U.S. Department of Labor

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

BRB No. 20-0365 BLA

RAYMOND STEELE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUDE ENERGY, INCORPORATED	)	DATE ISSUED: 07/30/2021
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Elena S. Goldstein, Deputy 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, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lauren C. Boucher's Decision and Order Awarding Benefits (2019-BLA-05789) 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 subsequent claim filed on June 4, 2018.[1]

The administrative law judge credited Claimant with 19.55 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). She therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30

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[1] Claimant filed two prior claims. Directors' Exhibits 1-2. The district director denied Claimant's more recent prior claim on December 9, 2009, because he did not establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until filing the current claim. Director's Exhibit 4.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As the district director denied Claimant's prior claim because he failed to establish any element of entitlement, he must submit new evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[3] 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.

U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. It alternatively contends the administrative law judge's finding that it did not rebut the presumption failed to comply with the Administrative Procedure Act (APA).[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response urging the Benefits Review Board to reject Employer's challenge to the constitutionality and applicability of the Section 411(c)(4) presumption.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

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

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[4] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). If a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 19.55 years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, 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 9, 22-23.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; Hearing Transcript at 19.

(2010), is unconstitutional. Employer's Brief at 20-22. 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 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 Claimant has neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability is 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.[8]

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).

Employer relies on the opinions of Drs. Zaldivar and Spagnolo to disprove legal pneumoconiosis. Dr. Zaldivar opined Claimant has chronic obstructive pulmonary disease (COPD) and emphysema due to smoking, while Dr. Spagnolo diagnosed Claimant with untreated asthma likely worsened by his severe heart disease. Employer's Exhibits 1-3, 9,

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[7] "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).

[8] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 27.

10. The administrative law judge found neither opinion adequately reasoned. Decision and Order at 29-31.

Employer argues the administrative law judge applied an improper standard because she required Employer's experts to exclude the possibility that Claimant has legal pneumoconiosis. Employer's Brief at 10. We disagree. The administrative law judge correctly stated that Employer must establish that Claimant does not have legal pneumoconiosis, i.e., a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 27; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). And, as discussed below, she did not reject the opinions of Drs. Zaldivar and Spagnolo because they failed to satisfy a legal standard. Rather, she permissibly found they did not adequately explain why *they* ruled out coal mine dust exposure as a causative factor for Claimant's respiratory impairment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

Employer also argues the administrative law judge failed to properly consider the underlying rationales given for Drs. Zaldivar's and Spagnolo's opinions on legal pneumoconiosis and did not adequately explain why she discredited them. Employer's Brief at 4-19. We disagree.

As the administrative law judge accurately noted, Dr. Zaldivar completely excluded coal mine dust exposure as a causative factor for Claimant's respiratory impairment based on several factors. First, Dr. Zaldivar eliminated a diagnosis of legal pneumoconiosis, in part, because Claimant does not have radiographic evidence of clinical pneumoconiosis and therefore "not enough particles have been retained within the lungs to cause a lot of damage."[9] Employer's Exhibit 10 at 39-40. Contrary to Employer's contention, the

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[9] Dr. Zaldivar acknowledged the lack of x-ray evidence of pneumoconiosis "doesn't rule out that he couldn't have legal pneumoconiosis, but to – to rule it in, one has to then look at the risk factors." Employer's Exhibit 10 at 40. He then discussed Claimant's smoking history and possible bronchospasm and concluded "in this case, there is [sic] the risk factors to produce lung disease that are – in his specific case more powerful than the effect of coal that we cannot even see the effects of radiographically." *Id*. at 41-42. The administrative law judge permissibly found, however, that "even if the content of coal dust in the lungs increases the severity or likelihood of emphysema, and even if the radiographic evidence does not demonstrate that Claimant retained coal dust in his lungs, the alleged absence of coal dust in Claimant's lungs does not preclude the possibility that coal dust contributed to Claimant's emphysema." Decision and Order at 29. We see no error in the administrative law judge's conclusion that "the absence of

administrative law judge permissibly found Dr. Zaldivar's rationale unpersuasive because the regulations do not require a positive x-ray for clinical pneumoconiosis in order to diagnose legal pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4), 718.202(b); *Looney*, 678 F.3d at 313 (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the administrative law judge "fairly read" it as requiring radiographic evidence of clinical evidence before he would diagnose legal pneumoconiosis); Employer's Brief at 10-12.

The administrative law judge also noted Dr. Zaldivar explained "Claimant's history (including smoke exposure at a young age, genetic predisposition, and respiratory symptoms) and pattern of impairment (including bronchospasm, rapid decline in lung function, and variable broncho-reversibility) are consistent with smoking-induced lung disease and possible asthma." Decision and Order at 29; *see* Employer's Exhibits 1, 10. The administrative law judge concluded these factors did not necessarily preclude a diagnosis of legal pneumoconiosis. Decision and Order at 29.

We disagree with Employer that the administrative law judge "overlook[ed]" Dr. Zaldivar's explanation that Claimant's history and impairment pattern "are not only consistent with smoking and asthma but are *inconsistent* with legal pneumoconiosis." Employer's Brief at 12, citing to Employer's Exhibits 1 at 4, 8; 10 at 11-13, 15, 29-33. In the portions of Dr. Zaldivar's opinion that Employer cites, he focuses on why he believes Claimant's respiratory impairment is due to causes other than coal dust exposure.[10]

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radiographic evidence of coal dust in Claimant's lungs does not support Dr. Zaldivar's absolute conclusion that Claimant's lengthy coal mine exposure history can be wholly ruled out as a cause of his emphysema." *Id.* The persuasiveness of a medical opinion is for the administrative law judge to decide, and she has explained her rationale sufficiently in this case. *See Owens*, 724 F.3d 550, 557; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

[10] Dr. Zaldivar discussed Claimant's coal dust and smoking exposures and when his respiratory impairment became more severe. Employer's Exhibit 1 at 4. He also explained that "the logical assumption is that [Claimant's] symptoms may be a manifestation of an asthmatic condition with bronchospasm exacerbated by his smoking habit." *Id.* at 8. He concluded:

> There is no radiographic evidence of pneumoconiosis and clinically the pulmonary impairment is a result of destruction of lung tissue by [a]

Further, even when directly asked how he completely excluded coal dust exposure as a contributing or aggravating cause of Claimant's impairment, Dr. Zaldivar focused on the lack of radiographic evidence and how Claimant's other risk factors could cause his respiratory condition. *See* Employer's Exhibit 10 at 39-49. Thus, the administrative law judge permissibly found that while Dr. Zaldivar's reasoning supports a conclusion that smoking may be the primary cause of Claimant's respiratory condition, he failed to adequately explain why Claimant's years of coal mine dust exposure did not also significantly contribute to, or substantially aggravate, his condition especially given the Department of Labor's recognition that the effects of smoking and coal dust are additive.[11] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 29; Employer's Exhibits 1, 10.

> longstanding smoking habit which began very early in the life of [Claimant] when the lungs were not fully formed as yet and more vulnerable to the effect of the tobacco smoke. There is some degree of bronchospasm present as well which is a manifestation of smoking and not coal workers' pneumoconiosis.

Id. At his deposition, Dr. Zaldivar discussed other possible causes for Claimant's respiratory symptoms including asthma, cardiac disease, bronchospasm, and fossil fuel exposure, emphysema, and smoking. Employer's Exhibit 10 at 11-13, 15, 29-33. He explained that wheezing is not a symptom characteristic of coal dust induced lung disease but rather asthma. *Id*. at 11.

[11] Employer asserts the administrative law judge's reliance on the preamble to the 2001 revised regulations is foreclosed by a recent executive order and that the preamble was not issued in accordance with notice-and-comment rulemaking. Employer's Brief at 18, *citing* Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 9, 2019). Multiple circuit courts and the Board have held that an administrative law judge may evaluate expert opinions in conjunction with the Department of Labor's discussion of sound medical science in the preamble. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Obush*, 650 F.3d 248; *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). We therefore reject Employer's assertion. Further, we note that the Executive Order cited by Employer has been revoked. Exec. Order No. 13,992, "Revocation of Certain Executive Orders Concerning Federal Regulation" (Jan. 20, 2021).

Dr. Spagnolo excluded a diagnosis of legal pneumoconiosis and "generally explained that Claimant's symptoms (cough, wheezing, shortness of breath) can be caused by asthma and heart disease, and these same symptoms are indicative of heart failure." Decision and Order at 30. The administrative law judge noted, however, that "these same symptoms were relied on by Dr. Forehand, Dr. Green, and Dr. Raj in diagnosing legal pneumoconiosis." *Id.* Taking into consideration that Claimant's symptoms "could be indicative of any number of impairments," the administrative law judge permissibly found Dr. Spagnolo "failed to adequately explain how and why he attributed them solely to asthma and heart disease, especially considering he acknowledged at his deposition that a person can simultaneously suffer from asthma, heart disease, and pneumoconiosis." *Id.*; *see* Employer's Exhibit 9 at 44-45. Thus, the administrative law judge permissibly found that Dr. Spagnolo did not adequately explain why Claimant's impairment, even if due to asthma or any heart condition, was not significantly related to or substantially aggravated by coal mine dust exposure. *See Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; Decision and Order at 31.

We consider Employer's arguments regarding Drs. Zaldivar and Spagnolo to be a request to reweigh the evidence, which we are not empowered to do. *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 gave credible reasons for discounting the opinions of Drs. Zaldivar and Spagnolo and her findings satisfy the APA, we affirm her determination that Employer did not disprove Claimant has legal pneumoconiosis.[12] Decision and Order at 30-31. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) 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); Decision and Order at 31-32. The administrative law judge permissibly found the opinions of Drs. Zaldivar and Spagnolo lack credibility on the cause of Claimant's total respiratory disability because they did not diagnose legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d

[12] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Spagnolo, we need not address all of Employer's arguments regarding the additional reasons the administrative law judge gave for rejecting their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 28-31.

498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 32. We therefore affirm the administrative law judge's determination that Employer failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31-32. Thus, we affirm her finding that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge