U.S. Department of Labor

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

BRB No. 20-0354 BLA

EFFORT THORNSBERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	
	)	DATE ISSUED: 07/30/2021
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Steven J. Winkelman (Seema Nanda, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2017-BLA-05963) rendered on a claim filed on November 2, 2015, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively it contends the administrative law judge erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional arguments.

The Benefit 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[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 findings that Claimant established at least fifteen 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 4-5, 8.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 8.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 18-21. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

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[4] nor clinical pneumoconiosis,[5] 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.[6]

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 8-18. We disagree.

[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).

[5] "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. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 11-12.

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). The United States Court of Appeals for the Sixth Circuit holds 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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer relied on the medical opinions of Drs. Dahhan and Jarboe. Director's Exhibit 24; Employer's Exhibits 2, 3. Dr. Dahhan diagnosed a purely obstructive ventilatory impairment caused by Claimant's cigarette smoking, and opined the impairment is unrelated to coal mine dust exposure. Director's Exhibit 24 at 2-3. Dr. Jarboe diagnosed a mixed obstructive and restrictive ventilatory impairment[7] caused by "bronchial asthma" and opined this impairment is unrelated to coal mine dust exposure. Employer's Exhibit 2 at 7. The administrative law judge found their opinions unpersuasive and inconsistent with the regulations, and thus insufficient to rebut the presumption of legal pneumoconiosis.[8] Decision and Order at 15-17.

[7] Dr. Jarboe explained the "[s]erial pulmonary function studies . . . appear to show a combination of obstruction and restriction. The earlier studies have shown more of an obstructive ventilatory defect. However, the pulmonary function studies done at the time of this examination show a fairly pure restrictive ventilatory defect, which is severe." Employer's Exhibit 2 at 7.

[8] Employer contends the administrative law judge erred in evaluating the opinions of Drs. Dahhan and Jarboe based on their consistency with the preamble to the 2001 revised regulations. Employer's Brief at 8-10. This argument has no merit. An administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the Department of Labor's resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-28 (9th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011);

Employer argues the administrative law judge applied an improper standard by requiring Drs. Dahhan and Jarboe to "rule out" coal mine dust exposure as a causative factor for Claimant's respiratory impairment. Employer's Brief at 5-8. We disagree. The administrative law judge correctly recognized Employer has the burden to establish Claimant does not have a lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i); Decision and Order at 12-14. Moreover, he discredited the opinions of its experts because he found they are inadequately reasoned, not because they failed to meet a heightened legal standard. *See Young*, 947 F.3d at 405; *Groves*, 761 F.3d at 600; Decision and Order at 15-17.

Specifically, the administrative law judge accurately observed both Dr. Dahhan and Dr. Jarboe cited Claimant's previous prescription for bronchodilator medication as indicative that his respiratory impairment is reversible. Decision and Order at 15-17; Director's Exhibit 24 at 2-3; Employer's Exhibit 2 at 7, 9. They opined Claimant's impairment does not constitute legal pneumoconiosis because coal mine dust exposure causes a fixed impairment that does not respond to bronchodilators. Director's Exhibit 24 at 2-3; Employer's Exhibit 2 at 7, 9. The administrative law judge found, however, that Claimant's impairment was qualifying for total disability both before and after bronchodilator administration on the pulmonary function testing Dr. Dahhan and Dr. Jarboe conducted.[9] Decision and Order at 15-17. He thus permissibly found their opinions unpersuasive because they failed to adequately explain why the irreversible portion of Claimant's obstructive impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *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); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 15-17.

In addition, substantial evidence supports the administrative law judge's finding that Dr. Dahhan's opinion conflicts with the regulatory definition of legal pneumoconiosis and the preamble. Decision and Order at 15. Dr. Dahhan excluded a diagnosis of legal pneumoconiosis based on the degree of Claimant's obstructive impairment. Director's Exhibit 24. He opined that Claimant's purely obstructive impairment is moderate and

---

Consol. Coal Co. v. Director, OWCP [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Employer's Brief at 14-22.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

disabling evidenced by the loss in his FEV1 on pulmonary function testing. *Id*. 24 at 2-3. He explained that coal mine dust exposure's effect "on the respiratory system cannot account for the amount of loss that [Claimant] has in his FEV1 which is estimated to be 5-9cc per year of coal dust exposure." *Id*. at 2-3. The definition of legal pneumoconiosis, however, includes "any chronic . . . obstructive pulmonary disease arising out of coal mine employment," 20 C.F.R. §718.201(a)(2), and the preamble recognizes that coal mine dust can cause clinically *significant* obstructive lung disease. 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). The administrative law judge therefore permissibly found Dr. Dahhan's opinion that coal dust could not have accounted for Claimant's degree of impairment conflicts with the regulations and the preamble. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 15.

Dr. Jarboe excluded legal pneumoconiosis based on negative x-ray readings by Drs. Crum and Tarver. Employer's Exhibit 2 at 8. He explained if Claimant's "rapidly progressive deterioration of lung function [were] due to the inhalation of coal dust (specifically the restrictive component), [he] would expect the presence of a fibrotic reaction to coal mine dust in the lung parenchyma." *Id*. The administrative law judge permissibly found this reasoning unpersuasive because the regulations provide a claim for benefits must not be denied solely on the basis of a negative chest x-ray and that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4), (b); *see Banks*, 690 F.3d at 487-88; *Adams*, 694 F.3d at 801-02; Decision and Order at 16.

Dr. Jarboe further noted pulmonary function studies performed between December 18, 2015 and March 29, 2018 evidence "a rapidly progressive and severe deterioration of lung function." Employer's Exhibit 2 at 8. He explained if Claimant's "impairment were due to coal workers' pneumoconiosis, [he] would not expect the rapid and precipitous fall in lung function over such a short period of time." *Id*. He further explained the "loss of lung function in a coal dust induced impairment is much slower and more indolent than that demonstrated in this case." *Id*. The administrative law judge permissibly found Dr. Jarboe did not adequately explain why he concluded coal mine dust exposure could not "have played at least a part in that [rapid] decline [of lung function] and contributed to it as an additive affect." Decision and Order at 16; *see Young*, 947 F.3d at 405; *Groves*, 761 F.3d at 600; 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A).

Thus we affirm the administrative law judge's finding that Employer failed to disprove Claimant has legal pneumoconiosis.[10] 20 C.F.R. §§718.201(a)(2),(b),

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Jarboe, any error in discrediting their opinions for other

718.305(d)(1)(i)(A); Decision and Order at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the administrative law judge's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

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); Decision and Order at 18-19. He rationally discounted the disability causation opinions of Drs. Dahhan and Jarboe because neither physician diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Big Branch Res., 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); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 18-19. We therefore affirm the administrative law judge's finding that 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.

reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. Employer's Brief at 8-18.

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