U.S. Department of Labor

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

BRB No. 19-0126 BLA

TROY R. WIMMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 02/06/2020
	)	
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05793) of Administrative Law Judge Paul R. Almanza rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on November 14, 2012.

The administrative law judge accepted the parties' stipulation to 25.49 years of underground coal mine employment and found claimant established total respiratory disability. Therefore, he found claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[1] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2). He further determined employer failed to 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, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 of proof shifted to employer to establish he has neither clinical nor legal pneumoconiosis[4] or "no

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of more than fifteen years of qualifying coal mine employment and total respiratory or pulmonary disability. Therefore, we affirm his determination claimant 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 4, 16, 20.

[3] Because claimant last worked in coal mine employment in Virginia, 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); Director's Exhibits 3, 7, 9.

[4] 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

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 determined that employer did not establish rebuttal by either method. Decision and Order at 22-27.

Existence of Pneumoconiosis

After finding employer disproved clinical pneumoconiosis, 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B), the administrative law judge analyzed legal pneumoconiosis. Decision and Order at 22-27. To disprove legal pneumoconiosis, employer must establish that 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Fino and Sargent.[5] Decision and Order at 12-13; Employer's Exhibits 5, 6, 11, 12. Dr. Fino opined claimant does not have legal pneumoconiosis but suffers from a mild to moderate obstructive impairment due to asthma, which is unrelated to coal dust exposure.[6] Employer's Exhibits 5, 12 at 11-15, 19, 29. Dr. Sargent opined claimant does not have legal pneumoconiosis but has a moderate, partially reversible obstructive

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to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). 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).

[5] The administrative law judge also considered the medical opinions of Drs. Forehand and Green who opined that claimant suffers from legal pneumoconiosis. Decision and Order at 6-8, 24; Director's Exhibit 12; Claimant's Exhibit 1.

[6] Dr. Fino examined claimant and reviewed the results of other physicians' examinations. Employer's Exhibits 5, 12 at 11-13. He diagnosed asthma with a reversible obstructive impairment. Employer's Exhibit 12 at 12-13. Based on the variability of claimant's pulmonary function study results over time and the reversibility of his impairment, Dr. Fino indicated that claimant's asthma was not caused or aggravated by coal dust exposure. *Id*. at 13.

impairment due to smoking and asthma, and unrelated to coal dust exposure.[7] Employer's Exhibits 6, 11 at 12-13, 15-17. The administrative law judge found both opinions insufficient to disprove legal pneumoconiosis because they are inconsistent with the regulations, inadequately reasoned, and merit little probative weight. Decision and Order at 27.

Employer contends the administrative law judge did not provide adequate reasons for discrediting the opinions of Drs. Fino and Sargent, and did not apply the proper standard of proof. Employer's Brief at 4-12. We disagree, as the administrative law judge provided valid rationales for discrediting both physicians' opinions.

The administrative law judge permissibly found Dr. Fino's opinion inadequately reasoned because he did not sufficiently support or explain "why, even if the [c]laimant has a 'classic' case of asthma, his significant history of coal mine dust exposure did not play a part in the development or exacerbation of his respiratory condition." Decision and Order at 25; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). He also permissibly found Dr. Fino's reference to smoking and asthma as "possible" causes of claimant's impairment made his opinion equivocal and, therefore, insufficient to establish claimant's long history of coal dust exposure did not play a role in his impairment. Employer's Exhibit 5; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 25. In addition, the administrative law judge acted within his discretion in finding Dr. Fino's opinion entitled to little weight because Dr. Fino based his diagnosis in part on the reversibility shown on claimant's pulmonary function testing but failed to address that Dr. Sargent's qualifying post-bronchodilator pulmonary function studies showed a residual obstructive impairment. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 25; Employer's Exhibit 6.

The administrative law judge rationally determined Dr. Sargent's opinion is also inadequately reasoned as he did not explain "why the [c]laimant's partial response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis." Decision and Order at 26; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14

[7] Dr. Sargent examined claimant and reviewed the results of other physicians' examinations. Employer's Exhibits 6, 11 at 4-5. He determined claimant suffers from a moderate, reversible obstructive impairment and mild hypoxia caused by asthma. Employer's Exhibit 11 at 12-13, 17. In light of the reversibility of claimant's obstructive impairment, and the waxing and waning of his pulmonary function study and blood gas study results, Dr. Sargent opined claimant's condition is not related to coal dust exposure. *Id*. at 15-16.

(4th Cir. 2012). The administrative law judge further permissibly found that Dr. Sargent's view that reductions in the FEV1/FVC ratio do not occur in coal dust-related impairments is inconsistent with the Department of Labor's recognition that coal dust can cause clinically significant obstructive lung disease as shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 26; Employer's Exhibit 6. In addition, the administrative law judge acted within his discretion in finding that Dr. Sargent's reliance on the length of time since claimant retired from coal mining to exclude a diagnosis of coal dust-related lung disease conflicts with the regulation providing pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 258-59 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 26; Employer's Exhibit 11 at 15-16. Finally, the administrative law judge permissibly found Dr. Sargent's statement that claimant's pulmonary function study results were "most consistent" with asthma is equivocal and insufficient to establish claimant's coal dust exposure was not a contributor to his respiratory impairment. Decision and Order at 27; Employer's Exhibit 11 at 16-17; *see Hicks*, 138 F.3d 524, 533.

Employer also alleges the administrative law judge erred by requiring the physicians to opine coal dust exposure "had no effect" on claimant's respiratory condition or to "rule out" coal dust exposure as a cause of claimant's respiratory impairment. Employer's Brief at 7-8, 10-12. This argument is without merit. The administrative law judge correctly stated employer has the burden to establish claimant does not have a chronic lung disease or impairment "significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 23; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Moreover, he did not reject the medical opinions because they are insufficient to meet a "no effect" or "rule out" standard. Rather, he rationally found the physicians did not adequately explain how they completely excluded coal mine dust as a cause of claimant's impairment or adequately address why claimant's impairment, even if not directly caused by coal dust exposure, was not "significantly related to or substantially aggravated by" coal dust exposure. 20 C.F.R. §§718.201(a), (b), 718.305(d)(1)(i)(A); Decision and Order at 9-14, 25-27; Employer's Exhibits 5, 6, 11 at 15-16, 12 at 11-13. The administrative law judge thus permissibly determined their opinions merit little weight.[8]

[8] It is employer's burden to rebut legal pneumoconiosis; therefore, we need not address employer's arguments regarding the administrative law judge's consideration of Drs. Forehand's and Green's diagnoses of the disease. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see* Employer's Brief at 12-13.

See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-282 (1983); Decision and Order at 25-27.

We therefore affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A) and his determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i); *see Owens*, 724 F.3d at 558.

Disability Causation

The administrative law judge next found the opinions of Drs. Fino and Sargent did not establish that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28. We reject employer's argument that the administrative law judge erred in discrediting the disability causation opinions of Drs. Sargent and Fino based on their failure to diagnose legal pneumoconiosis when the disease was established by invocation of the Section 411(c)(4) presumption, rather than a preponderance of the evidence. For the purposes of assessing the probative value of medical opinions relevant to rebuttal of disability causation, there is no material difference. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting the employer's argument that the administrative law judge "erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found"); Employer's Brief at 14-15. Thus, contrary to employer's argument, the administrative law judge also rationally discounted the disability causation opinions of Drs. Fino and Sargent because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 505; *Ogle*, 737 F.3d at 1074; Decision and Order at 31-32. We therefore affirm the administrative law judge's finding that employer failed to rebut disability causation. 20 C.F.R. §718.305(d)(1)(ii).

[9] Because employer must rebut both legal and clinical pneumoconiosis, the administrative law judge's finding that employer did not disprove legal pneumoconiosis precluded rebuttal under 20 C.F.R. §718.305(d)(1)(i), despite his finding that employer disproved clinical pneumoconiosis. Decision and Order at 22.

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and employer did not rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge