U.S. Department of Labor

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

BRB No. 20-0288 BLA

RALPH D. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	DATE ISSUED: 05/27/2021
Employer-Petitioner	)	
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Dana Rosen's Decision and Order Awarding Benefits (2018-BLA-05740) rendered on a subsequent claim filed on June 8, 2016,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 17.75 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Further finding Employer did not rebut the presumption, the administrative law judge awarded benefits.

On appeal, Employer argues 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 participated in this appeal.[4]

---

[1] Claimant filed previous claims on July 6, 1999, and March 12, 2007. Although the district director found Claimant established total disability, the evidence was insufficient to establish the existence of pneumoconiosis, also precluding a finding that Claimant is totally disabled due to pneumoconiosis. Director's Exhibit 1. As Claimant withdrew a third claim, it is "considered not to have been filed." *Id.*; *see* 20 C.F.R. §§725.306(b), 725.309(d).

[2] 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.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish pneumoconiosis in his previous claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and thereby established a change in

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (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 Claimant has neither legal nor clinical pneumoconiosis,[6] 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). 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*, 25 BLR at 1-155 n.8. Employer relies on Drs.

---

an applicable condition of entitlement at 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 44, 58.

[5] The record reflects Claimant performed his last coal mine employment in West Virginia. Decision and Order at 4; Hearing Transcript at 6, 20. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] "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 that is 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).

McSharry's and Rosenberg's opinions to disprove legal pneumoconiosis. Employer contends the administrative law judge erred in finding their opinions inadequately reasoned and, therefore, insufficient to satisfy its burden of proof. Decision and Order at 51-54. We disagree.

Dr. McSharry examined Claimant on November 30, 2017, and also reviewed the Department of Labor complete pulmonary evaluation by Dr. Green from Claimant's prior 2016 claim. He opined Claimant has "significant impairment, namely exertional desaturation [based on the blood gas study] and obstructive lung disease [based on the pulmonary function study] with diffusion abnormalities." Employer's Exhibit 1 at 2. Dr. McSharry opined that "these [impairments] are fully explained by his long history of smoking." *Id*. He stated there is "no objective evidence to implicate coal dust exposure as contributing to his disability or the impairment that is the cause of his disability," or "that coal dust exposure has caused or added to these abnormalities." *Id*.

During his deposition, Dr. McSharry indicated he had reviewed additional evidence, including pulmonary function studies conducted after the examination he conducted. He reiterated that Claimant has asthma but stated he was no longer certain that smoking-related emphysema is the sole cause of Claimant's exertional desaturation. He also did not offer a definitive opinion as to the cause of Claimant's diffusion abnormality. Employer's Exhibit 9 at 20, 29-34. He nonetheless opined that Claimant's impairments are unrelated to coal dust exposure.[7] Employer's Exhibit 9 at 34-43.

Contrary to Employer's assertion, we see no error in the administrative law judge's observation that Dr. McSharry was unclear as to the cause of Claimant's respiratory impairment. Decision and Order at 52. The administrative law judge permissibly found Dr. McSharry's opinion not well-reasoned because, in excluding a diagnosis of legal pneumoconiosis, he did not adequately explain how "he was able to determine that Claimant's condition was not caused by both his occupational coal dust exposure and its interplay with Claimant's smoking history and medical conditions." Decision and Order at

[7] Dr. McSharry noted Claimant's obstructive respiratory impairment progressed significantly between 2016 and 2019. He stated this rapid deterioration over a short period of time was inconsistent with an irreversible lung disorder like coal workers' pneumoconiosis, which progresses slowly. Employer's Exhibit 9 at 18-25, 35. Dr. McSharry opined the "most reasonable explanation" for Claimant's obstruction is asthma, though he acknowledged Claimant's case is "unusual." *Id*. at 41. He further acknowledged that coal mine dust exposure can cause hypoxemia and a diffusing capacity impairment, but felt he needed additional testing to determine if Claimant's impairment was related to a "pulmonary" condition. *Id*. at 41-42. Again, Dr. McSharry nonetheless excluded coal dust exposure as contributing to Claimant's impairment. *Id*. at 34.

52; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject Employer's assertion that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on legal pneumoconiosis. Dr. Rosenberg opined Claimant suffers from asthma unrelated to coal mine employment and also has disabling emphysema due solely to smoking. Employer's Exhibit 2. Relying on medical articles, Dr. Rosenberg reasoned that Claimant's emphysema was caused by smoking because coal dust particles on average are larger than smoking particles. *Id*. Thus, he opined the propensity for developing smoking-related emphysema is greater than for developing coal mine dust-related emphysema – "it's just natural that the small particles from smoke are able to get deeper into the lungs and cause diffuse destruction of the alveolar capillary bed and emphysema." Employer's Exhibit 10 at 33.

The administrative law judge accurately noted, however, that Dr. Rosenberg admitted coal mine dust particles vary in size and may be "sub-micron" like smoking particles. Employer's Exhibit 10 at 34; *see* Decision and Order at 54. Thus, the administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he did not adequately explain "how he was able to separate out any additive effect" from Claimant's specific coal mine dust exposure in causing his emphysema or contributing to his respiratory impairment. *See Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; Decision and Order at 54. The administrative law judge also correctly noted Dr. Rosenberg's opinion conflicted with Dr. McSharry's opinion as to whether all of Claimant's respiratory impairment can be explained by smoking. Decision and Order at 54.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within her discretion in rejecting the opinions of Drs. McSharry and Rosenberg, we affirm her finding that Employer did not disprove legal pneumoconiosis.[8] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th

[8] Because Employer has the burden of proof and the administrative law judge provided valid reasons for discrediting the opinions of Drs. McSharry and Rosenberg, we need not address Employer's remaining arguments regarding her weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, we need not address Employer's contentions regarding the administrative law judge's weighing of Drs. Raj's, Green's, and Nader's opinions; as these physicians

Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-17 (4th Cir. 2012); Decision and Order at 55-56. Thus, we affirm the administrative law judge's determination that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis.[9] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In order to disprove disability causation, Employer must 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). Contrary to Employer's contention, the administrative law judge permissibly found Drs. McSharry's and Rosenberg's opinions on the cause of Claimant's respiratory disability not credible for the same reasons she rejected them on legal pneumoconiosis. Decision and Order at 57. Further, the administrative law judge rationally discounted their opinions on disability causation because they did not diagnose legal pneumoconiosis.[10] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 57. We therefore affirm her finding Employer failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

diagnosed legal pneumoconiosis, their opinions do not support Employer's burden on rebuttal.

[9] Consequently, we need not address Employer's challenge to the administrative law judge's finding that it also failed to establish Claimant does not have clinical pneumoconiosis. Employer's Brief at 9-13.

[10] Neither doctor offered an opinion on disability causation that was not dependent on their conclusions on legal pneumoconiosis.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge