U.S. Department of Labor

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

BRB No. 20-0345 BLA

JESSE L. ATHEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUSTIN CONSTRUCTION COMPANY	)	DATE ISSUED: 06/29/2021
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Cynthia Liao (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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05159) 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 March 1, 2018.[1]

The administrative law judge found Claimant timely filed his claim and credited him with at least twenty-five years of underground coal mine employment based on Employer's concession. She further found Claimant established a totally disabling respiratory or pulmonary impairment and, thus, established a change in an applicable condition of entitlement,[2] and 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).[3] She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed three previous claims. The district director denied his first claim on December 30, 1999, because Claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant withdrew his second claim; therefore, it is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2. The district director denied his third claim on April 26, 2016, because the evidence did not establish any element of entitlement. Director's Exhibit 3.

[2] When 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 "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). Because Claimant's most recent prior claim was denied for failure to establish any element of entitlement, he had to establish at least one element of entitlement in order to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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) (2018); 20 C.F.R. §718.305.

On appeal, Employer contends the administrative law judge erred in finding the claim timely filed. It also challenges the constitutionality of the Affordable Care Act (ACA) and the constitutionality and applicability of the Section 411(c)(4) presumption, enacted as part of the ACA. Alternatively, it contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has filed a limited response urging the Benefits Review Board to reject Employer's contention that the Section 411(c)(4) presumption is unconstitutional.[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 Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Timeliness of the Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308(a), (c). The United States Court of Appeals for the Fourth Circuit has held that an oral communication of a medical determination of total disability due to pneumoconiosis is sufficient to trigger the statute of limitations. *Island*

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[4] Although Employer generally contends "the whole of the evidence fails to prove total pulmonary or respiratory disability," it has not identified with specificity any error in the administrative law judge's finding that total disability was established. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Employer's Brief at 12. We therefore affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established at least twenty-five 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 8, 20-22.

[5] 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); Hearing Transcript at 35; Director's Exhibit 1.

Creek Coal Co. v. Henline, 456 F.3d 421, 426-27 (4th Cir. 2006); *see also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96 (6th Cir. 2013). To rebut the presumption, Employer must show by a preponderance of the evidence that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Whether the evidence rebuts the presumption of timeliness involves factual findings by the administrative law judge. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-152 (1989) (en banc).

Employer contends Claimant's testimony at the formal hearing establishes his September 4, 2015 claim and any subsequent claims, including the current claim, are untimely.[6] Employer's Brief at 4-11. It points to Claimant's testimony that a physician, whose name he could not recall, told him shortly after he stopped working in 1996 that he was totally disabled due to pneumoconiosis. Employer's Brief at 7; *see* Hearing Transcript at 44.

On cross-examination, Claimant was asked if a doctor ever told him he was totally disabled due to pneumoconiosis. Hearing Transcript at 44. Claimant responded:

A. Yeah, after I was working.

Q. Do you remember what doctor told you, you were totally disabled by pneumoconiosis, after you left work?

A. I can't remember.

Q. Would it have been shortly after you left work?

A. Yeah. Or yes.

Q. So, you left work somewhere in 1996.

A. Yes.

[6] The administrative law judge noted Dr. Rasmussen diagnosed Claimant as totally disabled due to pneumoconiosis in a September 29, 1999 report prepared in conjunction with his initial claim. Decision and Order at 6; Director's Exhibit 1. Because Claimant's first claim was denied on December 30, 1999, Dr. Rasmussen's diagnosis is considered a misdiagnosis and did not trigger the statute of limitations. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616 (4th Cir. 2006); Decision and Order at 6.

Q. Would it [have] been -- is it fair to say in 2000 a doctor told you, you were totally disabled due to coal workers[’] pneumoconiosis?

A. Yes. Now some of these, I’m just doing the best I can on because --

Q. It’s okay.

A. -- that’s been a long time ago.

Q. It’s been about twenty years at this point?

A. Yeah. Yes.

Hearing Transcript at 44-45.

Contrary to Employer’s contention, the administrative law judge permissibly gave little weight to Claimant’s testimony because she found it “lack[ed] specificity” and “demonstrated confusion[,]” as he could not provide any specific information regarding the physician, the circumstances concerning the communication, or the date of the communication.[7] Decision and Order at 6; *see* 20 C.F.R. §725.308(c); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (the administrative law judge has discretion to assess witness credibility and the Board will not disturb her findings unless they are inherently unreasonable). She further noted Claimant’s wife’s testimony[8] that Claimant has memory problems[9] and Employer’s failure to support its allegation with any

[7] We note that in the quoted language, Employer suggests to Claimant that 2000 was the year of the communication. Claimant’s response can be viewed as consistent with the administrative law judge’s characterization of Claimant as demonstrating confusion, as he responds affirmatively but qualifies that with “I’m doing the best I can,” and “that’s been a long time ago.” Hearing Transcript at 44-45. Since the administrative law judge was present at the time of Claimant’s utterance, she is in the best position to judge whether Claimant was confused as to the date when he responded to counsel’s question. *See*); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-152 ; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

[8] Claimant’s wife was present at the formal hearing and was called to testify. Hearing Transcript at 51.

[9] Claimant’s wife testified “he gets confused on his short-term memory” and can’t remember his doctors’ names or those of his grandchildren or great-grandchildren. Hearing Transcript at 52-53. She also stated he has trouble remembering the dates of when things happened and is in the early stages of dementia. *Id*. at 52. She further testified she attended

concrete evidence that a physician actually communicated a medical determination of total disability due to pneumoconiosis to Claimant. Decision and Order at 6. Thus, she permissibly determined Employer failed to satisfy its burden to establish a medical determination of total disability due to pneumoconiosis was communicated to Claimant after the denial of his 1999 claim and more than three years before he filed his 2015 claim. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 6. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Employer failed to meet its burden to rebut the presumption of timeliness of Claimant's current claim. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000).

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 ACA, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 16-19. 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. ___, 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,[10] or that "no

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all of Claimant's doctors' appointments and did not recall any physician advising him he was totally disabled due to pneumoconiosis. *Id*. at 57-59.

[10] "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).

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.[11]

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 Dr. Zaldivar's opinion to disprove legal pneumoconiosis. Dr. Zaldivar opined that Claimant's reduced diffusion and mild resting hypoxemia are a result of extensive injuries to his lungs in 2017 and are unrelated to coal mine dust exposure. Employer's Exhibit 11 at 9. The administrative law judge found Dr. Zaldivar's opinion not well-reasoned or documented. Decision and Order at 28-29.

Employer argues the administrative law judge failed to provide valid reasons for discrediting Dr. Zaldivar's opinion, asserting it is the only credible opinion regarding the etiology of Claimant's respiratory impairment. Employer's Brief at 11-16. We disagree.

As the administrative law judge accurately noted, Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis because Claimant's "only abnormality" is one of reduced diffusion with mild hypoxemia, which has been consistently present since he fell from a rooftop in 2017, and is "most reasonably" the result of a lung contusion he sustained in the fall.[12] Employer's Exhibit 11 at 6-7, 9. The administrative law judge found Dr. Zaldivar's opinion unpersuasive because he did not adequately account for Claimant's 1999 qualifying blood gas studies indicating moderate to marked impairment in oxygen transfer with hypoxemia at rest and with exercise.[13] Decision and Order at 28-29; Director's Exhibit 1. Dr. Rasmussen conducted the September 29, 1999 blood gas study as part of

[11] The administrative law judge determined Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 31.

[12] Claimant fell from the roof of his one-story home while making repairs. Employer's Exhibit 4.

[13] A "qualifying" blood gas study yields results that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

the Department of Labor's complete pulmonary evaluation for Claimant's first claim. Director's Exhibit 1. Dr. Zaldivar acknowledged he was "concerned" by the hypoxemia demonstrated by Dr. Rasmussen's 1999 testing but relied on Dr. Forehand's 2015 non-qualifying blood gas studies to support his opinion,[14] even though he acknowledged they were "entirely different from any others on record."[15] Employer's Exhibit 11 at 6-7. The administrative law judge thus permissibly found Dr. Zaldivar's opinion "conclusory" and not persuasive to establish that Claimant's coal mine dust exposure was not a substantial contributing factor in his disabling oxygen impairment. Decision and Order at 29; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; Decision and Order at 28-29.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those opinions appropriate weight. *See Owens*, 724 F.3d at 558; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within her discretion in discrediting Dr. Zaldivar's opinion, we affirm her finding that Employer did not disprove legal pneumoconiosis. Thus, we affirm the administrative law judge's finding that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i).

[14] Dr. Forehand's October 13, 2015 blood gas study produced non-qualifying resting and exercise blood gas values.

[15] All of the more recent blood gas studies conducted on March 27, 2018, April 20, 2019, May 29, 2019, and June 15, 2019 produced qualifying values. *See* Decision and Order at 12-13; Director's Exhibit 15; Claimant's Exhibits 2-3; Employer's Exhibit 11.

[16] As the administrative law judge gave a valid reason for discrediting Dr. Zaldivar's opinion, we need not address Employer's other arguments regarding the additional reasons she gave for rejecting his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-14. Further, because Employer has the burden of proof and we have affirmed the administrative law judge's rejection of its medical expert, we need not address Employer's contention that the opinions of Drs. Green and Habre that Claimant has legal pneumoconiosis are not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-16.

Disability Causation

The administrative law judge next considered 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." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31-32. She permissibly discredited Dr. Zaldivar's opinion on disability causation because it was premised on his belief that Claimant does not have legal pneumoconiosis, contrary to her finding Employer did not disprove the existence of the disease.[17] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 31-32. We therefore affirm the administrative law judge's determination that Employer did not rebut he Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

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

DANIEL T. GRESH
Administrative Appeals Judge

[17] Dr. Zaldivar did not offer an opinion on this subject independent of his reasoning relating to the existence of legal pneumoconiosis.