U.S. Department of Labor

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

BRB No. 19-0393 BLA

DON H. STANLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OWENS TRUCKING COMPANY	)	DATE ISSUED: 08/12/2020
	)	
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 Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Bonnie Hoskins and Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Chief Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05179) rendered on a claim filed on August 17, 2015, pursuant to the Black Lungs Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). The administrative law judge found Claimant established nineteen years of underground coal mine employment and has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the Section 411(c)(4) presumption is unconstitutional. On the merits, Employer argues the administrative law judge erred in finding it did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds urging rejection of Employer's constitutional challenge to the Section 411(c)(4) presumption as inadequately briefed.

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.[2] 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, 362 (1965).

Constitutional Challenge

Employer summarily states that Section 1556 of the Patient Protection and Affordable Care Act, which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution[.]" Employer's Brief at 2; *see* Pub. L. No. 111-148, §1556 (2010). Because Employer does not explain its assertion, we reject it. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v.*

[1] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 Fourth Circuit because Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 9, 10.

Director, OWCP, 10 BLR 1-119, 1-120-21 (1987) (Board's review authority is limited to specific arguments raised in the parties' briefs).

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

Because Claimant invoked the Section 411(c)(4) presumption,[3] the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis[4] or "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 failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis,[5] 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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on Dr. Rosenberg's opinion to disprove that Claimant has legal pneumoconiosis. Dr. Rosenberg opined that Claimant has idiopathic pulmonary fibrosis

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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 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] We affirm, as unchallenged, the administrative law judge's finding that Employer failed to disprove clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 50. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), we address Employer's arguments on legal pneumoconiosis because they are relevant to the second method of rebuttal, 20 C.F.R. §718.305(d)(1)(ii). *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

(IPF) unrelated to coal mine dust exposure. Employer's Exhibit 1. He explained that if Claimant's fibrosis was coal mine dust-related, he expected to see extensive diffuse deposition of coal mine dust in association with the fibrosis found on biopsy and CT scans, which he opined Claimant did not have. Employer's Exhibit 1. Dr. Rosenberg indicated that no reliable medical studies show that coal mine dust exposure causes primary linear interstitial lung disease without some micronodular changes. *Id.* He further alleged that literature indicating a possible relationship between coal mine dust exposure and IPF is not reliable because it has not controlled for other factors that cause linear radiographic abnormalities, such as smoking, age, arthritis, medications, and numerous whole person medical disorders. *Id.*

Contrary to Employer's contention, we see no error in the administrative law judge's finding that Dr. Rosenberg's opinion is not adequately reasoned. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). The administrative law judge permissibly found, "[w]hile Dr. Rosenberg argues that the medical studies indicating a relationship between coal dust exposure and [IPF] are not reliable" he does "not actually cite to any direct medical literature" in support of his opinion that Claimant's IPF is not coal mine-dust related. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012). The administrative law judge also permissibly found Dr. Rosenberg's opinion unpersuasive because he did not adequately explain why Claimant's nineteen years of coal mine dust exposure "did not worsen or aggravate" Claimant's IPF or why he did not have pneumoconiosis concurrent with his IPF.[6] Decision and Order at 52; *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).

Employer's arguments on appeal are 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. Rosenberg's opinion, we affirm his finding Employer did not disprove legal

[6] Claimant's treatment records include includes diagnoses of chronic obstructive pulmonary disease (COPD) and emphysema. Claimant's Exhibit 3; Employer's Exhibits 6, 7. In addition to pulmonary fibrosis, Drs. Argarwal and Raj also diagnosed COPD which they attributed to a combination of smoking and coal mine dust exposure. Director's Exhibit 10; Claimant's Exhibit 2. Dr. Rosenberg did not address whether Claimant has COPD or emphysema apart from his IPF. Employer's Exhibit 1; *see* Claimant's Exhibit 3; Employer's Exhibits 6, 7.

pneumoconiosis[7] and his determination it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i); *Hicks*, 138 F.3d at 533; Decision and Order at 46.

Disability Causation

The administrative law judge found Dr. Rosenberg's opinion not well reasoned to establish no part of Claimant's respiratory or pulmonary total disability is caused by legal pneumoconiosis for the same reasons he found it not-well reasoned as to legal pneumoconiosis. Decision and Order at 54. Employer's only argument on disability causation is the administrative law judge erred in finding it did not disprove legal pneumoconiosis.[8] Employer's Brief at 3-4. Since we have rejected that argument, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory disability is due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 54.

[7] Because we affirm the administrative law judge's discrediting of Dr. Rosenberg's opinion, the only opinion supportive of Employer's burden of proof, we need not address Employer's arguments regarding Drs. Agarwal's and Raj's opinions that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 2.

[8] Dr. Rosenberg did not provide any rationale other than the absence of pneumoconiosis for finding that pneumoconiosis caused no part of Claimant's disability. Employer's Exhibit 1.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge