U.S. Department of Labor

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

BRB No. 19-0371 BLA

ROGER BLAKE KENDRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHISHOLM COAL COMPANY, INCORPORATED, d/b/a PIKESVILLE COAL COMPANY	)	DATE ISSUED: 06/25/2020
	)	
Employer-Petitioner Self-Insured	)	
	)	
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.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05900) of Administrative Law Judge Joseph E. Kane 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 subsequent miner's claim filed on April 8, 2016.[1]

The administrative law judge found claimant has at least twenty-six years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

The Board's scope of review is defined by statute. The administrative law judge's decision and order must be affirmed 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 (1965).

[1] This is claimant's second claim for benefits. He filed a claim on August 20, 2001, and the district director issued a final denial on March 10, 2003 because claimant did not establish any element of entitlement. Director's Exhibits 1, 3. Claimant took no further action until filing the current claim.

[2] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, 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] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-six years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, 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 2, 3, 4, 16-17.

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

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 "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 United States Court of Appeals for the Sixth Circuit requires employer to establish claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522, at *4 (6th Cir. Jan 21, 2020); *see also generally Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered the reports of Drs. Vuskovich and Castle. Dr. Vuskovich opined claimant does not have legal pneumoconiosis, but exhibits severe air-trapping due to chronic obstructive pulmonary disease caused by cigarette smoking. Employer's Exhibit 2. Dr. Castle opined claimant does not have legal pneumoconiosis but has a pulmonary impairment due to obesity hyperventilation syndrome. Employer's Exhibit 3. The administrative law judge assigned their opinions little weight and thus determined employer failed to disprove legal pneumoconiosis. Decision and Order at 12-14, 20-22.

Employer avers the administrative law judge erred in relying on the preamble to the 2001 regulatory revisions in weighing the medical opinions. It also contends he violated

[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). This definition encompasses 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).

the Administrative Procedure Act (APA)[6] by failing to adequately identify his bases for crediting Drs. Green's and Shamma-Othman's legal pneumoconiosis diagnoses. These allegations do not have merit.

As an initial matter, an administrative law judge may permissibly evaluate expert opinions in conjunction with the Department of Labor's (DOL) discussion of the prevailing medical science set forth in the preamble to the 2001 revised regulations. *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); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012). Moreover, the administrative law judge did not rely on the preamble to "categorically exclude" any opinion attributing claimant's impairment to smoking. Employer's Brief at 13. Rather, he set forth reasons unrelated to the preamble for why Drs. Vuskovich and Castle did not credibly exclude a diagnosis of legal pneumoconiosis. Employer does not allege any error with respect to these findings.

Specifically, the administrative law judge permissibly accorded diminished weight to Dr. Vuskovich's opinion because, unlike the other physicians offering opinions on the existence of pneumoconiosis, he is not a Board-certified pulmonologist.[7] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 20. He also rationally determined Dr. Vuskovich's opinion was entitled to little weight as he relied, in part, on the absence of a respiratory or pulmonary impairment as of the date of his record review on July 17, 2012, to exclude any effect from claimant's coal dust exposure,[8] but did not review qualifying blood gas test results from July and August 2017.

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[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[7] Dr. Vuskovich is Board-certified in internal medicine and occupational medicine. Employer's Exhibit 2.

[8] Specifically, Dr. Vuskovich stated that due to claimant's heavy smoking on the day of Dr. Shamma-Othman's June 15, 2016 blood gas study, his true ventilatory capacity was not measured. Employer's Exhibit 12; Director's Exhibits 12, 20; Decision and Order at 8-9, 12, 16, 20. Dr. Shamma-Othman's initial June 15, 2016 DOL-sponsored evaluation report, supplemented and reiterated by letter of March 23, 2017, found severe hypoxemia on the two qualifying blood gas studies administered on June 15, 2012. Director's Exhibits 12, 20; Decision and Order at 8-9. Dr. Shamma-Othman diagnosed legal pneumoconiosis

See Martin v. Ligon Preparation Co., 400 F.3d 302, 305-06 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 12, 16, 20; Claimant's Exhibits 1, 2.

The administrative law judge also rationally accorded less weight to Dr. Castle's view that the pulmonary function study performed on July 13, 2017, did not show obstruction, as he found it outweighed by the interpretations of Dr. Green, the administering physician, and Dr. Vuskovich, both of whom opined the study revealed obstruction. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); Decision and Order at 21. He therefore permissibly accorded little weight to Dr. Castle's opinion on legal pneumoconiosis because he relied on an inaccurate premise that claimant's lack of obstruction demonstrates he has no physiologic changes that could be due to his coal mine dust exposure. *See Napier*, 301 F.3d 703, 713-14; Decision and Order at 20-21. Moreover, the administrative law judge rationally concluded Dr. Castle failed to adequately explain why claimant's coal dust exposure did not contribute to, or aggravate, the pulmonary changes he attributed solely to obesity. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 19-21.

Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Vuskovich and Castle, and his findings are unchallenged on appeal, we affirm his credibility determinations.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *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); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm his finding that employer did not disprove the existence of legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(A); *Ogle*,

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due to claimant's coal mine employment and extensive smoking history. Director's Exhibits 12, 16, 20; Decision and Order at 8-9, 22.

[9] In light of Dr. Shamma-Othman's and Dr. Green's diagnoses of legal pneumoconiosis, the administrative law judge rationally found they do not aid employer in satisfying its burden on rebuttal. Decision and Order at 21. Hence, we need not address employer's argument that the administrative law judge violated the APA in crediting their opinions without adequately explaining his finding their opinions are "consistent with the scientific underpinnings of the Act" as set forth in the preamble to the 2001 regulatory revisions. Decision and Order at 22.

[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we

737 F.3d at 1072-73; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Anderson*, 12 BLR at 1-113.

Disability Causation

Employer also challenges the administrative law judge's finding that it failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Employer's Brief at 11-13; Decision and Order at 21-22. In support, employer reiterates its contention that the administrative law judge improperly credited the opinions of Drs. Shamma-Othman and Green as to the etiology of claimant's impairment. In light of employer's burden on rebuttal to disprove the presumed existence of pneumoconiosis, and its failure to establish error in the administrative law judge's legal pneumoconiosis analysis, employer's assertion is rejected. 20 C.F.R. §718.305(d)(1)(ii). To the contrary, the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Vuskovich and Castle that no part of claimant's total disability is due to legal pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 22. Consequently, we affirm his finding employer did not rebut the presumption that claimant's totally disabling respiratory impairment is due to pneumoconiosis. Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant has established his entitlement to benefits.

need not address employer's challenge to the administrative law judge's finding employer did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-11; Decision and Order at 5-6, 18-20.

Accordingly, the 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