U.S. Department of Labor

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

BRB No. 20-0283 BLA

AARON N. LAPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAKOTA WESTMORELAND CORPORATION	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 05/25/2021
WORKFORCE SAFETY & 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 in an Initial Claim of Stephen R. Henley, Chief Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Michelle S. Gerdano (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Chief Administrative Law Judge Stephen R. Henley's Decision and Order Awarding Benefits in an Initial Claim (2019-BLA-05242) rendered on a claim filed on October 16, 2017 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with thirty-four years of surface coal mine employment in conditions substantially similar to those in an underground mine, and found he established 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.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively it contends the administrative law judge erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenge to the Section 411(c)(4) presumption. Employer filed a reply brief reiterating its arguments.

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

[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.

[2] 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.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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. Employer's Brief at 22-24. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.*

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded 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), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Further, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). 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 decline to hold that the Section 411(c)(4) presumption is unconstitutional.

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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit because Claimant performed his coal mine employment in North Dakota. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[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). This definition encompasses 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 pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the

[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 did not establish rebuttal by either method.[5]

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 11-22. Employer's arguments have no merit.

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."[6] 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, 159 (2015) (Boggs, J., concurring and dissenting).

Employer relied on the medical opinions of Drs. Goodman and Basheda. Dr. Goodman diagnosed chronic obstructive pulmonary disease (COPD) caused by Claimant's "longstanding history of tobacco smoking." Employer's Exhibit 9 at 8-9. He also diagnosed a restrictive pulmonary impairment and a gas exchange impairment due to Claimant's obesity. *Id*. He concluded coal mine dust exposure "played no part" in the COPD, restrictive impairment, or gas exchange impairment. *Id*. The administrative law judge permissibly found Dr. Goodman's opinion "conclusory" because the doctor "did not explain how the underlying documentation supported" his opinion, or set forth "how he eliminated Claimant's thirty-four years of coal [mine] dust exposure as a possible

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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] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 7.

[6] Employer generally argues the administrative law judge applied an incorrect legal standard when weighing the medical opinions on rebuttal, but identifies no basis for this argument. Employer's Brief at 21-22. The administrative law judge correctly observed that legal pneumoconiosis includes "any chronic . . . pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 7-8. He thus stated Employer has the burden of establishing "the Miner's thirty-four years of coal dust exposure did not cause, or significantly contribute to, his totally disabling respiratory or pulmonary impairment." *Id*.; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

contributing cause of his respiratory impairment." Decision and Order at 8; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405-09 (6th Cir. 2020); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74, n.4 (4th Cir. 2017) (administrative law judge permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause").

Dr. Basheda diagnosed Claimant with cigarette smoke-induced COPD with an asthmatic component. Employer's Exhibit 10 at 17-19. He opined the COPD is "not related to legal pneumoconiosis." *Id*. He excluded legal pneumoconiosis, in part, because Claimant's February 8, 2018 pulmonary function study evidenced an "acute bronchodilator response," improving from severe to moderate after the administration of a bronchodilator. *Id*. at 6. He also noted the obstruction was "partially reversible" on a November 21, 2018 study and a January 26, 2018 study. *Id*. at 8-9. Based on the demonstrated bronchoreversibility, he diagnosed Claimant with asthma. *Id*. He also explained "[c]oal dust obstruction is neither reversible [nor] partially reversible" and attributed the residual impairment to cigarette smoking because cigarette smoking damages the lungs far more severely than coal mine dust exposure. *Id*. at 14-19.

The administrative law judge permissibly found this reasoning unpersuasive because Dr. Basheda failed to adequately explain why the irreversible portion of Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Young*, 947 F.3d at 405-09; *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); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 8-9. Moreover, the administrative law judge permissibly found Dr. Basheda failed to adequately explain why Claimant's coal dust exposure did not aggravate Claimant's asthma. Decision and Order at 8-9; *see Young*, 947 F.3d at 405-09; *Stallard*, 876 F.3d at n.4; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting).

Because the administrative law judge acted within his discretion in rejecting the opinions of Drs. Goodman and Basheda,[7] we affirm his finding that Employer did not

[7] Employer also argues the administrative law judge erred by failing to weigh Dr. Garman's medical opinion, which is contained in the treatment records. Employer's Brief at 16-19. During Claimant's Initial Annual Wellness visit on July 3, 2019, Dr. Garman listed "black lung disease" and COPD under the Active Problem list section of this report. Employer's Exhibit 4 at 8. He did not indicate whether the COPD was significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*. Thus Dr. Garman's opinion would not assist Employer in satisfying its burden on rebuttal, and any error by the

disprove legal pneumoconiosis and his determination that it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established "no part of the miner'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 10. He rationally discounted the disability causation opinions of Drs. Goodman and Basheda because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease.[9] *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 10. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

administrative law judge in not considering his opinion is harmless. 20 C.F.R. §718.305(d)(1)(i)(A); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Dr. Rose diagnosed legal pneumoconiosis. Director's Exhibit 3. The administrative law judge correctly found her opinion does not aid Employer on rebuttal. Decision and Order at 9. Thus we reject Employer's argument that the administrative law judge erred by failing to weigh her opinion. Employer's Brief at 11-12.

[9] Neither physician offered an opinion on this subject independent of his reasoning relating to the absence of pneumoconiosis.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge