U.S. Department of Labor

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

BRB No. 20-0291 BLA

ALFRED L. BREWER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 04/20/2021
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 on Subsequent Claim of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge William S. Colwell's Decision and Order Awarding Benefits on Subsequent Claim (2018-BLA-05581) rendered

on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 18, 2013.[1]

The administrative law judge credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. He further found Employer did not 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.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] This is Claimant's fourth claim for benefits. The district director denied Claimant's most recent claim, filed on November 10, 2004, because he did not establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.309; Decision and Order at 21-22.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4; Decision and Order at 4 n.3.

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[5] 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 did not establish rebuttal by either method.

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 3, 6-13. Employer's arguments have no merit.

To disprove legal pneumoconiosis, Employer must establish 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 Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

Employer relied on Dr. Fino's medical opinion to establish rebuttal. Dr. Fino initially diagnosed Claimant with variable resting hypoxemia with no evidence of an obstructive respiratory impairment. Employer's Exhibit 12. Specifically, Dr. Fino noted Claimant's arterial blood gas testing evidenced resting hypoxemia in 1988 but not 1990, no hypoxemia with exercise in 1999 and 2001, and resting hypoxemia in 2002 and 2005, but no increased hypoxemia with exertion. *Id*. at 8. He opined the hypoxemia is due to Claimant's obesity and elevated left diaphragm, and excluded legal pneumoconiosis because "[c]oal workers' pneumoconiosis is a permanent condition and does not cause variable changes in blood gases." Employer's Exhibit 3; *see* Director's Exhibits 12, 13. In a supplemental report, Dr. Fino acknowledged a November 5, 2014 pulmonary function study evidenced reduction in FEV1 and FVC values, but opined these reduced values are also unrelated to coal mine dust exposure and are due to obesity and Claimant's elevated left diaphragm. Director's Exhibit 13.

[5] 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 pneumoconiosis, *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).

Contrary to Employer's argument, the administrative law judge permissibly discredited Dr. Fino's opinion because he did not adequately explain why Claimant's coal mine dust exposure did not cause his reduced FEV1 and FVC values on pulmonary function testing.[6] *See Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22-23. The administrative law judge also rationally rejected Dr. Fino's opinion because he did not adequately explain why Claimant's hypoxemia is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 22-23.

Employer argues Dr. Fino's opinion is well-reasoned and documented, and adequate to rebut the presumption of legal pneumoconiosis. Employer's Brief at 6-13. It asserts Dr. Fino's opinion is based on a physical examination of Claimant and a "thorough" understanding of his medical history. *Id*. We consider Employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in rejecting Dr. Fino's opinion, we affirm his finding that Employer did not disprove legal pneumoconiosis and his determination that it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[7] *See* 20 C.F.R. §718.305(d)(1)(i).

[6] We reject Employer's argument that the administrative law judge did not apply the proper standard in evaluating whether it rebutted the presumption of legal pneumoconiosis. Employer's Brief at 6-13. Because Claimant invoked the Section 411(c)(4) presumption, the respiratory impairments Dr. Fino diagnosed are presumed to be significantly related to, or substantially aggravated by, coal mine dust exposure. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge properly evaluated whether Dr. Fino credibly explained why Claimant's respiratory impairments are not significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*.; *see* Decision and Order at 22-23.

[7] The administrative law judge correctly noted Employer must disprove both legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 24 n.10. He also correctly found that because Employer did not disprove legal pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) is precluded. Decision and Order at 24 n.10. Thus, we need not address Employer's allegation that the administrative law judge erred in failing to address whether it disproved clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-6.

The administrative law judge next considered whether Employer established "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); Decision and Order at 22-23. He rationally discounted Dr. Fino's disability causation opinion because the doctor did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995); Decision and Order at 22-23. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge