U.S. Department of Labor

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

BRB No. 19-0206 BLA

LARRY DALE CHARLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY LLC	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE/CHARTIS	)	DATE ISSUED: 03/27/2020
	)	
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 and Decision and Order on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (2016-BLA-05702) of Administrative Law Judge Lee J. Romero, Jr., 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 claim filed on July 14, 2015.[1]

The administrative law judge found claimant has twenty-seven years of underground coal mine employment[2] and is totally disabled by a 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,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found employer did not rebut the presumption and awarded benefits. The administrative law judge denied employer's motion for reconsideration.

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.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration if they are rational, supported by substantial evidence, and in

[1] Claimant filed two prior claims. Director's Exhibits 1, 2. The district director denied his most recent prior claim, filed on May 25, 2010, based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

[2] Claimant's most recent coal mine employment occurred in Kentucky. Hearing Transcript at 16-17. Accordingly, the Board will apply 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had 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) (2012); *see* 20 C.F.R. §718.305. We affirm, as unchallenged, the administrative law judge's finding that claimant invoked the presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

accordance with applicable law. 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, 362 (1965).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis[4] 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).

To establish the miner did not have legal pneumoconiosis, employer must demonstrate he 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 United States Court of Appeals for the Sixth Circuit had held that an employer may rebut legal pneumoconiosis by showing that the miner's coal mine employment "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 407.

The administrative law judge considered the opinions of Drs. Broudy and Rosenberg who opined claimant does not have legal pneumoconiosis. Dr. Broudy diagnosed chronic obstructive pulmonary disease (COPD) due to smoking. Employer's Exhibit 16. Dr. Rosenberg also diagnosed an obstructive pulmonary impairment due to smoking.[5] Employer's Exhibits 15, 19. The administrative law judge found their opinions

[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). 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).

[5] Employer asserts that the administrative law judge's "approximate finding" that claimant has "at least" a thirty-five pack-year smoking history is not sufficient to allow proper consideration of the medical opinions. Employer's Brief at 23-24. However, as discussed, *infra*, the administrative law judge permissibly found employers' physicians' explanations insufficient to establish rebuttal because they failed to adequately explain how

not well-reasoned because they did not credibly explain how they determined that claimant's years of coal mine dust exposure did not contribute, along with his smoking, to his pulmonary disease. Decision and Order on Reconsideration at 9-13.

We reject employer's contention the administrative law judge erred in so finding. Employer's Brief at 13-21. The administrative law judge found Dr. Broudy did not adequately explain why claimant's "slight" response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of, or contributor to, his remaining disabling impairment[6] and permissibly accorded less weight to his opinion. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *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); Decision and Order on Reconsideration at 10.

In regard to Dr. Rosenberg's opinion that claimant's obstructive pulmonary impairment was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor stated that when coal mine dust exposure is below 2 mg per cubic meter, "it is unlikely that a miner with no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Decision and Order on Reconsideration at 12; Employer's Exhibit 15 at 5. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[7] 20 C.F.R. §718.201(c); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000)

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they were able to dismiss coal mine dust exposure as impacting claimant's respiratory impairment (i.e. the physicians found that coal dust had no impact but did not adequately explain on what basis they were able to make this determination in the face of the rebuttable legal presumption to the contrary). Under the circumstances, employer has not shown that crediting claimant with a longer or more precise smoking history would have made any difference in the administrative law judge's finding as to the adequacy of their explanations. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[6] The pulmonary function study Dr. Broudy conducted on May 1, 2017, produced qualifying values both before and after the administration of a bronchodilator. Employer's Exhibit 16.

[7] The administrative law judge also noted Dr. Rosenberg did not indicate he had any knowledge that claimant's coal dust exposure was below "2mg/m." Decision and Order on Reconsideration at 12.

("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order on Reconsideration at 13.

The administrative law judge also permissibly discredited the opinions of Drs. Broudy and Rosenberg because they failed to adequately explain how they eliminated claimant's years of coal mine dust exposure as a significant contributor to his obstructive pulmonary impairment.[8] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order on Reconsideration at 10, 13.

Because the administrative law judge permissibly discredited the opinions of Drs. Broudy and Rosenberg,[9] the only opinions supportive of a finding that claimant did not have legal pneumoconiosis, we affirm his determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "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). He rationally discounted Drs. Broudy's and Rosenberg's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to

[8] Although the administrative law judge noted that Dr. Broudy opined that claimant's very long history of cigarette smoking was more than sufficient to cause claimant's obstructive impairment, he found that Dr. Broudy "failed to explain how claimant's . . . years of coal mine dust exposure did not exacerbate or contribute to [his] COPD." Decision and Order on Reconsideration at 10. The administrative law judge also found that Dr. Rosenberg "fail[ed] to provide any explanation as to how he eliminated claimant's [twenty-seven] years of exposure to coal mine dust exposure" as a cause of his COPD. *Id.* at 13.

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

disprove the existence of the disease.[10] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Reconsideration 14. Therefore, we affirm the administrative law judge's determination that employer failed to rebut legal pneumoconiosis as a cause of claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[10] Neither Dr. Broudy nor Dr. Rosenberg provided an explanation for their opinions apart from their determinations that claimant did not have legal pneumoconiosis.