U.S. Department of Labor

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

BRB No. 20-0378 BLA

BENNIE FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLAS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/28/2021
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
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 Larry A Temin, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC) Pikesville, Kentucky, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges

PER CURIAM:

Employer appeals Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-05346) rendered on a subsequent claim filed on October 31, 2016,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established twenty-seven years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable 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 pursuant to 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 erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of

[1] Claimant filed seven previous claims, three of which were withdrawn and "considered not to have been filed." 20 C.F.R. §725.306(b). The district director denied Claimant's most recent prior claim, filed on December 12, 2012, for failure to establish total disability. Director's Exhibit 4 at 3, 163.

[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] Where 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 he 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)(1); *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 did not establish total disability in his most recent prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id.*

[4] Employer includes one sentence in its brief that Claimant is not totally disabled but fails to explain this assertion or identify any error by the administrative law judge in weighing the evidence on total disability. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); Employer's Brief at 7. We therefore affirm the

benefits. The Director, Office of Workers' Compensation Programs, has not participated in the appeal.

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.[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 (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 Claimant has neither legal nor clinical pneumoconiosis,[6] or that "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); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015).

---

administrative law judge's finding that Claimant established total disability and we further affirm, as unchallenged, the administrative law judge's determination that Claimant established twenty-seven years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 11. Accordingly, we affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption and thereby established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Decision and Order at 11.

[5] Because Claimant performed his most recent coal mine employment in Kentucky, the Board applies the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

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."[7] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a de minimis contribution' and instead 'a contributing cause of some discernible consequence.'").

Employer relies on Drs. Dahhan's and Rosenberg's opinions to disprove legal pneumoconiosis. Dr. Dahhan opined that Claimant has a "significantly reversible obstructive pulmonary impairment" unrelated to coal mine dust exposure. Director's Exhibit 19. Dr. Rosenberg opined that Claimant "potentially has a component of legal [coal workers' pneumoconiosis (CWP)] based on the pattern of his impairment;" however, he also stated "the bronchodilator response [on pulmonary function testing] demonstrated would not be expected in relationship to legal CWP." Employer's Exhibit 6 at 6. The administrative law judge found Drs. Dahhan's and Rosenberg's opinions unpersuasive and insufficient to satisfy Employer's burden of proof. Employer's Brief at 4.

Employer first contends the administrative law judge erred in requiring its medical experts to "rule out" coal mine dust exposure as a causative factor for Claimant's impairment in order to disprove legal pneumoconiosis. Employer's Brief at 5. The administrative law judge, however, set forth the correct standard when he observed that Employer must prove Claimant's pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 14. Moreover, although the administrative law judge at times used the term "rule out," he ultimately rejected the opinions of Drs. Dahhan and Rosenberg as not well-reasoned, and not because their opinions failed to satisfy a heightened legal standard.

As the administrative law judge correctly noted, both Drs. Dahhan and Rosenberg opined Claimant does not have legal pneumoconiosis, in part, because Claimant's respiratory impairment was partially reversible after administration of bronchodilators

[7] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 14.

during pulmonary function testing. Decision and Order at 15; Director's Exhibit 19 at 2; Employer's Exhibit 6 at 4. The administrative law judge permissibly found their reasoning unpersuasive because they failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15.

The administrative law judge's function is to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in rejecting the opinions of Drs. Dahhan and Rosenberg, we affirm his finding that Employer did not disprove legal pneumoconiosis.[8] *See Young*, 947 F.3d at 407; Decision and Order at 15. Thus, we affirm the administrative law judge's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In order to disprove disability causation, Employer must establish "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). Because Employer raises no specific allegations of error regarding the administrative law judge's findings on disability causation, we affirm his determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[8] Because Employer bears the burden of proof and we have affirmed the administrative law judge's discrediting of Employer's experts, we need not address its argument that the administrative law judge erred in finding Dr. Raj's opinion that Claimant has legal pneumoconiosis reasoned and documented.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge