U.S. Department of Labor

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

BRB No. 15-0450 BLA

MICHAEL B. HUDDLESTON (o/b/o the Estate of KENNETH HUDDLESTON)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 06/16/2016
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 of Alice M. Kraft, Administrative Law Judge, United States Department of Labor.

Kevin M. McGuire and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-6776) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a

subsequent miner's claim filed on July 19, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with thirty-eight years of qualifying coal mine employment,[3] and found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that the miner invoked the rebuttable presumption set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant,[5] nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[6]

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[1] The miner filed three previous claims in 1974, 1991, and 2001. Director's Exhibits 1-3. The miner's 1974 and 1991 claims were denied by the district director for failure to establish any of the elements of entitlement. Director's Exhibits 1, 2. The miner's third claim, filed in 2001, was denied by reason of abandonment. Director's Exhibit 3. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the [miner] has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] Because the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] The miner died on May 20, 2011. Director's Exhibit 32. Claimant, the miner's son and co-administrator of the miner's estate, is pursuing the miner's claim. Director's Exhibit 39-1.

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).

Because the miner 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 the miner had neither legal nor clinical pneumoconiosis,[7] 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 [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Selby and Dahhan. Drs. Selby and Dahhan diagnosed disabling obstructive lung disease due to cigarette smoking. Director's Exhibits 39-20, 39-43; Employer's Exhibits 4 at 12-13, 5 at 23-24. Drs. Selby and Dahhan opined that the miner did not suffer from legal pneumoconiosis. Employer's Exhibits 4 at 14, 5 at 23.

The administrative law judge discredited the opinions of Drs. Selby and Dahhan because the physicians did not adequately explain how they determined that the miner's coal mine dust exposure did not contribute to his disabling obstructive lung disease.

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[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner invoked the Section 411(c)(4) presumption, and that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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). "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).

Decision and Order at 24-25. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 25.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Selby and Dahhan. We disagree. Noting that the preamble to the revised 2001 regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited their opinions because she found that neither physician adequately explained why the miner's coal mine dust exposure did not contribute, along with his cigarette smoking, to his disabling obstructive lung disease.[8] *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); Decision and Order at 23-25. The administrative law judge, therefore, permissibly discounted the opinions of Drs. Selby and Dahhan. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Selby and Dahhan,[9] we affirm her finding that employer failed to establish that the miner did not have legal pneumoconiosis.[10] Accordingly, we affirm the administrative law

[8] The administrative law judge found that Drs. Selby and Dahhan failed to offer any credible explanation for why they excluded coal dust as a contributing factor to the miner's disabling obstructive lung disease. Decision and Order at 24-25. A review of the record reveals that the administrative law judge's characterization of the opinions of Drs. Selby and Dahhan is accurate.

[9] We reject employer's contention that the administrative law judge improperly required employer to rule out the miner's coal mine dust exposure as a cause of his obstructive lung disease. Employer's Brief at 12. There is no indication that the administrative law judge applied such a standard. Rather, she found that the opinions of Drs. Selby and Dahhan on the existence of legal pneumoconiosis were not credible, because they did not adequately explain their opinions. Decision and Order at 24-25.

[10] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Selby and Dahhan, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Selby and Dahhan. We also decline to address employer's contentions of error regarding the administrative law judge's consideration of

judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Selby and Dahhan, that the miner's pulmonary impairment was not caused by pneumoconiosis, because Drs. Selby and Dahhan did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 25-26. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that the miner's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

Dr. Chavda's opinion, as his opinion does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Because the miner established invocation of the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

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