U.S. Department of Labor

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

BRB No. 19-0500 BLA

MARK R. RUSSELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OAK GROVE RESOURCES, LLC	)	DATE ISSUED: 08/31/2020
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Paisley Newsome and John R. Jacobs (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Kary B. Wolfe (Jones Walker LLP), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Larry W. Price's Decision and Order Awarding Benefits (2019-BLA-05004) 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 miner's claim filed on February 22, 2016.[1]

The administrative law judge credited Claimant with 27 years of underground coal mine employment, based on the parties' stipulation, and found the new evidence established 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 at 20 C.F.R. §725.309(c)[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).[3] The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed an initial claim for benefits on May 29, 2007, which the district director denied on February 25, 2008 because although Claimant established the existence of pneumoconiosis arising out of coal mine employment, he failed to establish a totally disabling respiratory impairment. Director's Exhibit 1. Claimant filed a second claim for benefits on June 25, 2010, which the district director denied as abandoned on October 20, 2011. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c). Claimant did not take any additional action before filing his current claim. Director's Exhibit 3.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he 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). The district director denied Claimant's most recent prior claim as abandoned. Director's Exhibit 2. Consequently, Claimant must demonstrate at least one element of entitlement to obtain review of his subsequent claim. *White*, 23 BLR at 1-3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment 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.

On appeal, Employer argues the administrative law judge erred in finding 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 response brief.[4]

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.[5] 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).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he 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

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that Claimant established twenty-seven years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, a change in an applicable condition of entitlement, 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 2 n.3, 3-4, 12-13.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 8; Hearing Transcript at 12-13.

[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).

[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.[7]

To disprove legal pneumoconiosis, Employer must establish the Miner did 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). On this issue, the administrative law judge considered the opinions Drs. Goldstein and Rosenberg.[8] Decision and Order at 9-10; Director's Exhibits 15, 16; Employer's Exhibit 3. Dr. Goldstein opined Claimant has shortness of breath and respiratory failure due to chronic obstructive pulmonary disease (COPD) caused by his smoking. Director's Exhibit 15, 16. Similarly, Dr. Rosenberg opined Claimant has COPD and emphysema due solely to his smoking history. Employer's Exhibit 3. The administrative law judge found both opinions inadequately reasoned and thus insufficient to rebut the presumption. Decision and Order at 10.

Employer argues the administrative law judge applied an incorrect burden of proof by requiring Drs. Goldstein and Rosenberg to prove Claimant's coal mine employment had no exacerbating or additive effect, and to "rule out coal dust as contributing even 1% to Miner's COPD." Employer's Brief at 5. We disagree.

The administrative law judge correctly stated Employer bore the burden of establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 4, *citing* 20 C.F.R. §718.201 (b); *see* 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Employer's assertion that the

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding Employer did not rebut the presumed existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7. Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i). We will address Employer's arguments on legal pneumoconiosis, however, as the administrative law judge's legal pneumoconiosis findings affected his disability causation findings. 20 C.F.R. §718.305(d)(1)(ii).

[8] The administrative law judge also considered Dr. O'Reilly's opinion that Claimant has clinical pneumoconiosis, and that his COPD is related to his smoking and coal mine employment, but discredited it as not well-reasoned. Decision and Order at 8-9; Director's Exhibit 18. Since Dr. O'Reilly's opinion cannot help Employer meet its burden, however, we need not address it here.

administrative law judge required it to establish coal dust had "no exacerbating or additive effect" and to rule out coal dust exposure "as contributing even 1% to [Claimant's] COPD," Employer's Brief at 5, thus mischaracterizes the administrative law judge's decision. The administrative law judge did neither. Instead, he acknowledged the physicians' reasons for attributing Claimant's COPD to smoking and found they did not adequately explain why Claimant's twenty-seven years of underground coal dust exposure did not also contribute to his COPD, along with identifying various other flaws in the physicians' reasoning. Decision and Order at 10. Moreover, Employer's argument that the administrative law judge's decision is "incorrect" and "inconsistent" given his acknowledgement of the reasons the physicians gave for why coal dust did not contribute to Claimant's COPD, Employer's Brief at 6-7, is without merit.

As Employer asserts, the administrative law judge acknowledged Dr. Goldstein's observation that Claimant's FVC was higher on the pulmonary function study he conducted than it had been on an earlier pulmonary function study, which Dr. Goldstein believed indicated scarring was not the cause of the changes in his lungs. Decision and Order at 9; Director's Exhibit 15 at 4. The administrative law judge also noted Dr. Goldstein's conclusion that Claimant's COPD is consistent with smoking.[9] *Id.*

In addition, the administrative law judge considered the various reasons Dr. Rosenberg provided to explain why Claimant's COPD is not significantly related to or substantially aggravated by coal dust. Decision and Order at 9-10; Employer's Exhibit 3. Dr. Rosenberg stated the reduction in Claimant's FEV1/FVC ratio was consistent with the effects of cigarette smoking, which he stated is more destructive to lung function than coal mine dust exposure. Employer's Exhibit 3 at 8-9. He also stated Claimant's reduced diffusing capacity indicated diffuse emphysema, which is caused by smoking, not coal mine dust exposure. *Id.* at 11. Finally, he opined that Claimant's significantly improved spirometric results post-bronchodilator are inconsistent with legal pneumoconiosis, and that miners who leave coal mining with no impairment rarely develop an obstruction related to coal mine dust years later. *Id.* at 11-12. The administrative law judge, however, provided valid reasons why he did not credit their opinions.

Contrary to Employer's contention, in light of the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive, the administrative law judge permissibly found Drs. Goldstein and Rosenberg failed to

[9] Dr. Goldstein stated Claimant's pulmonary function studies show a severe obstructive defect, hyperinflation, and an abnormal diffusing capacity, and that his "course is consistent with his long smoking history and with the patients that [he sees] who have COPD that have never worked in coal mines." Director's Exhibit 15 at 3-4.

adequately explain why Claimant's twenty-seven years of coal mine dust exposure did not significantly contribute, along with his smoking, to his COPD/emphysema.[10] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 10. Moreover, the administrative law judge permissibly found Dr. Rosenberg's opinion that Claimant's reduced FEV1/FVC ratio indicated his disease was due to cigarette smoking, rather than coal mine employment, conflicts with the scientific premise set forth in the preamble to the revised regulations that "coal miners have an increased risk of developing COPD . . . . [that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." 65 Fed. Reg. at 79,943 (internal citations omitted); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *Jordan*, 876 F.2d at 1460; Decision and Order at 9-10.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *see also Stallard*, 876 F.3d at 670; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge's basis for discrediting the opinions of Drs. Goldstein and Rosenberg is rational and supported by substantial evidence, we affirm his finding. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460. Thus, the administrative law judge reasonably found their opinions entitled to little weight and insufficient to rebut the presumption that Claimant suffers from legal pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10.

Because the administrative law judge permissibly discredited the opinions of Drs. Goldstein and Rosenberg, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his determination that Employer failed to rebut the

[10] The administrative law judge "detract[ed] considerable weight from Dr. Goldstein as he did not apparently address the additive effect of coal dust exposure to cigarette smoking." Decision and Order at 10. He also stated "while Dr. Rosenberg provided [a] thorough discussion on the smoking-related cause of [Claimant's] COPD, he did not explain why [Claimant's] near-equal length of coal mine employment had no exacerbating or additive effect." *Id*.

Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

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 11-12. Employer asserts the administrative law judge did not adequately address the medical evidence relevant to disability causation. Employer's Brief at 7. We disagree.

The administrative law judge noted Claimant's "COPD undisputedly renders him totally disabled," and there is no dispute between Drs. O'Reilly, Goldstein, and Rosenberg that Claimant's totally disabling respiratory impairment is due to COPD. Decision and Order at 12; Director's Exhibits 15, 16; Employer's Exhibit 3. As discussed *supra*, we affirm the administrative law judge's finding Claimant's COPD is legal pneumoconiosis. As the record reveals no other condition that could have caused Claimant's disabling respiratory impairment other than his COPD, the administrative law judge permissibly concluded Claimant is totally disabled due to legal pneumoconiosis. *See Jones*, 386 F.3d at 992-93; *Jordan*, 876 F.2d at 1460. We therefore affirm the administrative law judge's finding Employer failed to prove that no part of Claimant's total disability was caused by pneumoconiosis, and Employer failed to rebut the Section 411(c)(4) presumption. 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 Claimant is entitled to benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge