U.S. Department of Labor

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

BRB No. 19-0311 BLA

DAVID WAYNE COBB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL RIVER MINING, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 06/05/2020
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Rita A. Roppolo (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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-06167) of Administrative Law Judge Drew A. Swank 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 December 23, 2014.

The administrative law judge credited claimant with forty years of coal mine employment, including over fifteen years underground, and found he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Thus he 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 found 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. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (Director), filed a limited response, asserting the administrative law judge erred in discrediting physicians' opinions favorable to claimant because they could not determine the relative contribution of claimant's coal mine dust exposure as opposed to his smoking as a cause of his respiratory impairment.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational,

[1] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, 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 findings that claimant established forty years of coal mine employment, with over fifteen years in an underground coal mine, a totally disabling respiratory 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 5, 9-17.

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 "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 did not rebut the presumption by either method.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Zaldivar and Spagnolo.[5] Dr. Zaldivar opined claimant does not have legal pneumoconiosis but suffers

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment occurred in West Virginia. 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 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).

[5] The administrative law judge also considered claimant's treatment records and the opinions of Drs. Marantz and Nader that claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to his coal mine dust exposure and cigarette smoking. Director's Exhibits 18, 21; Claimant's Exhibits 2, 3; Employer's Exhibits 3-5, 10. As Dr. Marantz's and Dr. Nader's opinions do not assist employer in

from a pulmonary impairment due to chronic obstructive pulmonary disease (COPD) and asthma related to his cigarette smoking and cardiovascular disease. Director's Exhibit 43; Employer's Exhibit 16. Dr. Spagnolo opined claimant does not have legal pneumoconiosis but suffers from a pulmonary impairment due to his asthmatic condition worsened by severe heart failure. Employer's Exhibits 13, 15. The administrative law judge found both opinions insufficient to disprove legal pneumoconiosis as inadequately reasoned. Decision and Order 24-31.

Employer argues the administrative law judge did not provide adequate reasons for discrediting Dr. Zaldivar's and Dr. Spagnolo's opinions. We disagree.

As the administrative law judge found, Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis in part because claimant's pulmonary function testing improved after bronchodilation, stating he would not "expect to see broncho-reversibility due to a coal dust induced disease." Employer's Exhibit 16 at 28. The administrative law judge permissibly found this reasoning inadequately explained in light of Dr. Zaldivar's acknowledgment that claimant's later pulmonary function testing did not demonstrate reversibility but did reveal qualifying values for total disability even after bronchodilation. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 27, 29; Director's Exhibit 43; Employer's Exhibit 13 at 11. Further, while Dr. Zaldivar stated that "less than ten percent" of coal miners develop pneumoconiosis, the administrative law judge permissibly found "he did not adequately explain how this particular Claimant is not one of the miners who develop pneumoconiosis." *See 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 27.

The administrative law judge also noted Dr. Spagnolo attributed claimant's impairment to his heart condition and stated "up until [2014] he was essentially normal" and had pulmonary problems "only after he had his heart attack" in July 2014. Employer's Exhibit 15 at 30-31; Decision and Order at 29. The administrative law judge permissibly found this opinion undocumented because "it is unclear what medical records Dr. Spagnolo relied on" to conclude claimant did not have pulmonary problems prior to his heart attack,

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rebutting the Section 411(c)(4) presumption, we need not address the Director's assertion the administrative law judge erred in discrediting their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

as none of claimant's prior medical records were admitted into evidence.[6] Decision and Order at 29; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *see also Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health). The administrative law judge acknowledged Dr. Spagnolo cited medical records indicating claimant was able to walk two to three miles prior to his heart attack. Decision and Order at 29. He permissibly found, however, Dr. Spagnolo did not adequately address notations in the medical records indicating claimant suffered "labored breathing" climbing stairs prior to his heart attack or had a "past medical history" with "some element of COPD" that was "never officially diagnosed." Decision and Order at 29; *see Hicks*, 138 F.3d at 533; *Clark*, 12 BLR at 1-155; Employer's Exhibit 3 at 11, 26.

Although Drs. Zaldivar and Spagnolo opined other factors and conditions, such as claimant's asthma, cigarette smoke exposure, and severe heart failure accounted for his pulmonary impairment, the administrative law judge permissibly found they did not adequately explain why claimant's forty years of coal mine dust exposure could not also be a significantly contributing or substantially aggravating factor, along with his other conditions. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Hicks*, 138 F.3d at 533; Decision and Order at 27; Director's Exhibit 43; Employer's Exhibits 13 15, 16.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Spagnolo,[7] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding employer did not disprove legal pneumoconiosis. *See Owens*, 724 F.3d at 558; *Clark*, 12 BLR at 1-155; Decision and Order at 25-29. Employer's failure to disprove legal pneumoconiosis precludes a finding it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[6] Dr. Spagnolo's consulting opinion is based on claimant's treatment records and tests related to claimant's heart attack on July 13, 2014, and his continued treatment through June 2017. Employer's Exhibit 13.

[7] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Spagnolo, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 9-14.

Disability Causation

The administrative law judge next considered whether employer established that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Contrary to employer's assertion, he permissibly discredited Dr. Zaldivar's and Dr. Spagnolo's opinions because neither doctor diagnosed legal pneumoconiosis, contrary to his determination employer failed to disprove that claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 32-34. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

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 claimant is entitled to benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge