U.S. Department of Labor

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

BRB No. 20-0207 BLA

BENNY J. McPEAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
XMV, INCORPORATED	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE/ CHARTIS	)	DATE ISSUED: 05/27/2021
	)	
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Timothy J. McGrath's Decision and Order Awarding Benefits (2017-BLA-06195) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on October 21, 2016.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that Claimant had 21 years of underground coal mine employment. Decision and Order at 3. He found Claimant totally disabled from a respiratory or pulmonary impairment and, therefore, entitled to the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] *Id.* at 18. Although he found Employer disproved clinical pneumoconiosis, he found it did not disprove legal pneumoconiosis or establish that no part of Claimant's total disability is due to pneumoconiosis. *Id.* at 21, 27-29. The administrative law judge therefore awarded benefits. *Id.* at 30.

On appeal, Employer contends the administrative law judge erred in finding it did not rebut the presumption that Claimant has legal pneumoconiosis or that his total disability is due to the disease. Claimant filed a response brief, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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.[2] 33 U.S.C. §921(b)(3), as incorporated

[1] 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. 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).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant last performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Tr. at 39.

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

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

Because Claimant successfully invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[3] nor clinical pneumoconiosis, 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). The administrative law judge found Employer failed to establish rebuttal by either method.

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." 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). Employer contends the administrative law judge erred in finding it did not rebut the presumption of legal pneumoconiosis through the opinions of Drs. Rosenberg and Zaldivar. It maintains he erroneously stated Dr. Rosenberg did not address whether Claimant has some degree of obstructive impairment or its etiology, and incorrectly found his opinion inconsistent with the objective testing he administered. Employer also contends Dr. Zaldivar adequately explained his conclusions and the administrative law judge failed to provide any rationale for crediting Dr. Forehand's opinion diagnosing legal pneumoconiosis over Dr. Zaldivar's contrary conclusion. We reject these contentions.

Dr. Rosenberg found Claimant has a mild restrictive impairment due to his obesity. *See* Employer's Exhibit 2 at 10. He also noted Claimant "potentially has a degree of smoking-related emphysema which lowers the diffusing capacity" that "would not be expected in the presence of legal [pneumoconiosis]." *Id.* Dr. Zaldivar agreed with Dr. Rosenberg that the restriction on Claimant's lung capacity was likely due to his obesity. *See* Employer's Exhibit 4 at 52. He also stated there is "no evidence of any intrinsic pulmonary impairment," but added that any pulmonary impairment from the mild airway obstruction exhibited on Dr. Forehand's testing is the result of obesity and smoking and is

[3] "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).

unrelated to Claimant's coal mine work. *Id.* He thus concluded Claimant does not have either clinical or legal pneumoconiosis. *Id.* The administrative law judge found these opinions are neither well-documented nor well-reasoned and the preponderance of the evidence instead establishes Claimant has legal pneumoconiosis.[4] Decision and Order at 25-26. He therefore concluded Employer did not rebut the Section 411(c)(4) presumption. *Id.* at 26-27.

The administrative law judge has the discretion to weigh the evidence and draw inferences therefrom. *See Underwood v. Elkay Mining Inc.*, 105 F.3d 946 (4th Cir. 1997). He fully considered the relevant evidence and acted within his discretion in finding the opinions of Drs. Rosenberg and Zaldivar are not well-explained or well-reasoned and therefore unpersuasive. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 524 (4th Cir. 2013). He rationally discounted Dr. Rosenberg's opinion because although the physician opined Claimant's restrictive impairment is unrelated to coal mine dust exposure, he did not address evidence that Claimant also has some degree of obstruction or offer an opinion on its cause. Decision and Order at 25-26. As the administrative law judge found, Dr. Rosenberg was aware Dr. Forehand diagnosed a mixed obstructive and restrictive defect on pulmonary function testing. Employer's Exhibit 2 at 1. But, aside from summarizing his own pulmonary function testing as showing "restriction without obstruction," the administrative law judge accurately found Dr. Rosenberg did not "address Dr. Forehand's conclusion that Claimant had an obstructive impairment," "indicate whether he concurred or did not concur," or "address the etiology of such condition." Decision and Order at 25. The administrative law judge also found Dr. Rosenberg's failure to address this evidence problematic given that Dr. Zaldivar agreed Dr. Forehand's testing revealed "airway obstruction," Employer's Exhibit 4 at 6, thus "indicating Dr. Forehand's conclusion is supported by at least one other physician." Decision and Order at 26.

Contrary to Employer's contention, the administrative law judge also permissibly found Dr. Rosenberg's opinion undermined by an internal inconsistency. Decision and

[4] In contrast, the administrative law judge found the opinions of Drs. Forehand and Raj that Claimant's occupational coal mine dust exposure played a significant role in his disabling pulmonary impairment, "support the proposition Claimant has legal pneumoconiosis." Decision and Order at 27. In this regard, Dr. Forehand opined that Claimant's coal mine employment caused a "chronic coal mine dust-induced lung disease" and substantially contributed to and caused, in conjunction with his cigarette smoking, his "obstructive lung disease." Director's Exhibit 13 at 4 (emphasis removed). Dr. Raj diagnosed Claimant with clinical pneumoconiosis and chronic obstructive pulmonary disease due to both his coal mine dust exposure and smoking. Claimant's Exhibit 2 at 3-4.

Order at 26. Specifically, in his report Dr. Rosenberg concluded that "the alveolar capillary bed within [Claimant's] lungs is intact and not chronically scarred in relationship to past coal mine dust exposure." Employer's Exhibit 2 at 4. Yet, his interpretive comments on the pulmonary function testing state that the reduction in the diffusing capacity indicated a "possible loss of the alveolar capillary bed." Director's Exhibit 2 at 13; *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984).

Dr. Zaldivar found no intrinsic pulmonary impairment, attributed Claimant's restriction "entirely" to obesity, and stated his obstruction "can easily be attributed to his smoking habit." Employer's Exhibit 4 at 6. Dr. Zaldivar did not, however, specifically explain how he concluded that Claimant's respiratory impairments are not significantly related to or substantially aggravated by coal mine dust exposure, along with obesity and smoking. We hold the administrative law judge rationally discounted Dr. Zaldivar's opinion because he "dismissively concluded any obstructive impairment could be explained by Claimant's smoking history" without adequately addressing whether Claimant's coal mine dust exposure significantly contributed to either the obstructive or restrictive aspect of Claimant's totally disabling pulmonary impairment.[5] Decision and Order at 26; *see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995).

Having rejected all of the opinions supportive of Employer's burden, the administrative law judge concluded Employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 26-27. Because the administrative law judge's weighing of the evidence is permissible and supported by substantial evidence, we affirm his finding that the opinions of Drs. Rosenberg and Zaldivar do not disprove the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). We therefore affirm the administrative law judge's determination that Employer failed to rebut the presumption in this manner. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Disability Causation

The administrative law judge next addressed whether Employer rebutted the Section 411(c)(4) presumption by establishing "no part" of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Employer contends the administrative law judge erred in rejecting the opinions of Drs. Rosenberg and Zaldivar. The administrative law judge rationally discredited their

[5] Contrary to Employer's contention, given the administrative law judge's permissible rejection of Dr. Zaldivar's opinion, he was not required to provide any explanation for favoring Dr. Forehand's pulmonary evaluation.

disability causation opinions because neither diagnosed legal pneumoconiosis, which is contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" absent "specific and persuasive reasons" for concluding the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 28-29. He further noted the opinions of Drs. Forehand and Raj do not assist Employer in meeting its burden on rebuttal. *See* Decision and Order at 29. He therefore concluded Employer failed to rebut the presumption. *Id.* As this conclusion is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that Employer did not establish that no part of Claimant's totally disabling pulmonary impairment is due to legal pneumoconiosis. *Epling*, 783 F.3d at 504-05. Thus, we affirm the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge