U.S. Department of Labor

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

BRB No. 19-0440 BLA

ROY C. BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHIPYARD RIVER COAL TERMINAL	)	
	)	
and	)	
	)	
Self-insured through SHELL MINING COMPANY, c/o SAFECO INSURANCE COMPANY OF NORTH AMERICA	)	DATE ISSUED: 07/30/2020
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

Bonnie Hoskins (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer/Carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2017-BLA-06102) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (Act). This case involves a subsequent claim filed on September 30, 2016.[1]

The administrative law judge found Claimant has at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. He therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and 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).[2] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer summarily contends that Section 1556 of the Patient Protection and Affordable Care Act, which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution." Employer's Brief at 2-3; Pub. L. No. 111-148, §1556 (2010). On the merits of entitlement, Employer argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation

[1] This is Claimant's third claim for benefits. On March 5, 2004, the district director denied Claimant's most recent claim, filed on March 12, 2003, because he did not establish an element of entitlement. Director's Exhibit 2. Claimant took no further action until filing the current claim on September 30, 2016. Director's Exhibit 6.

[2] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Programs (the Director), in a limited response, urges the Benefits Review Board to decline to entertain Employer's unidentified and unsupported constitutional objection.[3]

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.[4] 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, 362 (1965).

Constitutionality of Section 411(c)(4)

As a threshold matter, we agree with the Director that Employer failed to provide any specific argument for its constitutional objection to Section 411(c)(4); it merely sets forth a one sentence, unsupported conclusion that revival of the presumption violates Article II of the Constitution. Employer's Brief at 2-3. The Board's procedural rules require the brief accompanying a petition for review to contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). Because Employer's assertion does not satisfy this requirement, we decline to address it. *Id*.; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumption by establishing that Claimant has neither legal nor clinical pneumoconiosis,[5] or by establishing that "no part of [his] respiratory or pulmonary

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established at least nineteen years of qualifying coal mine employment, a totally disabling respiratory impairment, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because Claimant's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

[5] "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 includes "any chronic pulmonary disease or respiratory or pulmonary impairment

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.[6] Decision and Order at 13-14.

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 United States Court of Appeals for the Sixth Circuit holds that this standard requires Employer to show Claimant'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). The "in part" standard requires Employer to establish coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

The administrative law judge considered Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis, but has a disabling gas exchange abnormality unrelated to coal dust exposure.[7] Decision and Order at 16, 17; Employer's Exhibits 2, 5.

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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).

[6] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 16.

[7] The administrative law judge also considered the opinions of Drs. Green and Raj that Claimant has legal pneumoconiosis and the treatment records from Norton Community Hospital in which Dr. Nader diagnosed chronic bronchitis. Director's Exhibit 13; Claimant's Exhibits 1, 2, 3. We need not address Employer's argument that the opinions of Drs. Green and Raj are not well-reasoned and documented, as their diagnoses of legal pneumoconiosis do not aid Employer in meeting its burden to rebut the disease. *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"); Director's Exhibit 13; Claimant's Exhibits 1, 2. Further, employer does not challenge the administrative law judge's finding

He found it not well-reasoned, contrary to the regulations, and unpersuasive. Decision and Order at 17. Thus he found Employer did not disprove legal pneumoconiosis. *Id*. at 17-18.

Employer asserts the administrative law judge erred in discrediting Dr. Rosenberg's opinion but points to no specific flaw in the administrative law judge's determinations. The administrative law judge observed that in excluding a diagnosis of legal pneumoconiosis, Dr. Rosenberg relied on his view that "Claimant's condition was not caused by coal mine dust" because he "had negative chest x-rays." Decision and Order at 17. He found Dr. Rosenberg's opinion unpersuasive as contrary to the regulations, which recognize a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative chest x-ray reading. *See* 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); Decision and Order at 17.

Further, the administrative law judge noted Dr. Rosenberg relied on his view that Claimant's "condition did not arise until many years after [he] left the mines." Decision and Order at 17. Noting Dr. Rosenberg stated "latent manifestations of pneumoconiosis are rare," the administrative law judge found he failed to explain why Claimant was not one of the rare individuals who had complications related to coal mine dust exposure that first became detectable after he left the mines. *Id*.; *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As Employer has not specifically challenged any of the reasons the administrative law judge provided for discrediting Dr. Rosenberg's opinion, we affirm his finding that Dr. Rosenberg's opinion is insufficient to rebut the presumption that Claimant has legal pneumoconiosis. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

As the administrative law judge discredited the only medical opinion supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer failed to disprove the disease. Decision and Order at 17-18. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have

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that Dr. Nader did not discuss the etiology of Claimant's condition. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011).

Disability Causation

The administrative law judge next considered whether Employer rebutted the presumption by establishing that "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). He discredited Dr. Rosenberg's disability causation opinion because he did not diagnose legal pneumoconiosis, contrary to the finding that Employer failed to disprove the disease. *See Big Branch Resources, 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 19. Further, the administrative law judge found the same reasons for which he discredited Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis also undercut his opinion that Claimant's disabling respiratory impairment is unrelated to pneumoconiosis. *Id*. Employer has not raised any specific challenge to these findings. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. 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. 20 C.F.R. §718.305(d)(1)(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, Claimant has established his entitlement to benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge