U.S. Department of Labor

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

BRB No. 20-0161 BLA

WILLIAM C. BISHOFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANA MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY (now BERKLEY INDUSTRIAL COMP)	)	DATE ISSUED: 03/30/2021
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Thomas, Thomas & Hafer LLP), Pittsburgh, Pennsylvania, for Employer and its Carrier.[1]

[1] On March 3, 2020, Christopher L. Wildfire of Margolis Edelstein (Pittsburgh, Pennsylvania) filed a petition for review and brief on behalf of Employer and its Carrier (Employer). On June 17, 2020, Sean B. Epstein of Thomas, Thomas & Hafer, LLP

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05055) rendered on a claim filed on September 12, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Based on the parties' stipulation, the administrative law judge credited Claimant with forty-eight years of coal mine employment, all of which she found occurred in underground mines. The administrative law judge further found the evidence establishes Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption, and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in admitting Claimant's post-hearing medical opinion evidence, and 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.

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.[3] 33 U.S.C. §921(b)(3), as incorporated

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(Pittsburgh, Pennsylvania) filed a request to be substituted as counsel for Employer. We hereby substitute Mr. Epstein as counsel for Employer. 20 C.F.R. §802.202(c).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes 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.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant's last coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional and the award of benefits should be vacated and the case remanded. Employer's Brief at 26-27. Employer cites the district court's rationale in *Texas* that the individual mandate for health insurance coverage contained in the ACA is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the individual mandate in the ACA unconstitutional, but vacated the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, 140 S.Ct. 1262 (2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption,[4] the burden shifted to Employer to establish he has neither legal[5] nor clinical pneumoconiosis,[6] or that "no part

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, BLR 1-710, 1-711 (1983); Decision and Order at 17.

[5] "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).

[6] "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

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.[7]

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, 1-159 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Basheda and Goodman that Claimant does not have legal pneumoconiosis but has chronic obstructive pulmonary disease (COPD) due to smoking and asthma. Employer's Exhibits 9, 10. She found neither opinion sufficiently documented and reasoned to carry Employer's burden to rebut legal pneumoconiosis.[8] Decision and Order at 21-22; Employer's Exhibits 9, 10. Employer does not specifically challenge these credibility determinations on their own terms. It instead argues that, to the extent the administrative law judge credited the contrary opinions of Drs. Krefft and Sood, she erred because they may have relied upon an x-ray reading that was not admitted into the record, and it is impossible to know if her consideration of their opinions affected her evaluation of the opinions of Drs. Basheda and Goodman. Employer's Brief at 25-26. We reject Employer's argument.

The administrative law judge explicitly found the opinions of Drs. Basheda and Goodman insufficiently documented and reasoned to rebut legal pneumoconiosis "irrespective of the weight [she] accorded to [C]laimant's physicians . . . ." Decision and Order at 22. The administrative law judge found Drs. Goodman and Basheda failed to adequately address the possible additive effects of coal mine dust and smoking, in light of Claimant's almost fifty years of exposure to coal mine dust. Decision and Order at 21-22; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also 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

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tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] The administrative law judge found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 21.

[8] The administrative law judge further found the opinions of Drs. Celko, Sood, and Krefft diagnosing legal pneumoconiosis did not assist Employer in rebutting the presumption. Decision and Order at 22.

coal dust exposure did not exacerbate claimant's smoking-related impairments). She also accorded less weight to Dr. Goodman's opinion that Claimant's COPD cannot be explained by his coal mine dust exposure because Dr. Goodman cited no medical literature for this proposition. Decision and Order at 21; *Balsavage*, 295 F.3d at 396; *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). Similarly, she discredited Dr. Basheda's opinion that Claimant's treatment with bronchodilators and steroids and the partial reversibility of his impairment exclude coal mine dust exposure as a cause of his COPD because Dr. Basheda cited no medical literature to support that opinion. Decision and Order at 21-22; *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163.

We agree with the administrative law judge that her dispositive criticisms are on their face completely independent of any weight she may have afforded the opinions of Drs. Krefft and Sood. Moreover, Employer has not attempted to articulate on appeal how discrediting those doctors' opinions would fill in the fundamental gaps in the opinions of Drs. Basheda and Goodman. Because Employer bears the burden to rebut the 411(c)(4) presumption, any error in admitting the post-hearing reports of Drs. Sood and Kreft thus is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's determination that Employer did not meet its burden to rebut legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24-25. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).[9]

The administrative law judge also found Employer failed to 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); Decision and Order at 25-26. We affirm this finding as unchallenged on appeal, *Skrack v. Island Creek Coal Co.*, BLR 1-710, 1-711 (1983), and therefore affirm the administrative law judge's determination that Employer failed to rebut the presumed fact of disability causation. 20 C.F.R. §718.305(d)(1)(ii).

[9] Given our holding, we need not consider Employer's arguments that the reports of Drs. Sood and Krefft were improperly admitted.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge