U.S. Department of Labor

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

BRB No. 19-0255 BLA

JAMES E. MILES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED, Self-Insured by ARCH COAL, INCORPORATED	)	DATE ISSUED: 04/30/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, GRESH and JONES, Administrative Appeals Judges

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05552) of Administrative Law Judge Scott R. Morris 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 miner's claim filed on April 3, 2015.

The administrative law judge found claimant has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge found employer did not rebut the presumption and awarded benefits.[2]

On appeal employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, employer argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject employer's contention the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits 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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the entirety of the Affordable Care Act (ACA), including its provisions reinstating the Section 411(c)(4) presumption, is unconstitutional. *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 8-9. The Director responds that the district court stayed its ruling striking down the ACA, *Texas*, 352 F. Supp. 3d at 690; thus she argues the decision does not preclude application of the amendments to the Black Lung Benefits Act found in the ACA. Director's Brief at 2.

On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA unconstitutional – the requirement that individuals maintain health insurance – but vacated and remanded the district court's determination the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393 (5th Cir. 2019) (King, J., dissenting).[3] Moreover, the United States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument the Section 411(c)(4) presumption is unconstitutional.

We further affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, a totally disabling respiratory impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5, 12-13.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis under Section 411(c)(4), the burden shifted to employer to establish claimant does not have legal or clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total

[3] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

[4] "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

disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); Decision and Order at 13. The administrative law judge found employer failed to establish rebuttal by either method.[5]

Relevant to legal pneumoconiosis, the administrative law judge considered Dr. Jarboe's opinion.[6] Decision and Order at 20-21; Employer's Exhibit 2. Dr. Jarboe examined claimant and reviewed medical records. He opined claimant has a severe restrictive ventilatory defect, as evidenced by his lung volume testing and spirometry, caused by longstanding and severe bronchial asthma. Employer's Exhibit 2 at 7. Dr. Jarboe also cited "the striking response demonstrated by Dr. Alam and myself to bronchodilating agents at the time of lung function testing," and medical literature referencing a link between asthma and restrictive ventilatory defects. *Id.* at 7-8. In addition, he diagnosed chronic bronchitis based on claimant's history of chronic cough and sputum production. He stated chronic bronchitis "may meet the definition of coal workers' pneumoconiosis," but concluded the definition is not met in this case because chronic bronchitis "will generally resolve after withdrawal from dust exposure as it does after smoking cessation" and claimant has not been exposed to coal mine dust in over twenty years. *Id.* at 8. Dr. Jarboe further stated "any cough and mucous production [claimant] may have had due to the inhalation of coal mine dust would have cleared over this span of time." *Id.*

The administrative law judge reviewed Dr. Jarboe's opinion and found it insufficient to disprove legal pneumoconiosis because it is inconsistent with the regulations and inadequately explained. Decision and Order at 20-21. Employer argues the administrative law judge erred by acting as a medical expert, focusing only on selected factors in discrediting Dr. Jarboe's opinion, and finding Dr. Jarboe did not adequately

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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 found employer rebutted the existence of clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 23.

[6] The administrative law judge also considered Dr. Alam's opinion. Decision and Order at 19-20; Director's Exhibit 11. However, because it is employer's burden to affirmatively establish claimant does not have clinical pneumoconiosis, *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011), we decline to address employer's argument the administrative law judge erred in weighing Dr. Alam's opinion as it does not assist employer in establishing rebuttal. Employer's Brief at 9.

explain his conclusions. Employer's Brief at 11, 14-15. We reject these allegations, as the administrative law judge acted within his discretion as fact-finder in determining Dr. Jarboe's opinion "merit[ed] little weight." Decision and Order at 20; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

The administrative law judge permissibly found Dr. Jarboe's reliance on "the length of time that has elapsed since Claimant left the mines as a factor weighing against pneumoconiosis" to be inconsistent with the regulations, which recognize pneumoconiosis as "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 Sunny Ridge Min. Co., Inc. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003); Decision and Order 20. Contrary to employer's argument, the administrative law judge further acted within his discretion in finding that the probative value of Dr. Jarboe's opinion was diminished by his attribution of claimant's impairment to bronchial asthma, when there is no evidence in the medical records Dr. Jarboe reviewed or in claimant's medical history that claimant has been diagnosed with asthma.[7] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 20.

In addition, the administrative law judge permissibly found that even if claimant has bronchial asthma, Dr. Jarboe failed to adequately explain why claimant's twenty-three years of coal mine dust exposure "did not substantially aggravate his severe pulmonary impairment due to asthma." Decision and Order at 20; *see Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 668 (6th Cir. 2015). Further, contrary to employer's argument, the administrative law judge did not apply a new legal standard requiring Dr. Jarboe to provide a complete citation to the study he relied on. Employer's Brief at 15-16. While he noted Dr. Jarboe did not provide a full citation, he did not discredit him on this basis. Rather, he permissibly found Dr. Jarboe did not explain how the study he cited for the proposition that coal mine dust exposure does not cause bronchial asthma invalidated the medical science underlying the Department of Labor's 2001 regulatory revisions. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92

[7] The administrative law judge highlighted several portions of claimant's medical history inconsistent with Dr. Jarboe's diagnosis of bronchial asthma, including Dr. Alam's note claimant was diagnosed with chronic bronchitis since at least 2012; one of the treatment notes Dr. Jarboe relied on diagnosing claimant with bronchiolitis, not asthma; and that Dr. Dahhan treated claimant for bronchiolitis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 20; Director's Exhibit 11, 21; Employer's Exhibit 2 at 7.

(6th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"); *see* 20 C.F.R. §718.201(a)(2), (b) (legal pneumoconiosis includes any chronic lung disease or impairment significantly related to or substantially aggravated by coal dust exposure); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (coal miners have an increased risk of developing chronic obstructive pulmonary disease, a term that "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma"); Decision and Order at 20.

Finally, we reject employer's argument the administrative law judge selectively considered Dr. Jarboe's opinion. The administrative law judge recognized Dr. Jarboe provided multiple reasons in support of his conclusion coal mine dust exposure did not cause or contribute to claimant's totally disabling restrictive impairment, but permissibly discounted his opinion for the reasons set forth above. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 20-21. As the administrative law judge's bases for discrediting Dr. Jarboe's opinion are rational and supported by substantial evidence, his finding is affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

Because Dr. Jarboe's opinion is the only opinion supportive of a finding claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011).

The administrative law judge next considered whether employer established rebuttal by proving no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23-24. He rationally discounted Dr. Jarboe's opinion that claimant's totally disabling respiratory impairment was not caused by pneumoconiosis because Dr. Jarboe did not diagnose pneumoconiosis, contrary to the administrative law judge's finding employer failed to disprove the presence of the disease. *See Ogle*, 737 F.3d at 1074; Decision and Order at 23-24. We therefore affirm the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis and the award of benefits. 30 U.S.C. §921(c)(4) (2012).

Accordingly, the administrative law judge's 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