U.S. Department of Labor

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

BRB No. 20-0162 BLA

RONALD E. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 02/24/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05394) rendered on a claim filed on July 28, 2017 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with twenty-two years and eight months of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore 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) (2018). She 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.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response. Employer has filed a reply brief reiterating its arguments.

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.[3] 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 (1965).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal

[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 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); Employer's Brief at 3-4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 15.

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.

Clinical Pneumoconiosis

We first reject Employer's argument that the administrative law judge did not adequately explain her basis for finding the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. Employer's Brief at 4-6. She weighed six readings of two x-rays dated October 19, 2017, and April 30, 2018. Decision and Order at 12-13. Drs. DePonte and Unger, both dually-qualified as B-readers and Board-certified radiologists, read the October 19, 2017 x-ray as positive for pneumoconiosis, while Dr. Meyer, also a dually-qualified radiologist, read it as negative. Director's Exhibits 20, 27; Claimant's Exhibit 1. Dr. DePonte read the April 30, 2018 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative. Claimant's Exhibit 2; Employer's Exhibit 1. Dr. Fino, a B-reader but not a Board-certified radiologist, also read this x-ray as negative. Director's Exhibit 28.

Contrary to Employer's argument, the administrative law judge performed a qualitative and quantitative review of the x-ray interpretations. She permissibly assigned greater weight to the physicians who are dually-qualified radiologists as they have superior credentials. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 13. She found the October 19, 2017 x-ray positive for pneumoconiosis because a greater number of dually-qualified radiologists read it as positive. Decision and Order at 13. Although an equal number of dually-qualified radiologists read the April 30, 2018 x-ray as positive for pneumoconiosis, she found Dr. Fino's negative reading buttressed Dr. Meyer's negative reading. *Id*. Thus she found the April 30, 2018 x-ray negative for pneumoconiosis. *Id*. Because the record contains one positive x-ray and one negative x-

[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 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).

ray, the administrative law judge rationally found the x-ray evidence in equipoise and thus insufficient to rebut the presumption of clinical pneumoconiosis. *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 13.

We reject Employer's contention that the administrative law judge should have assigned controlling weight to the most recent negative x-ray. Employer's Brief at 5. The United States Court of Appeals for the Sixth Circuit has held that, "in light of the known progressive nature of pneumoconiosis," crediting evidence on the basis of recency (the "later evidence" rule) is improper when, as in this case, the more recent x-ray evidence is negative for the existence of pneumoconiosis, while the prior x-ray evidence is positive for the disease. *Woodward*, 991 F.2d at 320. In such cases, "[t]he reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship." *Id*.

Moreover, we conclude the administrative law judge's discrediting of the medical opinions of Drs. Fino and Zaldivar on the issue of clinical pneumoconiosis is rational and supported by substantial evidence.[5] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). She correctly determined both physicians relied on their view that the x-ray evidence is inconsistent with a diagnosis of clinical pneumoconiosis and permissibly rejected their opinions as conflicting with her determination that the x-ray evidence is in equipoise and insufficient to rebut the presumption that Claimant has the disease. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Napier*, 301 F.3d at 713-714; Decision and Order at 15-17, 19-20; Employer's Brief at 6-7; Director's Exhibit 28; Employer's Exhibits 5, 6. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis based on the x-ray and medical opinion evidence.[6] 20 C.F.R. §718.305(d)(1)(i)(B).

[5] Because we affirm the administrative law judge's discrediting the opinions of Drs. Fino and Zaldivar, the only opinions supportive of Employer's burden of proof, we need not address its argument that she erred in crediting the opinions of Drs. Lenkey and Klayton that Claimant has clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-7.

[6] Contrary to Employer's argument, the administrative law judge properly weighed the x-ray evidence in conjunction with the medical opinion evidence in finding the evidence as a whole failed to rebut the presumption of clinical pneumoconiosis. *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 880-81 (6th Cir. 2012); Employer's Brief

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 Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). An employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Both Drs. Fino and Zaldivar diagnosed Claimant with smoking-related emphysema unrelated to coal mine dust exposure. Director's Exhibit 28; Employer's Exhibits 5-6, 8. The administrative law judge correctly found both physicians relied, in part, on Claimant's negative x-rays to exclude a diagnosis of legal pneumoconiosis. Decision and Order at 19-20. Specifically, Dr. Fino cited studies indicating that by "utilizing the results of a chest x-ray, a physician may be able to quantitate the amount of coal mine dust contribution to a miner's overall pulmonary impairment due to emphysema." Director's Exhibit 28 at 8. He also stated that when a miner has a "negative chest x-ray, or even a 1/0 chest x-ray, there will only be 7% additional loss of FEVI due to coal [mine] dust." *Id*. at 10. He explained if the miner had the "7% of his FEV1 back, he would still be disabled." *Id*. Because he considered Claimant's x-rays to be negative, Dr. Fino excluded legal pneumoconiosis. Director's Exhibit 28; Employer's Exhibit 5. Dr. Zaldivar similarly explained there is "a good correlation between a chest x-ray and the amount of mineral dust within [a miner's] lungs." Employer's Exhibit 6 at 4. He testified the "x-ray of an individual . . . who has centrilobular emphysema resulting from their work in the coal mines should show micronodules or linear densities." Employer's Exhibit 8 at 15. Based on the absence of "micronodules or linear densities on x-ray," Dr. Zaldivar excluded legal pneumoconiosis. *Id*. The administrative law judge permissibly found their reasoning unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 19-20.

Drs. Fino and Zaldivar also excluded legal pneumoconiosis based on studies evidencing the detrimental effects of cigarette smoking on an individual's lungs. Decision

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at 6-7. Employer has not identified any evidence the administrative law judge failed to weigh relevant to the existence of clinical pneumoconiosis.

and Order at 19-20; Director's Exhibits 28; Employer's Exhibits 5-8. The administrative law judge permissibly found this reasoning unpersuasive because neither doctor adequately explained why Claimant's smoking-related emphysema was not significantly related to, or substantially aggravated by, coal mine dust exposure. *Young*, 947 F.3d at 405; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14; Decision and Order at 19-20.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Employer did not disprove[7] the existence of legal pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

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). She permissibly discredited the disability causation opinions of Drs. Fino and Zaldivar because neither diagnosed pneumoconiosis, contrary to her finding Employer failed to disprove Claimant has the disease.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21-22. We therefore affirm the administrative law judge's finding 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.

[7] Because we affirm the administrative law judge's discrediting the opinions of Drs. Fino and Zaldivar, the only opinions supportive of Employer's burden of proof, we need not address its argument she erred in crediting Dr. Klayton's opinion that Claimant has legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 14-17.

[8] We also reject Employer's argument that the administrative law judge erred in failing to weigh Dr. Lenkey's opinion as supportive of its burden of proof. Employer's Brief at 8. Dr. Lenkey initially diagnosed legal pneumoconiosis. Director's Exhibit 20. After reviewing Dr. Fino's opinion, Dr. Lenkey stated the "contributions from tobacco [smoking] are very great and from the coal dust are more minimal," but nonetheless reiterated that Claimant "does have 'legal pneumoconiosis'" based on his objective testing. Director's Exhibit 29.

[9] In addressing whether pneumoconiosis caused Claimant's disability, neither Dr. Fino nor Dr. Zaldivar set forth an explanation independent of their conclusions that Claimant does not have pneumoconiosis. Director's Exhibit 28; Employer's Exhibits 5-6, 8.

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