impairment, in spite of what Dr. Fino believed was a significant history of coal mine dust exposure. Director's Exhibit 20 at 9-10. Similarly, Dr. McSharry acknowledged that claimant had a significant history of coal dust exposure, but concluded that his long smoking history was a "compelling alternate explanation" for his impairment. Employer's Exhibit 1 at 2, 5. The administrative law judge permissibly discredited their opinions for not fully

considering the additive effects of claimant's coal mine dust exposure and smoking on his COPD. *See Westmoreland Coal Co. v. Stallard*, --- F.3d ---, No. 16-1460, 2017 WL 5769516, at 7-8 (4th Cir. Nov. 29, 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24, 25 BLR 2-255, 2-263 (4th Cir. 2013); Decision and Order at 16-17; *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017).

Moreover, the regulations define legal pneumoconiosis to include any respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge reasonably discredited the opinions of Drs. Fino and McSharry for failing to explain how they excluded claimant's significant coal mine dust exposure as even a "contributing or aggravating factor" in his impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); Decision and Order at 16.

Because the administrative law judge permissibly discounted the opinions of Drs. Fino and McSharry, we affirm his determination that employer failed to establish that claimant does not have legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(A). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i).[11] *Id*. Finally, because all five physicians agreed that claimant's COPD is totally disabling and the administrative law judge reasonably

[10] Because the administrative law judge provided at least two valid bases for discrediting the opinions of Drs. Fino and McSharry, we need not address employer's remaining arguments regarding the administrative law judge's weighing of their opinions. Employer's Brief at 17-19. Errors, if any, in discounting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Nor do we need to address employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Klayton, Green, and Cordasco, as their opinions would not assist employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 19.

[11] Because employer's rebuttal burden required it to prove that claimant has neither legal nor clinical pneumoconiosis, *see* 20 C.F.R. §718.305(d)(1)(i)(A)-(B), and employer failed to establish that claimant does not have legal pneumoconiosis, we need not consider employer's argument that the administrative law judge erred in finding that claimant has clinical pneumoconiosis. Decision and Order at 13-16, 18; Employer's Brief at 15-16. Error, if any, regarding the finding of clinical pneumoconiosis would be harmless. *See Larioni*, 6 BLR at 1-1278.

determined that the opinions of Drs. Fino and McSharry failed to establish that claimant's COPD is not legal pneumoconiosis, the administrative law judge properly found that employer failed to prove that "no part" of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143-44, 25 BLR 2-689, 2-708-10 (4th Cir. 2015); Decision and Order at 18. We therefore affirm the administrative law judge's determination that claimant established entitlement to benefits. Decision and Order at 19.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed on the merits of entitlement, and the case is remanded to the administrative law judge for consideration of the responsible operator issue, consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge