U.S. Department of Labor

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

BRB No. 15-0128 BLA

JAMES M. LAYTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHREWSBURY COAL COMPANY/ VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 02/04/2016
	)	
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 – on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits – on Remand (2009-BLA-5817) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim[1] filed on September 2, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In its previous decision, the Board affirmed the administrative law judge's finding that claimant failed to establish that he has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Layton v. Shrewsbury Coal Co.*, BRB No. 13-0141 BLA, slip op. at 5 (Dec. 23, 2013) (unpub.). The Board also affirmed the administrative law judge's findings that claimant established 16.27 years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *Id*. at 3 n.4. With regard to rebuttal of the presumption, the Board affirmed the administrative law judge's determination that employer disproved the existence of clinical pneumoconiosis but vacated his finding that employer also disproved the existence of legal pneumoconiosis. *Id*. at 8. Specifically, the Board held that the administrative law judge's credibility findings did not satisfy 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), and that he erred in relying on Dr. Zaldivar's opinion to find that claimant did not have any form of emphysema that may constitute legal pneumoconiosis. *Id*. at 9-11. Accordingly, the Board vacated the denial of benefits and remanded the case for further consideration. *Id*. at 11.

On remand, the administrative law judge reweighed the evidence and determined that employer's evidence was insufficient to rebut the Section 411(c)(4) presumption. The administrative law judge awarded benefits, commencing September 2008, the month in which claimant filed his subsequent claim.

On appeal, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Hippensteel, and that his findings do not satisfy the APA. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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,

[1] Claimant's prior claim, filed on April 24, 1989, was finally denied by Administrative Law Judge Edward J. Murty, Jr., on May 23, 1991, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1.

and in accordance with applicable law.[2] 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).

Employer may rebut the presumption by establishing either that claimant does not have legal[3] and clinical[4] pneumoconiosis or 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)(i), (ii); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 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); *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA (Apr. 21, 2015).

In accordance with the Board's instruction, the administrative law judge reconsidered the evidence relevant to whether claimant has emphysema. In his November 23, 2012 Decision and Order, the administrative law judge determined that claimant did not have emphysema, based on Dr. Zaldivar's observation that a CT scan

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[3] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] Clinical pneumoconiosis is defined as:

> [T]hose 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).

showed no evidence of bullous emphysema. However, on remand, the administrative law judge found that Dr. Zaldivar did not actually read the CT scan referenced in his report. Rather, the CT scan was read by Dr. McCain, who stated that it showed "emphysematous changes within the upper lungs bilaterally." Claimant's Exhibit 4; *see* Decision and Order Awarding Benefits - on Remand at 3. The administrative law judge concluded that Dr. Zaldivar misread Dr. McCain's conclusions and thus rejected Dr. Zaldivar's opinion. Decision and Order Awarding Benefits - on Remand at 3. The administrative law judge further found that that "[t]he x-ray readings by Drs. Ahmed, Alexander and Meyer, all Board-certified radiologists, diagnosed emphysema[,] as did the reports of Drs. Hippensteel, Rasmussen and Houser." *Id*. Accordingly, the administrative law judge concluded that, because claimant suffers from emphysema, employer was required to show that it was not related to coal dust exposure in order to disprove the existence of legal pneumoconiosis. *Id*.

In considering the four medical opinions of record, the administrative law judge found that Dr. Houser diagnosed disabling emphysema/chronic obstructive pulmonary disease (COPD) caused by a combination of smoking and coal dust exposure. Claimant's Exhibits 7, 8. Dr. Rasmussen also diagnosed emphysema/COPD which he attributed to smoking and coal mine dust exposure. Director's Exhibit 12. In contrast, Dr. Zaldivar attributed claimant's disabling respiratory impairment to "asthma with remodeling, exacerbated by cigarette smoking," Employer's Exhibit 12, while Dr. Hippensteel diagnosed bullous emphysema caused by cigarette smoking and not by coal mine dust. Employer's Exhibit 5.

The administrative law judge found that Dr. Zaldivar's diagnosis of asthma was not supported by the record and that he did not offer a reasoned opinion on the issue of legal pneumoconiosis. Decision and Order Awarding Benefits - on Remand at 3. Similarly, the administrative law judge found that Dr. Hippensteel's opinion was not reasoned because he relied on premises which are in conflict with the regulations. *Id*. at 3-4. Employer challenges the administrative law judge's credibility determinations, asserting that the administrative law judge improperly substituted his opinion for that of the medical experts and did not explain the bases for his findings. Employer's arguments are rejected as without merit.

As noted by the administrative law judge, Dr. Zaldivar attributed claimant's respiratory impairment to bullous emphysema caused by smoking in three reports dated August 8, 2009, May 3, 2011, and November 20, 2011, and did not mention asthma until his deposition on July 22, 2012. Employer's Exhibits, 2, 9, 11, 14. During the deposition, Dr. Zaldivar was provided a copy of his own report of the examination he performed on claimant on April 11, 1990. Employer's Exhibit 14. In that 1990 report, Dr. Zaldivar wrote that claimant described himself has having respiratory reactions to

cold air, perfumes, and chemicals, and also told Dr. Zaldivar that he used "Primatene Mist" for his respiratory symptoms. Employer's Exhibit 14. Although Dr. Zaldivar "agreed that the [April 11, 1990] report identified no objective testing revealing asthma" he relied on claimant's own description in the 1990 report of having been diagnosed with asthma by his treating physician, Dr. Barry, the year before. Decision and Order Awarding Benefits - on Remand at 3, *see* Director's Exhibit 12. Dr. Zaldivar changed his diagnosis during the deposition, opining that claimant had a long history of untreated asthma, which led to airways remodeling and a disabling respiratory impairment. Director's Exhibit 14.

In assessing the weight to accord Dr. Zaldivar's opinion, the administrative law judge was not persuaded by Dr. Zaldivar's diagnosis of asthma. To the extent that the administrative law judge found that the record did not substantiate a diagnosis of asthma by Dr. Barry,[5] we affirm his finding that Dr. Zaldivar's "diagnosis of asthma is not convincing in light of the totality of the record."[6] Decision and Order Awarding Benefits - on Remand at 3*; see 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). Additionally, we see no error in the administrative law judge's finding that Dr. Zaldivar failed to adequately explain why claimant's coal dust exposure was not a substantial aggravating factor in claimant's asthma,[7] assuming that claimant suffered from that condition.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order Awarding Benefits - on Remand at 3.

[5] The administrative law judge noted that Dr. Houser specifically reviewed the treatment records from Dr. Barry's office and found no diagnosis or reference to asthma. Decision and Order Awarding Benefits - on Remand at 3.

[6] In 2009, Dr. Zaldivar reported that claimant denied a past medical history of asthma and also denied that he had respiratory symptoms affected by environmental factors. Employer's Exhibit 2. Dr. Rasmussen testified that there was not enough information to determine whether claimant has asthma, stating that "[claimant] didn't give to me a history suggestive of asthma, but I certainly can't rule it out." Employer's Exhibit 12 at 27, 45

[7] Although Dr. Zaldivar testified that asthma was not aggravated by coal dust exposure, he did not specifically explain his rationale for that statement. Director's Exhibit 14 at 62-63.

[8] There is no merit to employer's assertion that the administrative law judge "ignored that Dr. Hippensteel diagnosed asthma." Employer's Brief at 28. Dr.

With regard to Dr. Hippensteel, the administrative law judge noted correctly that he opined that it was "less likely" that coal dust was a factor in claimant's emphysema because there was no radiographic evidence for clinical pneumoconiosis. Employer's Exhibit 13 at 29, 30. The administrative law judge stated that Dr. Hippensteel's "need to observe clinical pneumoconiosis indicating coal dust deposition in the lung for a diagnosis of legal pneumoconiosis" is contrary to the regulatory definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. Decision and Order Awarding Benefits - on Remand at 4. Because the definition of legal pneumoconiosis does not require radiographic findings, and it is a disease that is distinct from clinical pneumoconiosis under the regulations, we affirm the administrative law judge's conclusion that Dr. Hippensteel's comments are contrary to the regulation at 20 C.F.R. §718.201. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Furthermore, the administrative law judge permissibly found that Dr. Hippensteel failed to adequately explain why he described claimant's impairment as "variable" and inconsistent with a fixed respiratory impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335. As noted by the administrative law judge, although claimant was diagnosed with a mild respiratory impairment by Dr. Zaldivar in 1990, "subsequent examinations in November, 2008 by Dr. Rasmussen and in August, 2009 by Dr. Zaldivar evidenced a total pulmonary disability." Decision and Order Awarding Benefits - on Remand at 4. The administrative law judge permissibly found that, to the extent that Dr. Hippensteel suggests that claimant's respiratory impairment was not "fixed as totally disabling" until after he left the coal mines, his opinion also fails to take into account 20 C.F.R. §718.201(c), which provides that pneumoconiosis is recognized as a latent and progressive disease "which may first become detectable only after the cessation of coal mine dust exposure." Decision and Order Awarding Benefits - on Remand at 3, *quoting* Employer's Exhibit 13 at 42; *see Clark*, 12 BLR at 1-155. We see no error in the administrative law judge's finding that Dr. Hippensteel's opinion is not rationally explained in accordance with the regulatory definition of legal pneumoconiosis and the recognition by the Department of Labor that pneumoconiosis may be a latent and progressive disease. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151,

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Hippensteel referenced "a history of asthma" as reported by Dr. Zaldivar in 1990, and indicated that he had no reason to question Dr. Zaldivar's diagnosis of asthma during his deposition. Because the administrative law judge permissibly concluded that Dr. Zaldivar's diagnosis of asthma was not rationally explained, any reference to asthma by Dr. Hippensteel is also not credible. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

11 BLR 2-1, 2-9 (1987); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Employer's Exhibit 13 at 9-10, 23.

The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the fact-finder to decide. *Banks*, 690 F.3d at 489, 25 BLR at 2-152-53; *Clark*, 12 BLR at 1-155. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis and, therefore, is unable to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

In considering whether employer rebutted the presumed fact of disability causation, the administrative law judge stated that "employer's evidence is directed towards its argument that legal pneumoconiosis does not exist, it does not argue that if legal pneumoconiosis does exist it does not contribute to [c]laimant's total pulmonary disability." Decision and Order Awarding Benefits - on Remand at 5. Although employer disputes the administrative law judge's characterization of its rebuttal arguments, employer does not identify any specific evidence in the record that the administrative law judge failed to consider relevant to whether it ruled out legal pneumoconiosis as a causative factor for claimant's respiratory disability. *See Cox v. Benefits Review Board*, 791 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Employer's Brief in Support of Petition for Review at 26. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to establish rebuttal of the presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii) by proving that claimant's total respiratory disability is unrelated to pneumoconiosis as defined in 20 C.F.R. §718.201. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504, BLR (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, we affirm the award of benefits.[9] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[9] We decline to address employer's contentions of error regarding the administrative law judge's crediting of the opinions of Drs. Rasmussen and Houser, as the opinions of these physicians do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge