U.S. Department of Labor

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

BRB No. 19-0399 BLA

JERRY W. SMITHERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERMAC, INCORPORATED	)	DATE ISSUED: 07/23/2020
	)	
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-06026) of Administrative Law Judge Morris D. Davis, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 25, 2014.

The administrative law judge credited Claimant with 26.75 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary

impairment. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found Claimant invoked the 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 determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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 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,[4] or that "no part of

[1] 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 surface coal mine employment in substantially similar conditions, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm as unchallenged on appeal the administrative law judge's determinations that Claimant established 26.75 years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment, 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 7, 9-12, 20-21.

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

[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). 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

[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 did not establish rebuttal by either method.[5]

In addressing whether Employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Ajjarapu[6] and Fino[7] that Claimant has legal pneumoconiosis and the contrary opinions of Drs. Sargent[8] and Jarboe.[9] Decision and Order at 25-29; Director's Exhibits 11, 12; Claimant's Exhibit 5; Employer's Exhibits 4, 5. He found the opinions of Drs. Ajjarapu and Fino well-reasoned and well-documented but accorded little weight to the opinions of Drs. Sargent and Jarboe because they were inadequately explained and unreasoned. *Id.* Because he discounted the opinions

---

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 rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 24-25.

[6] In her April 9, 2014 and July 24, 2016 reports, Dr. Ajjarapu diagnosed chronic bronchitis/legal pneumoconiosis based on Claimant's symptomatology, coal mine dust exposure, and the fact he is a non-smoker. Director's Exhibit 11.

[7] In his October 22, 2015 report, Dr. Fino diagnosed legal pneumoconiosis based on reductions in Claimant's FEV1 and FVC with reduced lung volumes, which he indicated is the type of pattern found in coal miners. Claimant's Exhibit 5.

[8] In a report dated January 28, 2016, and at his April 17, 2017 deposition, Dr. Sargent opined that Claimant does not suffer from legal pneumoconiosis but suffers from a disabling restrictive ventilatory impairment "likely" due to "paralysis of his right hemidiaphragm" and "possibly due to interstitial lung disease related to his lupus." Director's Exhibit 12; *see* Employer's Exhibit at 18-20. In a supplemental report dated September 6, 2016, Dr. Sargent stated Claimant's "radiographic studies and the character of his ventilatory impairment are inconsistent with impairment due to coal workers' pneumoconiosis" for the reasons discussed in his original report. Employer's Exhibit 1.

[9] In his May 21, 2017 report, Dr. Jarboe opined that there is no evidence to indicate the presence of legal pneumoconiosis and "a significant cause of [Claimant's] restrictive defect is paralysis of the right diaphragm." Employer's Exhibit 5. Dr. Jarboe also diagnosed bronchial asthma (despite Claimant's denial of a history of this disease), diastolic congestive heart failure, and lupus erythematosus. *Id.*

of Drs. Sargent and Jarboe, the administrative law judge found Employer did not disprove the existence of legal pneumoconiosis. Decision and Order 25-29.

Employer contends the administrative law judge applied a more stringent standard when finding the opinions of Drs. Sargent and Jarboe insufficient to rebut legal pneumoconiosis. Employer's Brief at 5-8. We disagree.

The administrative law judge stated correctly that to disprove legal pneumoconiosis, Employer must demonstrate 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 25; 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge did not, as Employer suggests, reject the opinions of Drs. Sargent and Jarboe because they failed to rule out coal dust exposure as a causative factor for Claimant's respiratory impairment. Rather, after fully considering the underlying rationale each doctor provided as to why Claimant does not have legal pneumoconiosis, he permissibly found their opinions not credible. *See generally Minich*, 25 BLR at 1-155 n.8; Decision and Order at 27-29.

The administrative law judge noted Dr. Sargent excluded coal mine dust exposure as a cause of Claimant's impairment based, in part, on the absence of x-ray "changes consistent with advanced simple or complicated pneumoconiosis."[10] Director's Exhibit 12. He permissibly found this opinion undermined as contrary to the premise "that exposure to coal mine dust can cause progressive and disabling obstruction, even in the absence of x-ray findings of pneumoconiosis." Decision and Order at 28; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Further, the administrative law judge reasonably discredited Dr.

[10] In his January 28, 2016 report, Dr. Sargent opined while coal dust exposure can result in a restrictive ventilatory defect, such a defect "is accompanied by changes on chest x-ray consistent with advanced simple pneumoconiosis or complicated pneumoconiosis." Director's Exhibit 12. Dr. Sargent explained because "[n]either of those conditions are present in this case," Claimant's restrictive defect is not due to coal dust exposure, and therefore, Claimant does not have legal pneumoconiosis. *Id.* He reiterated this opinion in his supplemental September 6, 2016 report by stating that because Claimant's symptoms of "dyspnea on exertion, productive cough, and shortness of breath" are non-specific to pneumoconiosis, "[a]ppropriate radiographic and physiologic abnormalities are required to attribute such symptoms to coal workers' pneumoconiosis." Employer's Exhibit 1.

Sargent's opinion as "equivocal and speculative" that Claimant's disabling respiratory impairment was "likely" caused by paralysis of his right hemidiaphragm. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984); Decision and Order at 27; Director's Exhibit 12.

Similarly, the administrative law judge permissibly accorded diminished weight to Dr. Jarboe's opinion[11] because it is predicated on his belief a showing of significant pneumoconiosis on x-ray is necessary to conclude that a respiratory restriction is due to coal mine dust. The administrative law judge rationally found this premise conflicts with "the concept recognized by the Act that impairment due to coal dust exposure, whether restrictive or obstructive, can occur in the absence of any x-ray findings of pneumoconiosis." Decision and Order at 28; *see Looney*, 678 F.3d at 305, 25 BLR at 2-115; *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; *Shores*, 358 F.3d at 490, 23 BLR at 2-26.

The administrative law judge also permissibly rejected the opinions of Drs. Sargent and Jarboe because they did not adequately explain why Claimant's more than twenty-six years of coal mine dust exposure was not a significantly contributing or substantially aggravating factor in his disabling respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14, 25 BLR at 2-128; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 27-28. 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*, 12 BLR at 1-155; Decision and Order at 29. Apart from its assertions the administrative law judge applied an improper rebuttal standard and errantly found Dr. Sargent's opinion speculative, both of which we reject, Employer has not otherwise challenged the administrative law judge's credibility findings with respect to Dr. Sargent or Dr. Jarboe. We therefore affirm his determination their opinions failed to disprove legal pneumoconiosis.[12]

[11] Dr. Jarboe opined that if Claimant's "restriction [was] due to the inhalation of coal mine dust, [he] would expect the presence of a fibrotic reaction to coal mine dust in the lung parenchyma, that is, the presence of either a high profusion of simple pneumoconiosis or complicated pneumoconiosis" which was not evident in Claimant's lungs. Employer's Exhibit 5.

[12] Because Drs. Ajjarapu and Fino diagnosed legal pneumoconiosis, and therefore, cannot satisfy Employer's burden to disprove legal pneumoconiosis, we need not address

As there are no other medical opinions supportive of Employer's burden, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. *Owens*, 724 F.3d at 558. Employer's failure to disprove legal pneumoconiosis precludes a finding that it established Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

We also affirm, as unchallenged on appeal, the administrative law judge's finding that Employer failed to prove that no part of Claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-31. We therefore affirm the administrative law judge's determination that Employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (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 that Claimant is entitled to benefits.

Employer's contentions regarding the administrative law judge's weighing of their opinions. Employer's Brief at 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

MELISSA LIN JONES
Administrative Appeals Judge