U.S. Department of Labor

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

BRB No. 19-0248 BLA

GREGORY D. ALLEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RUST MINING, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 03/13/2020
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, 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-05530) of Administrative Law Judge Jason A. Golden 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[1] filed on May 9, 2017.

The administrative law judge found claimant has twenty-four years of surface coal mine employment[2] in conditions substantially similar to those in an underground mine 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.

On appeal, employer 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 of benefits. The Director, Office of Workers' Compensation Programs, has not 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 if it is rational,

[1] Claimant filed three prior claims. Director's Exhibits 1-3. The district director denied his most recent prior claim, filed on February 15, 2008, based on claimant's failure to establish any element of entitlement. Director's Exhibit 3.

[2] Claimant's most recent coal mine employment occurred in Kentucky. Hearing Transcript at 64. 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).

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).

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[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 claimant does not have legal pneumoconiosis,[5] 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). 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. Tuteur and Selby who opined claimant does not have legal pneumoconiosis. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due solely to smoking. Employer's 1, 2, 4. Dr. Selby diagnosed emphysema due to smoking and asthma unrelated to coal mine dust exposure. Employer's Exhibit 6. The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined that claimant's

[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] Based on the x-ray evidence, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 15.

years of coal mine dust exposure did not contribute, along with his smoking, to his pulmonary disease. Decision and Order at 17-20.

We reject employer's argument the administrative law judge applied an improper rebuttal standard by requiring Drs. Tuteur and Selby to "rule out" any contribution by claimant's coal mine dust exposure. Employer's Brief at 5-8. The administrative law judge correctly stated legal pneumoconiosis includes any chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 12; 20 C.F.R. §§718.201(a)(2),(b). Moreover, he properly considered whether employer established that claimant's coal mine dust exposure did not contribute "in part" to his pulmonary disease. *Young*, 947 F.3d at 405-407; Decision and Order at 18-20.

Additionally, as discussed, *infra*, the administrative law judge did not reject the opinions of Drs. Tuteur and Selby because they were not sufficient to meet a "rule out" standard. Rather, he found their opinions on legal pneumoconiosis not credible because they were not adequately explained. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (administrative law judge permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012) (administrative law judge may accord less weight to physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

We further reject employer's contention the administrative law judge erred in finding the opinions of Drs. Tuteur and Selby not well-reasoned. Employer's Brief at 5-8. He accurately noted Dr. Tuteur excluded a diagnosis of legal pneumoconiosis based on a statistical assessment of claimant's cigarette smoke and coal mine dust exposures. Decision and Order at 18. Citing medical literature, Dr. Tuteur explained that "smokers who [have] never mined" have a twenty percent risk of developing COPD compared to a one to two percent risk "of non[-]smoking miners" developing the disease. Employer's Exhibit at 1 at 6. He therefore opined that claimant's COPD was "uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id*. The administrative law judge permissibly discredited this opinion as based on generalities, rather than claimant's specific condition.[6] *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983);

[6] The administrative law judge noted that Dr. Tuteur acknowledged it was possible, although highly unlikely, that coal mine dust exposure influenced claimant's COPD. Decision and Order at 18; Employer's Exhibit 1 at 6.

Knizner v. Bethlehem Mines Corp., 8 BLR 1-5, 1-7 (1985) (physician opinion based on generalities rather than specifics may be discredited).

The administrative law judge also correctly noted Dr. Tuteur excluded legal pneumoconiosis, in part, based on his assessment that the pulmonary function studies he and Dr. Baker conducted showed claimant's obstruction "improved significantly" after use of a bronchodilator. Employer's Exhibit 2 at 3-4. The administrative law judge found his opinion unpersuasive because he failed to adequately explain why the "irreversible component" of claimant's respiratory impairment was not caused or contributed by claimant's years of coal mine dust exposure.[7] Decision and Order at 18; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swige*r, 98 F. App'x 227, 237 (4th Cir. 2004).

We also affirm the administrative law judge's finding that Dr. Selby's opinion is not well-reasoned. While acknowledging Dr. Selby's statements that claimant's emphysema and asthma were "not caused or exacerbated by his exposure to coal dust," the administrative law judge permissibly discredited his opinion because he "fail[ed] to provide any credible reason or rationale" for how he eliminated a contribution from claimant's twenty-four years of coal mine dust exposure. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *see also Looney*, 678 F.3d at 313-14; Decision and Order at 19-20.

Because the administrative law judge permissibly discredited the opinions of Drs. Tuteur and Selby,[8] 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)(2)(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

[7] In particular, Dr. Baker opined the post-bronchodilator pulmonary function studies he performed were "significantly reduced" and revealed a "moderately severe" obstructive defect. Claimant's Exhibit 1 at 2-3.

[8] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Tuteur and Selby, 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).

rationally discounted Drs. Tuteur's and Selby's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease. *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 at 20-21. 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 is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge