U.S. Department of Labor

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

BRB No. 20-0381 BLA

HAROLD K. PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
Self-insured through PITTSTON COMPANY, c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 08/31/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits on a Request for Modification of an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

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

BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge Larry S. Merck's Decision and Order Awarding Benefits on a Request for Modification of an Initial Claim (2017-BLA-05372) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification of a denied claim filed on June 14, 2011.

In her June 2, 2016 Decision and Order Denying Benefits, Administrative Law Judge Dana Rosen credited Claimant with twenty-three years of underground coal mine employment. Director's Exhibit 59. She also found he has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore 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) (2018); Director's Exhibit 59. She concluded, however, that Employer rebutted the presumption by establishing Claimant does not have pneumoconiosis. Director's Exhibit 59. Thus she denied benefits. *Id.*

Claimant timely requested modification. Director's Exhibit 60. In his June 16, 2020 Decision and Order that is the subject of this appeal, Judge Merck (the administrative law judge) found Claimant established a mistake in a determination of fact in Judge Rosen's conclusion that Employer rebutted the Section 411(c)(4) presumption. 20 C.F.R. §725.310. He thus awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefit 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.[3] 33 U.S.C. §921(b)(3), as incorporated

[1] 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.

[2] We affirm, as unchallenged on appeal, the finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

An administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). A party is not required to submit new evidence because an administrative law judge has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001).

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,[4] 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 failed to establish rebuttal by either method and thus determined Claimant established a mistake in fact in Judge Rosen's denial of benefits.[5]

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order 3; Director's Exhibits 2, 8, 30.

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[5] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 18; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

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).

The administrative law judge considered the rebuttal opinions of Drs. Fino, Castle, and Sargent that Claimant has a disabling obstructive respiratory impairment due to emphysema. Director's Exhibits 13, 37, 45, 47, 58; Employer's Exhibits 8, 10, 11, 12. All three doctors opined Claimant's emphysema was caused by an enzyme deficiency that he inherited from his parents called Alpha-1 antitrypsin (A1A) deficiency.[6] *Id*. They opined the emphysema is unrelated to coal mine dust exposure. *Id*. The administrative law judge found all three opinions not well-reasoned and inconsistent with the preamble to the 2001 revised regulations. Decision and Order at 20-23.

Employer argues the administrative law judge applied the wrong legal standard when discrediting the opinions of Drs. Fino, Castle, and Sargent. Employer's Brief at 8, 11, 12-14 (unpaginated). It specifically argues he required each doctor to "rule out" coal mine dust as a causative factor of Claimant's emphysema. *Id*. We disagree. The administrative law judge properly held Employer must affirmatively establish Claimant does not have "a chronic lung disease significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment" in order to rebut the presumption of legal pneumoconiosis. Decision and Order at 18; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, he discredited the opinions of its experts because he found them inadequately reasoned, not because they failed to meet a heightened legal standard. *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 18-22.

[6] Dr. Fino explained how Claimant's emphysema resulted from his A1A deficiency. He stated that humans normally have "an enzyme called trypsin that circulates within our bloodstream." Director's Exhibit 13 at 10. He noted "trypsin is an enzyme that is used in meat tenderizers to soften up a tough piece of meat," and it "could start to auto-digest the lungs if it were not for another protein that we have in our lungs called [A1A]." *Id*. He explained individuals such as Claimant "with an [A1A] deficiency do not have the antitrypsin to counteract the trypsin. Therefore, the trypsin is unabated and causes emphysema in the lungs." *Id*. He opined Claimant has a severe version of the A1A deficiency because he inherited "two bad genes" from his parents and his body makes very little of the A1A protective enzyme. Director's Exhibit 45 at 8-10.

Employer next argues that the administrative law judge mischaracterized and irrationally discredited the physicians' opinions. Employer's Brief at 8-15 (unpaginated). We disagree.

The administrative law judge noted Drs. Fino and Castle excluded coal mine dust exposure as a causative factor of Claimant's emphysema because coal dust is not associated with the development of A1A deficiency. Decision and Order at 19-21. Dr. Fino stated Claimant's A1A deficiency "would be acting the same with or without coal [mine] dust exposure" while Dr. Castle testified that coal mine dust exposure does not cause or aggravate an A1A deficiency. Employer's Exhibit 11 at 10-11; Director's Exhibit 45 at 17. But, as the administrative law judge accurately noted, the preamble relies on medical studies that indicate coal mine dust exposure is associated with an increase in destructive enzymes in the lungs along with a reduction in the A1A protective enzyme:

> Anti-proteases are enzymes that protect the lung from proteases and elastases that are released during an inflammatory reaction (such as that produced by inhalation of coal mine dust). Without this protection, the proteases and elastases can destroy the elastin and collagen that comprise the structure of the lung, resulting in emphysematous changes. *This was demonstrated in an animal model of coal dust inhalation, where the coal dust was found to increase elastase levels and cause degradation of alpha-1 antitrypsin* (one of the protective enzymes) in association with pathologic findings of emphysema. In vitro studies have also demonstrated that the protective anti-protease activity of [A1A] is decreased by exposure to coal dust. These observations support the theory that *dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms-namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.*

65 Fed. Reg. 79,920, 79,942-43 (Dec. 20, 2000) (emphasis added); *see* Decision and Order at 20-21. In light of this language, the administrative law judge permissibly found the opinions of Drs. Fino and Castle unpersuasive because they are inconsistent with the preamble.[7] *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 667 (4th Cir. 2017);

[7] Contrary to our concurring colleague's position, *see infra* at 8-9, it is clear why the administrative law judge found Dr. Fino's and Dr. Castle's opinions inconsistent with the medical science credited in the preamble. The physicians' broad statements that coal dust exposure has no effect on A1A deficiency is contradicted by the preamble's conclusion that coal dust exposure can degrade/decrease A1A. 65 Fed. Reg. 79,920, 79,942-43 (Dec. 20, 2000). We also disagree that Dr. Fino's and Dr. Sargent's opinions are rendered more

Westmoreland Coal Co. v. Cochran, 718 F.3d 319, 323 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); Decision and Order at 20-21.

The administrative law judge also noted Drs. Fino and Sargent excluded coal mine dust exposure as a cause of Claimant's emphysema because his lung function was normal when he stopped working in the coal mines. Decision and Order at 20-21. Specifically, Dr. Fino testified that Claimant stopped working in coal mining in 1997 and if he had "coal dust-related obstruction, there would be abnormality at that time." Employer's Exhibit 11 at 12. Because Claimant's FEV1 value on pulmonary function testing "was normal" in 1997, 1998, and 2004, Dr. Fino excluded legal pneumoconiosis and explained Claimant's obstructive impairment is consistent with an A1A deficiency. *Id.* Similarly, Dr. Sargent noted Claimant "stopped working in 1997" and at "that time and for several years thereafter he had normal lung function testing." Employer's Exhibit 12. Based on this factor, Dr. Sargent concluded "it is highly unlikely that [Claimant's twenty-three] years of coal mining employment has contributed at all to his current impairment." *Id.*

The administrative law judge permissibly discredited their opinions because the regulations provide that pneumoconiosis is considered a latent and progressive disease that may first become detectable only after a miner leaves coal mine employment. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 20-22.

Moreover, the administrative law judge noted Dr. Sargent indicated it is "highly unlikely" Claimant developed an obstructive impairment due to coal mine dust exposure, and individuals such as Claimant with the severe genetic phenotype of A1A deficiency "can develop significant obstruction" in their fifties and sixties. Decision and Order at 21, *quoting* Employer's Exhibit 12. He permissibly found Dr. Sargent "focused on generalities and statistics, rather than Claimant's specific condition." Decision and Order at 22; *see Stallard*, 876 F.3d at 671-72; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

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credible because they stated coal dust could not have caused or contributed to Claimant's emphysema years after he left the mines. As discussed herein, the administrative law judge permissibly found this aspect of their opinions unpersuasive in light of the regulations defining 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).

Finally, the administrative law judge permissibly found that, even if Claimant's genetically-inherited A1A deficiency could be the explanation for his emphysema, Drs. Fino, Castle, and Sargent failed to adequately explain why the condition was not significantly related to, or substantially aggravated by, coal mine dust exposure. *Stallard*, 876 F.3d at 671-72 n.4; *Owens*, 724 F.3d at 558; *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); 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); Decision and Order at 20-22.

Thus we affirm the administrative law judge's finding that Employer failed to disprove Claimant has legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 22. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the administrative law judge's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established no part of Claimant'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 23-24. Contrary to Employer's argument, he rationally discounted the disability causation opinions of Drs. Fino, Castle, and Sargent because none of them diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 23-24; Employer's Brief at 15-16 (unpaginated). We therefore affirm the administrative law judge's findings that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). We also affirm his finding Claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 and the award of benefits.[8]

[8] As it is unchallenged, we affirm the administrative law judge's finding that granting modification would render justice under the Act. *Skrack*, 6 BLR at 1-711; Decision and Order at 24-25.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on a Request for Modification of an Initial Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with the majority decision in result only. The administrative law judge's finding that Employer failed to rebut the presumption of legal pneumoconiosis is supported by substantial evidence. He permissibly found Drs. Fino, Castle, and Sargent all failed to adequately explain why Claimant's emphysema was not significantly related to, or substantially aggravated by, coal mine dust exposure, even if the primary cause of the emphysema was his genetically-inherited A1A deficiency. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); *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); 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); Decision and Order at 20-22.

I would not affirm the administrative law judge's finding that the opinions of Drs. Fino, Castle, and Sargent are inconsistent with the scientific evidence cited in the preamble to the 2001 revised regulations, however. Decision and Order at 20-21. The relevant studies merely indicate coal mine dust inhalation may be associated with an increase in destructive enzymes and a reduction in the A1A protective enzyme in a miner's lungs. 65 Fed. Reg. 79,920, 79,942-43 (Dec. 20, 2000). Thus the studies set forth why the inhalation of coal mine dust may cause a miner to develop emphysema. *Id.* They do not establish

that coal mine dust is the only cause for any reduction in the A1A protective enzyme nor the timing and requisite circumstances for onset of coal-dust-related emphysema. *Id.*

Drs. Fino, Castle, and Sargent all set forth that Claimant experienced a reduction in the A1A protective enzyme consistent with the severe version of the genetically-inherited A1A deficiency, known as the "ZZ phenotype," and not that associated with the inhalation of coal mine dust. Employer's Exhibit 12; *see also* Director's Exhibit 47; Employer's Exhibit 11. Specifically, they each explained individuals with this genetic condition experience a "precipitous" loss of lung function around their "early to mid-fifties." Employer's Exhibit 11 at 12-14; *see also* Director's Exhibit 47 at 20-21; Employer's Exhibit 12. They opined Claimant's clinical picture supports their respective conclusions because he did not experience a loss of lung function when he left coal mining, thus indicating coal mine dust did not cause him to develop emphysema and the associated reduction in the A1A protective enzyme. Director's Exhibit 47; Employer's Exhibits 11, 12. He did, however, develop a loss of lung function seven years after leaving the mines in his early fifties, which is consistent with genetically-inherited A1A deficiency. *Id.*

As Drs. Fino, Castle, and Sargent each set forth an explanation as to why, in this particular Claimant's case, he developed an A1A deficiency independent of the inhalation of coal mine dust, and it is not apparent that their opinions *necessarily* contradict any findings in the study, the administrative law judge has not adequately explained why their opinions are inconsistent with the scientific evidence cited in the preamble. Thus this particular credibility finding does not comply with the explanatory requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. 932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Notwithstanding this error, remand for reconsideration of this credibility finding is unnecessary because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Fino, Castle, and Sargent, as discussed above. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). That is, regardless of whether their explanations were inconsistent with the study on anti-proteases cited in the preamble,

their conclusory dismissals of any role of the miner's coal dust exposure were permissibly rejected by the administrative law judge as inadequately explained.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge