U.S. Department of Labor

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

BRB No. 20-0051 BLA

RUDOLPH J. YURKOVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 01/12/2021
	)	
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

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

Before: BOGGS, Chief Administrative Appeals Judge, 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 (2017-BLA-06148) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on June 6, 2016.

The administrative law judge found Claimant has twenty-six years of underground coal mine employment and established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), which Employer conceded. *See* Decision and Order at 4-5, 8. She therefore found Claimant 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) (2018).[1] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in admitting post-hearing supplemental reports of Claimant's experts, Drs. Krefft and Sood. Alternatively, Employer argues the administrative law judge improperly denied its request to respond to the supplemental reports. Additionally, Employer argues 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. Employer filed a reply brief. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The 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) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory 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 findings that Claimant established twenty-six years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), 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 4, 7-12.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 26.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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 Claimant 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.[5]

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).

The administrative law judge addressed the opinions of Drs. Fino and Zaldivar. Dr. Fino opined Claimant does not have legal pneumoconiosis but severe chronic obstructive pulmonary disease (COPD) due to smoking.[6] Employer's Exhibits 3 at 15, 5 at 15. Similarly, Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but "asthma-COPD overlap" syndrome due to genetics, failure to take asthma medications, and

[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).

[5] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 28.

[6] Dr. Fino opined coal dust is not a clinically significant contributing factor to Claimant's severe chronic obstructive pulmonary disease (COPD), which is a primarily fixed emphysema. Employer's Exhibit 5 at 15.

smoking.[7] Employer's Exhibit 6 at 6-7. The administrative law judge found their opinions not well-reasoned. Decision and Order at 23-25. She therefore found Employer did not disprove legal pneumoconiosis. *Id*. at 28.

Employer asserts the administrative law judge erred in rejecting the opinions of Drs. Fino and Zaldivar. Employer's Brief at 15-17. We disagree. The administrative law judge noted Drs. Fino[8] and Zaldivar[9] relied on the view that "x-rays can be used to quantitate the

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[7] Citing medical literature for the proposition that the average loss of lung function in an individual who is asthmatic and smokes is "quite considerable," Dr. Zaldivar opined that the entirety of Claimant's obstructive impairment is explained by his smoking and asthma. Employer's Exhibit 6 at 6-7. Dr. Zaldivar explained that smoking causes emphysema and that failure to take asthma medication can result in remodeling of the lungs, which becomes COPD. Employer's Exhibit 7 at 12-13, 16. Further, he explained he ruled out coal dust as a contributing cause of Claimant's obstructive impairment because there is a direct relationship between pathological coal dust retention and centriacinar emphysema, and Claimant's chest x-rays demonstrated little-to-no parenchymal dust changes. Employer's Exhibit 6 at 6; Employer's Exhibit 7 at 20-22.

[8] Dr. Fino testified:

> In this case, we have other very powerful inducers of lung disease that definitely do cause disease like he has. That's the smoking and asthma untreated. So back to the question: One cannot generalize in all cases. But in this specific case, I'm absolutely confident that a 1/0 is not causing any measurable abnormality.

Employer's Exhibit 7 at 23.

[9] Dr. Zaldivar testified:

> And we know that – since we know that the greater the amount of dust retained within the lungs, the greater the damage. And we know that the film in this case, in my opinion, based on the study on the results by Dr. Meyer, specifically, in my opinion, again, because he's an expert in the field of occupational lung diseases – radiographical occupational lung diseases, that there is no pneumoconiosis. And Dr. Fino had the same opinion. There is very little, if any, dust within his lungs.

Employer's Exhibit 7 at 18-19.

amount of coal dust retained in the lungs and the coal content of the lungs."[10] Decision and Order at 24. As the regulations recognize that a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative chest x-ray reading, the administrative law judge permissibly found their opinions not well-reasoned. *See* 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *see also Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); Decision and Order 24. Further, the administrative law judge permissibly found that, although Dr. Fino opined smoking is the cause of Claimant's impairment, he did not adequately explain why Claimant's twenty-six years of coal mine dust exposure did not significantly contribute, along with smoking, to his obstructive impairment.[11] *See Balsavage*, 295 F.3d at 396; *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming rejection of medical opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's impairment); Decision and Order 24.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign them weight; the Board may not reweigh

[10] The administrative law judge noted Dr. Fino stated "chest x-rays can therefore be used to estimate the loss in FEV1 due to coal mine dust and a physician may be able to quantitate the amount of coal mine dust contribution to a miner's overall pulmonary impairment by estimating coal content of the lungs from x-rays." Decision and Order at 17. She also noted Dr. Zaldivar stated "while the negative x-ray 'does not rule out the possibility that some mineral dust may be found within the lungs,' because 'there is no obvious finding of reaction to the lungs to any dust means that the amount of mineral dust deposited within the lungs must indeed be low, or even non-existent;' as stated [in articles by Drs. Leigh and Ruckley]." *Id.* at 20.

[11] Citing one medical study that compared the average loss of lung function in coal miners with zero/little clinical pneumoconiosis to that of a non-smoking, non-coal mining population, Dr. Fino opined that no more than seven-to-ten percent of Claimant's emphysema, and no more than seven percent of his decrement in FEV1 on pulmonary function testing, is due to coal mine dust. Employer's Exhibit 3 at 10, 15. Further citing medical literature for the proposition that "the impact of cigarette smoking [on lung function] is far greater than that of coal mine dust," Dr. Fino opined smoking accounts for the entirety of Claimant's impairment. *Id*. at 14-15. In so doing, he concluded Claimant would be totally disabled by his obstructive impairment even if he did not have the additional seven percent decrement in his FEV1 due to coal dust; therefore, any portion of Claimant's impairment caused by coal dust exposure was not a substantially contributing cause of his impairment and cannot be called "legal pneumoconiosis." *Id*. at 12, 15; Employer's Exhibit 5 at 19.

the evidence or substitute its own inferences for the administrative law judge's. *See Balsavage*, 295 F.3d at 396; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge permissibly rejected the only medical opinions supportive of a finding that Claimant does not have legal pneumoconiosis,[12] we affirm her finding that Employer failed to disprove the disease. Decision and Order at 24-25. Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether Employer rebutted the presumption by establishing "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). Employer generally avers the opinions of Drs. Fino and Zaldivar establish the absence of any disability caused by pneumoconiosis. We reject this contention. The administrative law judge permissibly rejected Dr. Fino's and Dr. Zaldivar's opinions that pneumoconiosis is not the cause of Claimant's disability because they did not diagnose legal pneumoconiosis.[13] Decision and Order at 29; *see Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Therefore, we affirm the administrative law judge's finding that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(ii).

[12] Because the administrative law judge provided valid reasons for rejecting the opinions of Drs. Fino and Zaldivar on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding his weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] The physicians' opinions as to disability causation rested on their assumption that legal pneumoconiosis did not exist.

[14] We need not address Employer's assertions that the administrative law judge erred in admitting the post-hearing supplemental reports of Claimant's experts and denying its request to respond to them because she permissibly rejected the only medical opinions from Employer's experts that could rebut the presumed facts of legal pneumoconiosis and

Because Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and Employer did not rebut it, Claimant established his entitlement to benefits.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

disability causation at 20 C.F.R. §718.305(d)(1)(i), (ii). *See Larioni v. Director, OWCP*, 6 BLR 1-1278 (1984).