U.S. Department of Labor

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

BRB No. 20-0437 BLA

THOMAS M. RASNAKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION, LIMITED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/19/2021
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Olgamaris Fernandez (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Carrie Bland's Decision and Order Awarding Benefits (2017-BLA-06026) rendered on a subsequent claim filed on April 23, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 28.56 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She 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) (2018),[2] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309. The administrative law judge 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.[3] Claimant responds in support of the award of benefits. The

[1] This is Claimant's third claim for benefits. He filed his most recent claim on April 18, 2013, which the district director denied as abandoned on March 6, 2014. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c).

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 28.56 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*

Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional argument.

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.[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 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 21-23. 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. , 141 S. Ct. 2104, 2120 (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 nor clinical pneumoconiosis,[5] or that "no part of

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Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 17-18.

[4] Because Claimant performed his last coal mine employment in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16-17.

[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). 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

[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 5-15. We disagree

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 relied on the medical opinions and deposition testimony of Drs. Zaldivar and Basheda. Director's Exhibit 14; Employer's Exhibits 1, 6, 9, 10.

Dr. Zaldivar opined Claimant has smoking-related chronic obstructive pulmonary disease (COPD) in the form of asthma and emphysema, aggravated by obesity and obstructive sleep apnea, and unrelated to coal mine dust exposure. Employer's Exhibits 1 at 8, 6 at 6, 9 at 26-27. In his initial report, Dr. Zaldivar cited Claimant's negative chest x-ray as a basis for his opinion that Claimant "does not have legal pneumoconiosis." Employer's Exhibit 1 at 8. In a supplemental report, he stated "when there is no clear evidence of radiographic pneumoconiosis and there are other more likely causes for the symptoms . . . the logical conclusion is that the work in the mines was not responsible for the ongoing symptoms." Employer's Exhibit 6 at 6. Contrary to Employer's argument, the administrative law judge permissibly discredited Dr. Zaldivar's opinion because the doctor "appears to conflate clinical and legal pneumoconiosis." Decision and Order at 13; *see* 20 C.F.R. §§718.201(a), 718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012) (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); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (explaining "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is present"); Employer's Brief at 8-10.

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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 7, 18.

Further, in light of the Department of Labor's recognition that the effects of smoking and coal mine dust can be additive, the administrative law judge permissibly found Dr. Zaldivar failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with his cigarette smoking, to his COPD. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (administrative law judge permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); 20 C.F.R. §718.201(b); 65 Fed. Reg. at 79,940; Decision and Order at 14.

Dr. Basheda opined Claimant has an obstructive respiratory impairment due to persistent asthma. Director's Exhibit 14. He noted Claimant's impairment demonstrates a partial and variable bronchodilator response on pulmonary function testing consistent with asthma. *Id*. Dr. Basheda opined the impairment is not legal pneumoconiosis because coal mine dust exposure causes a fixed impairment that does not respond to bronchodilators and is not variable. *Id*. He explained the irreversible portion of the impairment is due to airway remodeling resulting from Claimant's improperly treated asthma, which he has had since his early twenties. *Id*. The administrative law judge permissibly found this reasoning unpersuasive because Dr. Basheda failed to adequately explain why the irreversible portion of Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *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); Decision and Order at 14.

Dr. Basheda further testified Claimant does not have legal pneumoconiosis because "[t]ypically, coal [mine] dust does not cause asthma." Employer's Exhibit 10 at 19. He stated it can only "exacerbate" underlying asthma. *Id*. The administrative law judge permissibly found Dr. Basheda's statement unpersuasive because the doctor failed to explain why Claimant's case is not atypical. *See Owens*, 724 F.3d at 558; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 14.

Finally, Dr. Basheda stated coal miners with "true occupational asthma" cannot work in the coal mines "without having serious health issues," as they are unable to engage in heavy exertion. *Id*. Thus Dr. Basheda concluded that if coal mine dust exposure did aggravate Claimant's asthma, he would not have been able to work in the mines without experiencing "serious or possibly life-threatening . . . asthma symptoms." *Id*. The administrative law judge permissibly found this reasoning unpersuasive because pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *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); 20 C.F.R. §718.201(c); Decision and Order at 14; Employer's Brief at 12.

Thus we affirm the administrative law judge's finding that Employer failed to disprove Claimant has legal pneumoconiosis.[7] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 18. 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 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 18. She rationally discounted the disability causation opinions of Drs. Zaldivar and Basheda because neither physician diagnosed legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; *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); 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.

[7] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda, any error in discrediting their opinions for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, we need not address Employer's arguments regarding his crediting the opinions of Drs. Green and Nader that Claimant has legal pneumoconiosis because they cannot aid Employer in rebutting the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Employer's Brief at 15-21; Director's Exhibit 11; Claimant's Exhibits 2, 3.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge