U.S. Department of Labor

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

BRB No. 20-0307 BLA

RONALD CONKLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 05/20/2021
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

William M. Bush (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: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-06003) rendered on a claim filed on July 16, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 31.09 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, 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). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a response brief in support of the award.

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

[1] Section 411(c)(4) 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 or pulmonary 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 findings that Claimant established thirty-one years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 7.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 3; Hearing Transcript at 32-33.

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 invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant 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); *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 1-159.

Employer relies on the opinions of Drs. Basheda and Rosenberg to rebut the presumption. Dr. Basheda opined Claimant does not have legal pneumoconiosis and diagnosed "moderate tobacco induced obstructive lung disease with an asthmatic component and hyperinflation/air trapping." Employer's Exhibit 2 at 30. Dr. Rosenberg opined Claimant has chronic obstructive pulmonary disease in the form of emphysema and chronic bronchitis due to smoking and unrelated to coal mine dust exposure. Employer's Exhibit 4 at 7-15. The administrative law judge found their opinions not well reasoned and thus concluded Employer did not disprove legal pneumoconiosis. Decision and Order at 27-30.

[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).

Employer asserts the administrative law judge improperly rejected Dr. Basheda's opinion as contrary to the preamble to the 2001 revised regulations based on an erroneous belief it establishes "all obstructive lung disease is pneumoconiosis." Employer's Brief at 11, *citing* Decision and Order at 15. But the administrative law judge did not discuss the preamble in relation to Dr. Basheda's opinion. Rather, he permissibly found Dr. Basheda "provided no reference to a medical text, treatise, or study to support his assertions" that Claimant's impairments could not be attributed to coal mine exposure. Decision and Order at 16; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002). He also permissibly found Dr. Basheda's bare "assertion that there is 'no reason to implicate' coal dust exposure for causing Claimant's obstruction" falls short of affirmatively establishing Claimant's coal mine dust exposure did not contribute to his respiratory impairment. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); Decision and Order at 16. We therefore affirm the administrative law judge's finding that Dr. Basheda's opinion is insufficient to establish that Claimant does not have legal pneumoconiosis.

Employer also generally asserts the administrative law judge erred in discounting Dr. Rosenberg's opinion.[5] Employer's Brief at 18-19. Although Employer summarizes his opinion and summarily states it supports rebuttal, Employer raises no specific challenge to the administrative law judge's finding it is based on statistical generalities and does not address the irreversible component of Claimant's respiratory impairment. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 17. We therefore affirm the administrative law judge's determination that Dr. Rosenberg's opinion is insufficient to disprove legal pneumoconiosis. Decision and Order at 17.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Employer failed to establish Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal

[5] We need not address Employer's challenges to the weight that the administrative law judge assigned to the opinions of Drs. Sood, Krefft, and Celko because they each diagnosed legal pneumoconiosis and, thus, their opinions do not assist Employer in satisfying its burden of proof. Employer's Brief at 17-21.

pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[6] 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). The administrative law judge found Drs. Basheda's and Rosenberg's opinions on the cause of Claimant's respiratory disability not credible for the same reasons he rejected them on legal pneumoconiosis. Decision and Order at 29-30. Employer does not challenge the administrative law judge's findings on disability causation, other than to reassert its argument that Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the administrative law judge's finding that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29-30.

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

[6] 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 13-17.