U.S. Department of Labor

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

BRB No. 15-0362 BLA

SANFORD B. BLACKWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 05/13/2016
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Katie A. Collier and Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-5311) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 28, 2009.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least thirty-nine years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(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. Claimant responds in support of the administrative law judge's award of benefits. Although the Director, Office of Workers' Compensation Programs, has not filed a substantive response brief, he notes that, should the Board remand this case for further consideration, the administrative law judge may

[1] Claimant filed five previous claims, all of which were finally denied. Director's Exhibits 1-5. Claimant's most recent prior claim, filed on August 21, 2003, was denied by the district director on May 3, 2004 because claimant did not establish any of the elements of entitlement. Director's Exhibit 5.

[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 claimant's coal mine employment was in Alabama. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc).

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

take official notice of several documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations.[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. 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 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 the miner did not have either legal or clinical pneumoconiosis,[6] 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.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered Dr. Russakoff's opinion. Dr. Russakoff diagnosed "a totally disabling pulmonary or respiratory impairment" due to "massive obesity." Employer's Exhibit 3 at 4-5. Dr. Russakoff opined that claimant does not suffer from legal pneumoconiosis. *Id.* at 3.

In evaluating whether employer established that claimant does not suffer from legal pneumoconiosis, the administrative law judge found that Dr. Russakoff's opinion was inconsistent with the regulations. Decision and Order at 27-28. The administrative law judge also accorded less weight to Dr. Russakoff's opinion because he failed to adequately explain how he was able to eliminate claimant's coal mine dust exposure as a cause of claimant's pulmonary impairment. *Id.* at 28. The administrative law judge,

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant 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).

[6] "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).

therefore, found that employer failed to establish that claimant does not have legal pneumoconiosis.

Employer argues that the administrative law judge erred in her consideration of Dr. Russakoff's opinion. We disagree. In regard to Dr. Russakoff's opinion that claimant's pulmonary impairment was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that claimant's pulmonary impairment did not develop until twelve years after claimant ceased his coal mine employment. Decision and Order at 27-28; Employer's Exhibit 3 at 3-4. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which 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, 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); Decision and Order at 28.

The administrative law judge also permissibly questioned Dr. Russakoff's opinion that claimant's pulmonary impairment is due solely to obesity, because she found that the physician failed to adequately explain his reason for eliminating claimant's thirty-nine years of coal mine dust exposure as a source of his pulmonary impairment.[7] *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 28. The administrative law judge, therefore, permissibly discounted Dr. Russakoff's opinion.[8]

[7] The administrative law judge found that while "it is apparent that [c]laimant has gained significant weight since his retirement, Dr. Russakoff does not persuasively explain why [c]laimant's impairment is attributable entirely to this weight gain and not related to [c]laimant's . . . [thirty-nine] years of coal mine dust exposure." Decision and Order at 28.

[8] Because the administrative law judge provided valid bases for according less weight to Dr. Russakoff's opinion, any error she may have made in according less weight to his opinion for other reasons would be harmless. *See Kozele v. Rochester & 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 Dr. Russakoff's opinion.

Because the administrative law judge permissibly discredited Dr. Russakoff's opinion,[9] we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis.[10] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id.*

The administrative law judge next addressed whether employer established rebuttal by proving 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 permissibly found that the same reasons for which she discredited Dr. Russakoff's opinion that claimant does not suffer from legal pneumoconiosis, also undercut his opinion that claimant's disabling impairment is unrelated to his coal mine employment. 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d

[9] Employer argues that the administrative law judge erred by requiring Dr. Russakoff to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 22. We disagree. A review of the administrative law judge's Decision and Order reflects that the administrative law judge correctly stated that employer bore the burden of establishing that claimant does not have pneumoconiosis. Decision and Order at 16; *see* 20 C.F.R. §718.305(d)(1)(i). Moreover, the administrative law judge did not reject Dr. Russakoff's opinion as insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, she found that Dr. Russakoff's opinion on the existence of legal pneumoconiosis was not credible, because he did not adequately explain his opinion. Decision and Order at 27-28.

[10] We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Hawkins and Barney, 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).

[11] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); Decision and Order at 29. As no other evidence would support a finding to the contrary, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge