U.S. Department of Labor

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

BRB No. 19-0450 BLA

BYRCHEL POSKAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/20/2020
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Ann Marie Scarpino (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits (2016-BLA-05664) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a miner's claim filed on December 23, 2014.

The administrative law judge credited Claimant with 24.84 years of coal mine employment, including 17.84 years in underground mines, and found he has a totally disabling respiratory or pulmonary impairment.[1] 20 C.F.R. §718.204(b)(2). The administrative law judge 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).[2] The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption because it was enacted as part of the Affordable Care Act (ACA). Employer further argues the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject Employer's ACA argument.[3]

[1] The administrative law judge noted Employer stipulated Claimant established at least fifteen years of coal mine employment and total respiratory disability. The administrative law judge reviewed Claimant's history of coal mine employment and made a finding as to the length of his employment in underground mines. Decision and Order at 3 n.3, 6-9, 20.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption Claimant is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. 921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that Claimant established 17.34 years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 20.

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 & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

I. Constitutionality of 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 Board should vacate the administrative law judge's award of benefits because the ACA, which enacted Section 411(c)(4), Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 8-9 (unpaginated). Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*. *Id.* at 9 (unpaginated). 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 Response Letter at 1-2.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *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 in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and 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). We therefore reject Employer's argument that the

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 5, 6.

Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

II. 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, 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. Decision and Order at 23-26.

A. Existence of Legal Pneumoconiosis

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In addressing whether Employer met its burden, the administrative law judge considered the opinions of Drs. McSharry[5] and Sargent[6] that Claimant does not suffer from legal pneumoconiosis. Decision and Order at

[5] In a report dated July 7, 2015, and in his November 14, 2017 deposition, Dr. McSharry opined Claimant does not have legal pneumoconiosis but "suffers from several pulmonary impairments including asthma, restrictive lung disease due to obesity, hypercarbia and hypoxemia related to obesity-hypoventilation and sleep apnea syndrome, and a history of cigarette smoking intermittently over several decades in the past." Director's Exhibit 18; Employer's Exhibit 16 at 22-23, 25-26, 29-31. He also stated Claimant's pulmonary function test abnormalities "also are explainable by his obesity (the restrictive disease) and asthma and cigarette smoking (the reversible obstruction)." Director's Exhibit 18. He further indicated "there was no compelling reason to postulate the presence of lung disease related to coal dust exposure in [Claimant] whose symptoms are otherwise fully explainable by other known disease processes and whose x-ray shows no sign of coal workers' pneumoconiosis." *Id*.

[6] In his November 8, 2017 report, Dr. Sargent opined Claimant does not suffer from legal pneumoconiosis, but diagnosed a disabling restrictive ventilatory impairment due to his morbid obesity, sleep apnea, and pulmonary hypertension. Employer's Exhibit 14. He stated:

> [T]he physiologic testing is most consistent with restriction due to his obesity . . . I do not believe coal dust exposure has contributed substantially to this

23-25; Director's Exhibit 18; Employer's Exhibits 14, 16. He accorded little probative weight to these opinions because they are inadequately explained and unreasoned. Decision and Order at 24-25. He therefore concluded Employer did not disprove the existence of legal pneumoconiosis. *Id*. at 25.

Employer contends the administrative law judge did not provide a valid rationale for discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 14-21 (unpaginated). We disagree.

As the administrative law judge correctly observed, Dr. McSharry found no evidence of legal pneumoconiosis primarily because Claimant's pulmonary symptoms, abnormal pulmonary function test results, and desaturation with exercise were "easily explained" by his obesity, asthma, and cigarette smoking history. Director's Exhibit 18. Based on Dr. McSharry's view that Claimant's symptomatology was "fully explainable by other known disease processes" and his "x-ray shows no sign of coal workers' pneumoconiosis," he concluded coal dust exposure was not a cause of Claimant's lung disease. *Id*.

The administrative law judge permissibly discredited Dr. McSharry's opinion because he did not adequately explain why Claimant's lengthy coal mine dust exposure did not significantly relate to or substantially aggravate Claimant's disabling respiratory impairment, along with the other diagnosed conditions. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 24-25. In addition, the administrative law judge permissibly found Dr. McSharry did not adequately explain why he found Claimant's 17.34 years of underground coal mine dust exposure did not contribute to his impairment, along with his minimal smoking history.[7] *See Owens*, 724

> impairment and if [Claimant] were of normal weight, I suspect his pulmonary function testing would be normal. He is also suffering from congestive heart failure and atrial fibrillation along with sleep apnea, all of which are consistent with disease caused by his obesity. He likely is suffering from pulmonary hypertension also due to his sleep apnea.

Id.

[7] The administrative law judge found Claimant has a smoking history of 2.75 pack years ending in 1986, which he characterized as "remote and slight." Decision and Order at 5-6. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711. Dr. Sargent stated Claimant's "symptoms of cough, wheezing, and shortness of breath are

F.3d at 558; *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); Decision and Order at 24, *citing* 65 Fed. Reg. at 79,939-43 (the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking). Because the administrative law judge provided valid rationales for his credibility determinations, we affirm his discrediting of Dr. McSharry's opinion.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

Dr. Sargent opined Claimant's disabling pulmonary condition is due to his morbid obesity, sleep apnea, and pulmonary hypertension. Employer's Exhibit 14. As the administrative law judge accurately noted, "Dr. Sargent states that the pattern of impairment is more consistent with restriction due to obesity than coal worker's pneumoconiosis, but that does not mean that coal mine dust exposure could not have been a contributing or aggravating factor." Decision and Order at 25; Employer's Exhibit 14. Contrary to Employer's contention therefore, the administrative law judge permissibly found Dr. Sargent's opinion unpersuasive on the basis it did not adequately address coal dust as a substantially contributing or aggravating factor in his pulmonary impairment. *See Owens*, 724 F.3d at 558; Decision and Order at 25. Further, the administrative law judge reasonably discredited Dr. Sargent's opinion as "equivocal" or "speculative" as he stated, "I do not believe coal dust exposure has contributed substantially to [Claimant's] impairment and if [Claimant] were of normal weight, I suspect his pulmonary function testing would be normal." Decision and Order at 25; *see Hicks*, 138 F.3d at 533; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Employer's Exhibit 14.

Because the administrative law judge permissibly discredited the opinions of Drs. McSharry and Sargent, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), we affirm his finding Employer failed to establish Claimant does not have legal

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easily explained by the asthma and may be worsened by his history of cigarette smoking." Director's Exhibit 18.

[8] In light of our holding that the administrative law judge provided adequate reasons for finding Dr. McSharry's opinion unreasoned and unpersuasive, we decline to address Employer's additional contention the administrative law judge erred in discounting Dr. McSharry's opinion because he relied on negative x-ray readings. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 17-18 (unpaginated).

pneumoconiosis, precluding a rebuttal finding that Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

B. Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption 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). He determined the opinions of Drs. McSharry and Sargent are insufficient to satisfy Employer's burden. Decision and Order at 25-26. We reject Employer's argument the administrative law judge erred in discrediting its experts' opinions. Employer's Brief at 21 (unpaginated).

The administrative law judge rationally discounted the opinions of Drs. McSharry and Sargent as to whether Claimant's disability is due to pneumoconiosis because he permissibly discredited their opinions that Claimant does not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (physician who mistakenly believes that claimant does not have pneumoconiosis may not be credited on the issue of disability causation absent "specific and persuasive reasons"); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995); Decision and Order at 26. Therefore, we affirm the administrative law judge's finding Employer failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and Employer did not rebut the presumption, we affirm the administrative law judge's finding that Claimant is entitled to benefits.

[9] In light of our affirmance of the administrative law judge's finding Employer failed to disprove legal pneumoconiosis, we need not address its challenges to his determination that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge