U.S. Department of Labor

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

BRB No. 19-0312 BLA

CHARLES M. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 06/09/2020
	)	
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.

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

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

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-06205) 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 subsequent claim filed on March 24, 2016.[1]

The administrative law judge credited claimant with twenty-nine 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 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) (2012),[2] and established a change in the applicable condition of entitlement at 20 C.F.R. §725.309.[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge applied the wrong legal standard and otherwise erred in finding it failed to rebut the Section 411(c)(4) presumption.

[1] On February 22, 2006, the district director denied claimant's first claim, filed on August 10, 2005, because he did not establish pneumoconiosis. Director's Exhibit 1. Claimant took no further action until filing the current claim on March 24, 2016. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he establishes 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); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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). The district director denied claimant's prior claim because he did not establish pneumoconiosis. Decision and Order at 2; Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to have his case considered on the merits. 20 C.F.R. §725.309(c)(3).

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief.[4]

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.[5] 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 (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,[6] 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 failed to establish rebuttal by either method.[7]

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-nine years of underground coal mine employment, total disability, invocation of the Section 411(c)(4) presumption, and a change in the applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7, 16, 24.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

[6] "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). "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).

[7] The administrative law judge found employer disproved clinical pneumoconiosis. Decision and Order at 15.

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 administrative law judge considered the opinions of Drs. Zaldivar and Castle.[8] Decision and Order at 23-24, 26-28; Director's Exhibit 24; Employer's Exhibits 1, 9, 10. Dr. Zaldivar opined claimant does not have legal pneumoconiosis but suffers from asthma/chronic obstructive pulmonary disease (COPD) overlap due to cigarette smoking.[9] Director's Exhibit 24; Employer's Exhibit 10 at 35, 41. Dr. Castle opined claimant does not have legal pneumoconiosis but suffers from tobacco smoke-induced COPD with a significant asthmatic component.[10] Employer's Exhibits 1, 9. The administrative law judge found their opinions inadequately explained and not well-reasoned, and therefore insufficient to satisfy employer's burden to disprove legal pneumoconiosis. Decision and Order at 26-28.

Employer argues the administrative law judge applied an incorrect legal standard in stating that employer must demonstrate claimant's impairment is "entirely unrelated" to coal mine dust exposure. Employer's Brief at 7-9, *quoting* Decision and Order at 16. We disagree. The administrative law judge correctly stated "employer can rebut presumed legal pneumoconiosis by proving that [claimant] does not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence."[11] Decision and Order at 9, *quoting* 20 C.F.R. §718.201(b);

[8] The administrative law judge also considered the opinions of Drs. Habre, Green, and Nader that claimant has legal pneumoconiosis and found they do not assist employer in meeting its burden on rebuttal. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 25-26; Director's Exhibits 13, 27; Claimant's Exhibits 2, 3.

[9] Dr. Zaldivar examined claimant on February 1, 2017, and provided deposition testimony on January 25, 2019. Director's Exhibit 24; Employer's Exhibit 10.

[10] Dr. Castle provided a medical records review on October 5, 2017, and provided deposition testimony on January 17, 2019. Employer's Exhibits 1, 9. He also noted "some findings that would go along with a diagnosis of emphysema." Employer's Exhibit 9 at 36.

[11] As employer asserts, the administrative law judge also stated, in summary, Dr. Zaldivar's and Dr. Castle's opinions were insufficient to establish claimant's impairment

see 718.305(d)(1)(i)(A). In discounting the opinions of Drs. Zaldivar and Castle, the administrative law judge did not require the physicians to rule out any contribution from coal mine dust exposure to claimant's impairment.[12] Rather, he permissibly found neither physician adequately explained why coal mine dust exposure did not contribute to, or aggravate, the miner's obstructive impairment. *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); Decision and Order at 26-28.

We also reject employer's contention the administrative law judge erred in weighing Dr. Zaldivar's opinion. Employer's Brief at 9-16. Dr. Zaldivar examined claimant and concluded "[t]here is no radiographic pneumoconiosis and clinically, the impairment is one of long-standing asthma caused by smoking and unrelated to his occupation." Director's Exhibit 24. He further opined claimant "has "developed emphysema from smoking . . . ." *Id*. At his deposition, Dr. Zaldivar described claimant's impairment as asthma/COPD overlap, which he concluded was due to smoking and heredity factors. Employer's Exhibit 10 at 21, 31-32. The administrative law judge correctly noted Dr. Zaldivar eliminated coal dust exposure as a causative factor for claimant's COPD based on "the fact that he can better explain [claimant's] causation on other factors" and his opinion that the risk for coal workers' pneumoconiosis is low.[13] Decision and Order at 26, 27. The administrative law

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is "entirely unrelated to coal mine dust exposure." Decision and Order at 16; Employer's Brief at 7-10. Any error in referencing this phrase is harmless, as he ultimately did not reject their opinions for failing to satisfy a particular rebuttal standard. Rather, he concluded employer's experts did not disprove the existence of legal pneumoconiosis because the bases for their opinions were not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 26-28. Thus, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting); Employer's Brief at 6-7.

[12] Instead, Drs. Zaldivar and Castle themselves excluded any contribution by coal mine dust to claimant's impairment. Dr. Zaldivar testified he did not believe any impairment in claimant's case was additive from coal dust exposure and smoking, and that claimant's asthmatic component is neither caused nor related in any way to his mining work. Employer's Exhibit 10 at 35, 41. When Dr. Castle was asked if he could rule out coal mine dust exposure as a cause of [claimant's] impairment, he replied, "I can. . ." Employer's Exhibit 9 at 31.

[13] Dr. Zaldivar opined that coal mine dust exposure did not cause claimant's chronic obstructive pulmonary disease because he "doesn't have radiographic pneumoconiosis," he was a long-time smoker and exposed to smoking "since childhood," has "a

judge permissibly found that even though other factors and conditions could account for claimant's COPD, Dr. Zaldivar failed to persuasively explain why he excluded coal mine dust exposure as a significant contributing cause of claimant's pulmonary impairment, along with "other factors." *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, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order at 26-27. Contrary to employer's contention, the administrative law judge did not selectively analyze Dr. Zaldivar's opinion. Rather, he found Dr. Zaldivar's reasoning regarding the cause of claimant's pulmonary impairment inadequate. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Nor is there merit to employer's assertion the administrative law judge erred in discrediting Dr. Castle's opinion. Employer's Brief at 17-19. The administrative law judge correctly observed that Dr. Castle eliminated coal mine dust exposure as a causative factor in claimant's COPD based, in part, on his view claimant's reduced FEV1/FVC ratio on his pulmonary function testing is inconsistent with obstruction due to coal mine dust exposure. Decision and Order at 27; Employer's Exhibits 1, 9. Dr. Castle explained that smoking-related forms of obstructive lung disease are typically associated with a significant reduction in the ratio of FEV1 to FVC, while impairments related to coal dust exposure are generally associated with a preserved ratio or minimal reduction.[14] Employer's Exhibits

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predisposition to developing asthma and has some symptoms of asthma with bronchospasm." Employer's Exhibit 10 at 33. Dr. Zaldivar explained that "[a]nother entity doesn't have to be invoked unless you have some demonstration that the other entity actually is playing a role." *Id.* Dr. Zaldivar noted "the risk for coal workers' pneumoconiosis, aside from having worked in the mines, is too low because it doesn't matter how many years a [miner] works in the mines;" "[w]hat really matters is what concentration of dust has [a miner] been exposed to and how much of that dust [has the miner] retained." *Id.* at 34. So without knowing the concentration of dust a miner has been exposed to, Dr. Zaldivar explained a chest x-ray is used "as a surrogate" because medical "studies have clearly shown that there is a direct relationship between the amount of dust retained within the lungs and the degree of centriacinar emphysema." *Id.* at 34, 35. Thus Dr. Zaldivar concluded, "in the context of this case," the x-ray evidence ruled out legal pneumoconiosis, "because there are many other reasons that better explain [claimant's] lung problems than legal pneumoconiosis." *Id.* at 35. Dr. Zaldivar later stated his opinion would not change in the presence of a positive x-ray. *Id.* at 76.

[14] Dr. Castle stated the June 16, 2016 post-bronchodilator pulmonary function study demonstrated "significant bronchoreversibility" and the February 1, 2017 pulmonary function study demonstrated a "significant reduction in the FEV1%," which he stated is "typical and indicative of tobacco smoke induced pulmonary emphysema." Employer's

1, 9 at 15, 16, 26, 27. The administrative law judge permissibly discredited this portion of Dr. Castle's opinion because his reasoning conflicts with the medical science the Department of Labor has accepted, which recognizes coal mine dust exposure can cause clinically significant obstructive disease shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Looney*, 678 F.3d at 314-15 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 27. The administrative law judge also noted Dr. Castle testified his opinion would remain the same if he did not rely on the FEV1/FVC ratio. Decision and Order at 28. Noting Dr. Castle did not provide "any medical text, treatise, or other support" for his continued assertion that coal dust did not contribute to claimant's impairment, the administrative law judge permissibly found Dr. Castle's revised opinion unpersuasive and insufficient to disprove legal pneumoconiosis. *See Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 28; Employer's Exhibit 9 at 31.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign weight; the Board may not reweigh the evidence or substitute its own inferences on appeal. *Compton*, 211 F.3d at 207-08; *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 permissibly discredited the opinions of Drs. Zaldivar and Castle,[15] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis,[16] we affirm his finding employer failed to 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

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Exhibit 1 at 11. Dr. Castle further stated "[c]oal workers' pneumoconiosis does not cause reversibility in airway obstruction because of the irreversible nature of the process." *Id*. He also stated, however, that "when it does so, it generally does so with a concomitant reduction in both the FVC and FEV1 with a normal or nearly normal FEV1%." *Id*.

[15] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle on legal pneumoconiosis, we need not address employer's remaining arguments on his weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[16] It is employer's burden to disprove legal pneumoconiosis; therefore, we need not address employer's arguments regarding the administrative law judge's consideration of the opinions of Drs. Habre, Green, and Nader diagnosing the disease. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 20-24.

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).

Disability Causation

As to 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," the administrative law judge again weighed the opinions of Drs. Zaldivar and Castle. He permissibly found the same reasons for discrediting their opinions that claimant does not suffer from legal pneumoconiosis also undercut their opinions that his total disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 24-28. We therefore affirm the administrative law judge's finding that employer failed to establish no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 28.

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