U.S. Department of Labor

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

BRB No. 16-0236 BLA

RANDY C. MCGLOTHLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/23/2017
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5889) of Administrative Law Judge John P. Sellers, III,[1] rendered on a subsequent claim filed on November 23, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge determined that claimant established nineteen years and eight months of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[3] Additionally, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] The administrative law judge further found that

[1] Administrative Law Judge Richard T. Stansell-Gamm conducted the hearing in this claim on August 14, 2014. Decision and Order at 2. The parties were subsequently notified that Judge Stansell-Gamm had retired from the Office of Administrative Law Judges and that the case was reassigned to Administrative Law Judge John P. Sellers, III (the administrative law judge). *Id*. at 3.

[2] Claimant filed an initial claim for benefits on May 28, 1999, which was denied by the district director on July 28, 1999, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 2, 2001, which was also denied by the district director on October 3, 2002, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 2. Claimant requested modification on October 2, 2003, which was denied by the district director on June 15, 2004. *Id*. Claimant did not take any further action before filing the current claim. Director's Exhibit 3.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be 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), as implemented by 20 C.F.R. §718.305(b).

[4] 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 that at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because

employer failed to rebut the Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the award of benefits.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. 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[7] nor clinical[8] pneumoconiosis, or by

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claimant's prior claim was denied for failure to establish any element of entitlement, the administrative law judge concluded that claimant satisfied the requirements of 20 C.F.R. §725.309(c) because evidence newly submitted with the subsequent claim established that claimant is totally disabled. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 21; Director's Exhibit 2.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established nineteen years and eight months of underground coal mine; claimant established a totally disabling respiratory or pulmonary impairment; claimant invoked the rebuttable presumption at Section 411(c)(4); and claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[7] Legal pneumoconiosis includes "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

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)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-46 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

A. The Presumed Existence of Legal Pneumoconiosis

In evaluating whether employer disproved the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge considered the medical opinions of Drs. Forehand, Castle, and Fino. The administrative law judge determined that Dr. Forehand's opinion was of little probative value on the issue of whether claimant has legal pneumoconiosis "due to its inconsistency, lack of thorough explanation and reliance on evidence outside the record."[9] Decision and Order at 28. We affirm the administrative law judge's discrediting of Dr. Forehand's opinion, as it is not challenged by employer in this appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "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) (emphasis added).

[8] 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). "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." *Id*.

[9] Dr. Forehand examined claimant on March 3, 2011, at the request of the Department of Labor, and diagnosed legal pneumoconiosis in the form of chronic obstructive lung disease, which he attributed to coal dust exposure. Director's Exhibit 15. During his deposition, Dr. Forehand diagnosed asthma, unrelated to coal dust exposure, and attributed claimant's respiratory condition entirely to it. Employer's Exhibit 9. Dr. Forehand also referenced test results from an examination he conducted of claimant on June 26, 2014, which were not in the record. *Id*.

With regard to the opinions of Drs. Castle and Fino, the administrative law judge found that they did not persuasively explain why claimant's *non-reversible* obstructive respiratory condition is caused entirely by asthma with no contribution by coal dust exposure.[10] Decision and Order at 27-30; Director's Exhibit 15; Employer's Exhibits 2, 3, 10, 13. Thus, the administrative law judge concluded that employer did not satisfy its burden to disprove the existence of legal pneumoconiosis and failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[11]

As an initial matter, we reject employer's contention that the administrative law judge improperly applied the "rule out" standard, applicable to rebuttal of the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii), when considering whether employer disproved the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). Contrary to employer's argument, the administrative law judge correctly stated the legal standard applicable under 20 C.F.R. §718.305(d)(1)(i)(A), as follows:

> In order to defeat the presumption of legal pneumoconiosis . . . Employer has the burden of demonstrating that the [c]laimant's [nineteen] years and [eight] months of coal dust exposure did *not significantly contribute to, or substantially aggravate* his totally disabling respiratory or pulmonary impairment.

Decision and Order at 24 (emphasis added); *see* 20 C.F.R. §718.201(a)(2); *Minich*, 25 BLR at 1-155 n.8. Furthermore, although the administrative law judge referenced Drs. Castle and Fino as "ruling out" coal dust exposure as a causative factor for claimant's

[10] The administrative law judge noted that the record also contained reports by Drs. Forehand, Castle and Iosif, prepared in conjunction with claimant's prior claims. Director's Exhibits 1, 2. The administrative law judge permissibly found that the earlier opinions were "of limited probative value due to their age." Decision and Order at 32; *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge also found that Dr. Iosif's opinion does not assist employer in disproving the existence of legal pneumoconiosis to the extent that Dr. Iosif stated that "[c]oal dust exposure could aggravate [claimant's asthma] acting as a nonspecific airway irritant." Decision and Order at 32, *quoting* Director's Exhibit 2.

[11] Although the administrative law judge determined that employer disproved that claimant has clinical pneumoconiosis, Decision and Order at 22-24, employer must disprove *both* clinical and legal pneumoconiosis in order to establish rebuttal under 20 C.F.R. §718.305(d)(1)(i).

respiratory condition, this was not a statement of employer's burden of proof on the issue of legal pneumoconiosis. Decision and Order at 29-30. Rather, the administrative law judge was describing the conclusions of both physicians.[12] Drs. Castle and Fino each opined that claimant does not have legal pneumoconiosis because *they* completely eliminated coal dust exposure as a causative or aggravating factor in claimant's respiratory condition. As discussed *infra*, the administrative law judge permissibly concluded that employer failed to rebut the Section 411(c)(4) presumption in this case because he determined that employer's evidence is not credible, and not because the administrative law judge applied an incorrect legal standard. Decision and Order at 28-32.

With regard to Dr. Castle's opinion, the administrative law judge noted correctly that Dr. Castle diagnosed claimant with a moderate obstructive respiratory impairment, based on the results of the pulmonary function testing. Decision and Order at 16-17; Employer's Exhibit 2. In his September 4, 2012 report, Dr. Castle opined that claimant suffers from moderate obstructive respiratory impairment due "entirely due to bronchial asthma rather than coal workers' pneumoconiosis or a coal mine dust[-]induced lung disease." Employer's Exhibit 2. During his deposition, Dr. Castle explained that claimant's pulmonary function testing with Dr. Forehand showed a "marked degree of reversibility" with the use of a bronchodilator, while his own pulmonary function study showed moderate obstruction without bronchodilator response. Employer's Exhibit 10. Dr. Castle explained that this type of variability is characteristic of an impairment related to asthma because people with asthma may experience remodeling of the airways resulting in "some minimal degree of fixed airway obstruction." *Id*. at 27. Dr. Castle further testified that there was no evidence that bronchial asthma has any association with coal dust exposure and, thus, did not meet the criteria of legal pneumoconiosis. *Id*. at 28.

In considering the weight to accord Dr. Castle's opinion, the administrative law judge observed:

> Dr. Castle indicated that lung remodeling in asthmatics results in "a minimal degree of fixed airway obstruction." However, . . . [Dr. Castle

[12] Employer challenges the administrative law judge's statement that "a physician [Dr. Castle] ruling out legal pneumoconiosis" must "explain why coal dust could not have contributed" to claimant's respiratory or pulmonary impairment. Decision and Order at 29. Employer also contends that the administrative law judge erred when he stated that Dr. Fino did not adequately explain "his conclusion that coal mine dust exposure played no part in the development of [claimant's] disabling obstruction." *Id*. at 30.

> reported that] the claimant's degree of reversibility was only 30% in the test performed by Dr. Forehand, meaning that 70% was non-reversible, or fixed, based upon Dr. Forehand's studies. This would strongly indicate that the [c]laimant had more than a "minimal degree of fixed airway obstruction."

Decision and Order at 29, *quoting* Employer's Exhibit 10. Contrary to employer's contention, we see no error in the administrative law judge's finding that Dr. Castle did not adequately explain why the fixed portion of claimant's respiratory impairment is due entirely to remodeling of the lungs, as opposed to obstructive lung disease caused by coal dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997). The administrative law judge also rationally found that while Dr. Castle identified "evidence confirming that [claimant] has asthma -- partial reversibility, variability, sensitivity to environmental factors, wheezing, etc.[,]" Dr. Castle's opinion "does not address the more specific issue here, which [is] what evidence, if any[,] *affirmatively* demonstrates that the [c]laimant does not have legal pneumoconiosis in conjunction with his asthma."[13] Decision and Order at 30 (emphasis added); *see Bender*, 782 F.3d at 137, 25 BLR at 2-699; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

There is also no merit in employer's argument that the administrative law judge improperly rejected Dr. Fino's opinion that claimant does not have legal pneumoconiosis. Dr. Fino, like Dr. Castle, opined that claimant suffers from asthma and attributed the fixed portion of claimant's obstructive respiratory impairment to airways remodeling, which "occurs in 10 to 12 percent of asthmatics." Employer's Exhibit 13 at 15. The administrative law judge observed, however, that "the preamble states that between 15 and 16 percent of nonsmoking miners contract moderate obstruction from coal dust exposure." Decision and Order at 31, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). The administrative law judge permissibly concluded that "the fact that between 10 to 12 percent of asthmatics experience lung remodeling does not statistically militate"

[13] Further, the administrative law judge acted within his discretion in giving less weight to Dr. Castle's opinion because he excluded coal dust as a cause of claimant's obstructive impairment, based on his belief that coal dust causes a mixed restrictive and obstructive impairment. Decision and Order at 30; Employer's Exhibit 2. As noted by the administrative law judge, Dr. Castle's view is contrary to the regulations, recognizing that legal pneumoconiosis may be purely obstructive in nature. Decision and Order at 30; *see* 20 C.F.R. §718.201(a)(2).

in favor of Dr. Fino's opinion. Decision and Order at 31; *see Clark*, 12 BLR at 1-153. Thus, we affirm the administrative law judge's conclusion that Dr. Fino's opinion fails to affirmatively disprove the existence of legal pneumoconiosis, as Dr. Fino "did not adequately explain why claimant's "coal dust exposure did not contribute to or substantially aggravate claimant's fixed, non-reversible [obstructive] impairment." Decision and Order at 31; *see Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Because the administrative law judge's credibility findings with respect to the opinions of Drs. Castle and Fino are supported by substantial evidence, we affirm the administrative law judge's determination that employer failed to disprove the existence of legal pneumoconiosis and rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[14] *Bender*, 782 F.3d at 137, 25 BLR at 2-699.

B. The Presumed Causal Relationship

The administrative law judge determined that employer did not disprove the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). We see no error in the administrative law judge's finding that the opinions of Drs. Castle and Fino are not credible regarding the cause of claimant's respiratory or pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of that disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th

[14] Employer states that the administrative law judge failed to consider that there is "no medical basis from a physician's assessment of the clinical data to find that legal pneumoconiosis existed because of the 'fixed component' of [claimant's] disease." Employer's Brief at 24. To the extent employer suggests that claimant must provide an opinion sufficient to establish that he has legal pneumoconiosis, employer misstates the burden of proof. Because claimant invoked the presumption at Section 411(c)(4), he is presumed to have legal pneumoconiosis, even in the absence of an affirmative medical opinion stating a diagnosis of legal pneumoconiosis. Employer has the burden to affirmatively establish that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 33. As it is supported by substantial evidence, we affirm that the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis.

For all of the above-stated reasons we affirm the administrative law judge's determination that employer did not satisfy its burden to rebut the Section 411(c)(4) presumption and we affirm the award of benefits. *See* 30 U.S.C. §921(c)(4).

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