U.S. Department of Labor

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

BRB No. 19-0221 BLA

JAMES L. RHINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2018-BLA-05102) of Administrative Law Judge Drew A. Swank on a claim filed on

February 13, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 21.15 years of underground coal mine employment[1] 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.[2] 30 U.S.C. §921(c)(4) (2012). He 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 presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in 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 claimant has neither legal nor clinical pneumoconiosis[4] or "no part

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

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.309(c); Decision and Order at 7.

[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). "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).

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.[5]

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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Basheda and Rosenberg that claimant does not have legal pneumoconiosis and Drs. Sood, Celko, and Krefft that he does. Decision and Order at 13-16.

Dr. Basheda opined claimant has no evidence of an obstructive respiratory impairment, but has a mild restrictive lung disease due to weight gain, coronary artery bypass grafting, and changes associated with previous cardiac surgery. Employer's Exhibit 2 at 20. He opined the restrictive lung disease is unrelated to coal mine dust exposure. *Id*. Dr. Rosenberg also opined claimant does not have an obstructive respiratory impairment, but has a restrictive lung impairment due to "bypass surgery, with pleural parenchymal scarring and elevation of the left hemidiaphragm." Employer's Exhibit 4 at 6. He concluded the impairment is unrelated to coal mine dust exposure. *Id*.

Dr. Sood diagnosed chronic bronchitis and progressive restrictive lung disease based on claimant's symptoms and pulmonary function testing. Claimant's Exhibit 2 at 10. He opined claimant's "exposure to coal mine dust was a substantially contributing cause" of these diseases because of its "adequate duration (21+ years); intensity (working underground and at the face of the mine); and latency (of approximately three decades between onset of exposure and onset of disease)."[6] *Id*. at 11. Dr. Celko diagnosed chronic asthmatic bronchitis based on claimant's fifteen year history of a daily productive cough and ten year history of daily wheezing. Director's Exhibit 15 at 4. He opined this disease

[5] The administrative law judge found employer disproved clinical pneumoconiosis but not legal pneumoconiosis. Decision and Order at 15-16. Although employer asserts the administrative law judge erred in admitting x-ray evidence on the issue of clinical pneumoconiosis in excess of the evidentiary limitations, it does not explain how this alleged error undermines the award of benefits. *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"); Employer's Brief at 5-6.

[6] Dr. Sood opined claimant's cigarette smoking history was not of sufficient duration to contribute to either lung disease. Claimant's Exhibit 2 at 11.

is due to claimant's coal mine dust exposure, cigarette smoking history, gastroesophageal reflux disease, and airway remodeling from asthma. *Id*. Dr. Krefft diagnosed a mixed obstructive and restrictive lung impairment caused by emphysema and chronic bronchitis. Claimant's Exhibit 6 at 2. She opined these lung diseases are "related to [claimant's] at least [twenty-one] years of confirmed coal mine employment." *Id*. She explained her diagnosis was based on claimant's "extensive primarily underground coal mine employment history, respiratory symptoms most notable for shortness of breath with activity, wheezing and cough with sputum (with cough and dyspnea noted during the last years of his coal mine employment), [and] history of treatment with inhaled bronchodilator therapy[.]" *Id*.

In weighing the conflicting evidence, the administrative law judge noted the regulations do "not require that coal mine dust exposure be the sole cause of a claimant's respiratory impairment" in order for claimant to have legal pneumoconiosis. Decision and Order at 16; *see* 20 C.F.R. §718.201(a)(2), (b). He found neither Dr. Basheda nor Rosenberg "persuasively explain[ed] how [c]laimant's coal mine dust exposure did not contribute to the restrictive defect they both admit he has." *Id*. at 27. Alternatively, he found the opinions of Drs. Sood, Celko, and Krefft are well-reasoned and documented and "best reflect the medical evidence" of record. *Id*. at 16. Thus he found employer failed to rebut the presumption of legal pneumoconiosis. *Id*.

Employer first asserts the opinions of Drs. Basheda and Rosenberg are the most well-reasoned and documented of record and sufficient to rebut the presumption of legal pneumoconiosis. Employer's Brief at 7, 9-10. Contrary to employer's argument, the administrative law judge permissibly found neither physician "persuasively explain[ed] how [c]laimant's coal mine dust exposure did not contribute to the restrictive defect they both admit he has." Decision and Order at 27; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522, at *4 (6th Cir. Jan 21, 2020); 20 C.F.R. §§718.201(b), 718.305(d)(2)(i). Employer does not specifically address the administrative law judge's finding. Thus we affirm his finding that employer's evidence is insufficient to rebut the presumption.

Notwithstanding the administrative law judge's discrediting of employer's evidence, we also affirm his alternative finding that the opinions of Drs. Sood, Celko, and Krefft diagnosing legal pneumoconiosis are credible. Decision and Order at 16. Specifically, we reject employer's assertion that neither Dr. Sood nor Dr. Krefft cited to objective evidence to support their opinions or explained the role of claimant's heart conditions in the development of his restrictive lung disease. Employer's Brief at 12-16. Dr. Sood reviewed the results of pulmonary function testing performed on October 29, 2014, December 23, 2015, March 20, 2017, and November 7, 2017, along with lung volume testing performed on October 29, 2014, March 20, 2017, and November 7, 2017.

Claimant's Exhibit 2 at 5-6. He explained his diagnosis of legal pneumoconiosis was based on pulmonary function testing evidencing "progressive restriction, lung volume measurement[s] confirming the presence of restriction, and diffusing capacity measurement showing moderately reduced value." *Id*. He stated claimant's coronary artery bypass surgery cannot explain claimant's restrictive lung disease because reductions in FVC, total lung capacity, and diffusing capacity occur within one week of surgery, but improve by approximately ninety-percent four to six months thereafter.[7] *Id*. at 12.

Dr. Krefft reviewed the March 20, 2017 and November 7, 2017 pulmonary function studies and based her opinion on "diagnostic testing" that evidences "substantial diffusion impairment and mixed restriction and obstruction (based on marked increase in lung volumes and residual volume measured higher out of proportion to other lung volumes)." *Id*. Addressing the role of claimant's "coronary artery disease, congestive heart failure, and pulmonary hypertension," Dr. Krefft noted they "do not explain the lung physiologic abnormalities and the temporal onset of [claimant's] respiratory symptoms of breathlessness and cough with sputum while exposed to substantial coal dust during his employment as a tubeman." She highlighted that claimant "switched to work as a supply motorman to avoid the coal dust and oil irritants that he encountered frequently during his job duties as a tubeman." *Id*.

Contrary to employer's argument, the administrative law judge permissibly found the opinions of Drs. Celko, Sood, and Krefft well-reasoned and documented, and "best reflect the medical evidence" of record. Decision and Order at 16; *see Balsavage*, 295 F.3d at 396. Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 16.

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). He permissibly discredited the opinions of Drs. Rosenberg and Basheda because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also 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.

[7] Dr. Sood also opined claimant's weight does not explain the restrictive lung disease because his FVC rapidly declined between 2015 and 2017, when his weight was stable. Claimant's Exhibit 2 at 12.

2013); Decision and Order at 27. We therefore affirm the administrative law judge's determination that employer failed to rebut pneumoconiosis as a cause of claimant's disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

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