U.S. Department of Labor

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

BRB No. 18-0601 BLA

WALTER A. SUTTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DONALDSON MINE COMPANY	)	DATE ISSUED: 11/25/2019
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05347) of Administrative Law Judge Natalie A. Appetta, rendered on a claim filed pursuant to the

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on September 4, 2015.[1]

Consistent with the parties' stipulation, the administrative law judge credited claimant with sixteen years of underground coal mine employment and found new evidence established total disability. She therefore found claimant established a change in the applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that 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, has not filed a brief in this appeal.[4]

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[1] This is claimant's fourth claim for benefits. The district director denied claimant's most recent prior claim, filed on November 16, 2009, because he failed to establish total disability. Director's Exhibits 1-3.

[2] 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 "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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish total disability. Consequently, claimant had to submit new evidence establishing total disability to have his case considered on the merits. 20 C.F.R. §725.309(c)(2), (3).

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is 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); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established sixteen years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the

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.[5] 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 shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis[6] or that "no 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 found employer disproved clinical pneumoconiosis but failed to disprove either legal pneumoconiosis or disability causation.[7]

Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3 n.6, 4-6, 7-8, 16.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[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). This definition encompasses 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). 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).

[7] Because employer's burden to rebut pneumoconiosis includes both legal and clinical pneumoconiosis, the administrative law judge's finding that employer disproved clinical pneumoconiosis did not conclusively establish rebuttal under 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 20, 22.

Legal Pneumoconiosis

Employer initially contends the administrative law judge's findings on rebuttal of legal pneumoconiosis do not conform to the Administrative Procedure Act (APA),[8] as she failed to consider all relevant evidence and set forth the reasoning underlying her discrediting of the opinions of employer's medical experts. We disagree.

To disprove legal pneumoconiosis, employer must demonstrate 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). In this case, employer relied on the opinions of Drs. Zaldivar and Spagnolo.[9]

Dr. Zaldivar examined claimant on August 18, 2017 and submitted a report based on the results of that examination and a review of medical records. Employer's Exhibit 1. He noted a family history of asthma and that both claimant and his mother smoked cigarettes. *Id*. at 4. Dr. Zaldivar explained that exposure to cigarette smoke, particularly *in utero,* can cause DNA changes that lead to the development of asthma. *Id*. He further observed claimant's pulmonary function studies consistently showed restriction with a mild diffusion impairment, and a positive response to bronchodilators. *Id*. He concluded claimant's history and test results supported a diagnosis of a totally disabling respiratory impairment caused by asthma. *Id*. at 5-6. At Dr. Zaldivar's subsequent deposition, he testified that the variability of claimant's pulmonary function study results, his

[8] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] The administrative law judge also addressed the opinions of Drs. Green, Nader and Gaziano. Drs. Green and Nader diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) caused by coal dust exposure and cigarette smoking. Claimant's Exhibits 1, 2. Dr. Gaziano diagnosed a restrictive impairment and attributed it to coal dust exposure. Director's Exhibit 13. The administrative law judge discredited these opinions because the diagnoses of COPD by Drs. Green and Nader were poorly documented, and Dr. Gaziano did not adequately explain why he determined claimant's restrictive impairment was caused by coal dust exposure. Decision and Order at 20-21.

bronchodilator response, and recent improvements in his FEV1, FVC, and total lung capacity led him to diagnose asthma rather than a coal dust-induced lung disease. Employer's Exhibit 6 at 19-21. He attributed claimant's elevated pCO2 to hypoventilation. *Id*. at 24. Dr. Zaldivar concluded coal dust exposure can be ruled out as a cause of claimant's respiratory impairment based on the pulmonary function study results, and stated there is "absolutely no relationship between coal dust and asthma." *Id*. at 31.

Dr. Spagnolo examined claimant on November 25, 2017 and reviewed medical records. Employer's Exhibit 4 at 1. He observed that none of claimant's pulmonary function studies showed a definite obstructive defect, while the slightly reduced total lung capacity and the slightly elevated pCO2 "are easily explained by a condition called obesity hypoventilation syndrome." *Id*. at 9. Dr. Spagnolo concluded:

> [Claimant's] complaints are due to a long[-]standing asthmatic condition and probably aggravated by many years of smoking. Underlying cardiac disease may also be contributing to his respiratory complaints. In addition, he appears now to have obesity hypoventilation syndrome that is compromising his ventilation.
>
> [Claimant's] clinical findings and respiratory complaints, including his complaint of exertional shortness of breath, are not caused by, contributed to, or hastened by coal workers' pneumoconiosis or any chronic lung disease arising out of coal mine employment. . . . I also believe that coal dust exposure has not played any role in any disability or impairment that he may currently have.

Employer's Exhibit 4 at 9-10. In a subsequent deposition, Dr. Spagnolo explained that the variability in claimant's pulmonary function study results and his positive bronchodilator response are consistent with asthma rather than a coal dust-induced lung disease. Employer's Exhibit 5 at 29-30. He also indicated the elevation in pCO2 on claimant's recent blood gas studies can best be explained by his "use of narcotics and antidepressants or his sleep disorder." *Id*. at 28-29. Finally, Dr. Spagnolo stated that he ruled out coal dust exposure as causing or contributing to a respiratory or pulmonary impairment because he did not believe claimant had an impairment. *Id*. at 37-39, 43; *see also* Employer's Exhibit 4 at 9-10.

Contrary to employer's contention, the administrative law judge permissibly determined that the opinions of Drs. Zaldivar and Spagnolo were "insufficient to rebut pneumoconiosis" because they "failed to adequately address the potential of aggravation in any diagnosis of asthma in [c]laimant[.]" Decision and Order at 21; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d

899, 901 (4th Cir. 1995); Decision and Order at 21. Although, as employer maintains, both physicians explained why the evidence supports a diagnosis of asthma, rather than a coal dust-induced respiratory or pulmonary impairment, they did not explain why claimant's sixteen years of coal dust exposure did not aggravate the effects of his asthma.[10] In addition, the administrative law judge complied with the APA by setting forth credibility determinations on both opinions and providing the underlying rationale for her decision to discredit them. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21.

Disability Causation

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). Contrary to employer's contention, she again permissibly discounted the opinions of Drs. Zaldivar and Spagnolo that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to her finding. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (doctor who fails to diagnose pneumoconiosis cannot be credited on disability causation absent "specific and persuasive reasons" and at most can be given "little weight"); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 25. Therefore, we affirm the administrative law judge's determination that employer failed to prove no part

[10] Dr. Zaldivar indicated that because coal dust is not an allergenic agent, it would not cause an asthma attack. Employer's Exhibits 1, 6 at 20. Similarly, Dr. Spagnolo observed that if claimant was "one of those asthmatics" who had an acute reaction to coal dust, he would not have been able to work as a miner for sixteen years. Employer's Exhibit 5 at 34-36; *see also* Employer's Exhibit 4 at 9. Consistent with the administrative law judge's finding, however, neither physician commented as to whether claimant's sixteen year history of coal dust exposure aggravated the effects of his asthma.

[11] Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Zaldivar and Spagnolo on rebuttal of legal pneumoconiosis, we need not address employer's remaining arguments regarding the weight accorded to their opinions on that issue. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge