U.S. Department of Labor

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

BRB No. 20-0089

ROBERT T. CUNNINGHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
EAST COAST RISK MANAGEMENT, LLC	)	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, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-06021) 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 a miner's claim filed on June 26, 2017.

The administrative law judge found Claimant had twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 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).[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 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, did not file a response brief.[2]

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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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 Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, and thus invoked 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, 11.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 33.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof 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 rebut the presumption 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 Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Basheda and Rosenberg that Claimant has chronic obstructive pulmonary disease (COPD) caused by his smoking history and unrelated to his coal mine dust exposure. Employer's Exhibits 3, 5.

Employer argues the administrative law judge erred in finding Dr. Basheda did not adequately address why he excluded coal mine dust as a cause of Claimant's obstructive impairment. Employer's Brief at 9. Dr. Basheda opined that the bronchodilator response seen on Claimant's spirometry is inconsistent with a coal dust-induced obstruction, which

[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). "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] We decline to address Employer's arguments regarding the administrative law judge's weighing of the opinions of Drs. Celko, Sood, and Krefft. Employer's Brief at 1, 4-6, 13-20. The administrative law judge correctly observed they do not aid Employer in rebutting the presumption because each opined Claimant's disability is caused by clinical and legal pneumoconiosis. Decision and Order at 21-24; Director's Exhibit 16; Claimant's Exhibits 5, 7. As we affirm her rejection of the only opinions supportive of Employer's burden on rebuttal, *see infra*, review of the administrative law judge's weighing of the opinions of Drs. Celko, Sood, and Krefft is unnecessary. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

is a fixed disorder. Employer's Exhibit 3 at 15. He also opined that Claimant's lung volume measurements demonstrated variable air trapping, which is consistent with a partially reversible type of obstructive lung disease and would not result from a fixed obstruction. *Id.* at 16. The administrative law judge permissibly found Dr. Basheda's opinion does not adequately address why he excluded coal mine dust as a cause of Claimant's COPD when, "by Dr. Basheda's own definition, Claimant shows some 'fixed' obstruction because he only shows partial reversibility." *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 22.

Employer also asserts the administrative law judge erred in discrediting Dr. Basheda's opinion for being in conflict with the Department of Labor's (DOL) recognition of the latent and progressive nature of pneumoconiosis. Employer's Brief at 9. Dr. Basheda noted Claimant left the coal mines in 1991, smoked at least one to two packs of cigarettes a day in 2017, was able to perform heavy labor after leaving the coal mines, and subsequently developed respiratory symptoms. Employer's Exhibit 3 at 16. Based on these observations, Dr. Basheda opined that "[t]he logical explanation for his [COPD] is his continued cigarette smoking." *Id.* Contrary to Employer's contention, we see no error in the administrative law judge's determination that this aspect of his opinion is not persuasive in light of the DOL's recognition that pneumoconiosis is "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); *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); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 22-23.[6]

Employer further argues the administrative law judge should have credited Dr. Rosenberg's opinion because he relied on "the most recent medical literature and medical studies, which reveal that cigarette smoking is more detrimental than coal dust exposure."

[6] Because the administrative law judge provided valid reasons for rejecting Dr. Basheda's opinion, we need not address Employer's argument that the administrative law judge erred in also finding Dr. Basheda did not explain his varying uses of the term "reversible" as meaning either a temporary lessening of obstruction seen on pulmonary function testing or the healing of coal workers' pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22; Employer's Brief at 9. Additionally, aside from alleging the administrative law judge erred, Employer does not explain its argument.

Employer's Brief at 12. Dr. Rosenberg opined that more recent studies and literature establish an earlier Attfield and Hodous study the DOL relied upon in the preamble to the 2001 regulatory revisions underestimates the negative effects of cigarette smoking. Employer's Exhibit 5 at 8. He also opined that, using that earlier study's methodology, Claimant's predicted reduction in FEV1 on pulmonary function testing due to coal mine dust exposure is far less than his actual loss in FEV1, and thus his loss of FEV1 is not consistent with a coal mine dust etiology. *Id.* Contrary to Employer's contentions, the administrative law judge permissibly found the more recent medical literature and studies neither negate the results of the earlier studies the DOL relied upon in the preamble that demonstrate coal mine dust is detrimental, nor preclude coal mine dust as a contributing or aggravating factor in Claimant's "significant obstructive lung disease." *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing only one of the employer's medical experts "cited literature that post-dates the Preamble – none of which appears to even discuss the effects of coal mine dust exposure on the lungs"); Decision and Order at 23. Thus, she permissibly found Dr. Rosenberg did not "adequately explain why the undisputed negative effects of cigarettes eliminate coal mine dust as a potential cause" of Claimant's COPD. *See generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 173 (4th Cir. 1997) (administrative law judge "may weigh the medical evidence and draw his own conclusions"); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) ("It is the role of the administrative law judge, as the trier of fact, to determine both the credibility of the evidence and the inferences to be drawn from it."); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985) ("Where there is a rational basis for the administrative law judge's credibility determination, the determination must be upheld."); Decision and Order at 23.

Because the administrative law judge permissibly discredited the opinions of Drs. Basheda and Rosenberg, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm her determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[7] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

[7] We therefore need not address Employer's arguments that the administrative law judge erred in finding it failed to rebut clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-6.

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 accurately observed all the physicians agree "Claimant's disability is, in part, COPD manifesting on [pulmonary function study] as severe obstructive lung disease," which she found to be legal pneumoconiosis. Decision and Order at 26. As we have affirmed her finding that Claimant's COPD constitutes legal pneumoconiosis, we further affirm her finding Employer failed to meet its burden to show no part of Claimant's disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge