U.S. Department of Labor

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

BRB No. 20-0308 BLA

WILLIE CAUSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY INCORPORATED	)	
	)	
	)	DATE ISSUED: 05/18/2021
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM

Employer appeals Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2018-BLA-06245) rendered on a claim filed pursuant to the

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on April 27, 2017.[1]

The administrative law judge credited Claimant with at least fifteen 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). He therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs (the Director), 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.[4] 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).

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[1] This is Claimant's third claim for benefits. The district director denied Claimant's most recent claim on June 8, 2007 because he did not establish any element of entitlement. Director's Exhibits 2, 5.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established at least fifteen years of underground coal mine employment and total disability and, therefore, established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 725.309; Decision and Order at 4, 14.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[5] 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 did not establish rebuttal by either method.

Clinical Pneumoconiosis

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of clinical pneumoconiosis. Employer's Brief at 11-14. Employer's arguments have no merit.

The administrative law judge considered seven interpretations of three x-rays. Decision and Order at 15-16. All of the interpreting physicians are dually-qualified Board-certified radiologists and B readers. *Id*. Drs. DePonte and Ramakrishnan read the June 26, 2017 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative.[6] Director's Exhibit 16; Claimant's Exhibits 2, 3; Employer's Exhibit 2. Dr. DePonte read the October 17, 2017 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative. Director's Exhibit 22; Claimant's Exhibit 2. Dr. Crum read the September 24, 2018 x-ray as positive for pneumoconiosis, while Dr. Kendell read it as negative. Claimant's Exhibit 1; Employer's Exhibit 1.

The administrative law judge found the June 26, 2017 x-ray positive for pneumoconiosis based on the preponderance of positive readings by dually-qualified radiologists and the readings of the October 17, 2017 and September 24, 2018 x-rays in equipoise. Decision and Order at 15-16. He thus concluded the x-ray evidence is positive for clinical pneumoconiosis and insufficient to rebut the presumption of the disease. *Id*.

[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). 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 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).

[6] Dr. Lundberg interpreted the June 26, 2017 x-ray for quality only. Director's Exhibit 12.

Employer contends the administrative law judge erred in weighing these conflicting readings without considering the doctors' "academic appointments."[7] Employer's Brief at 11-14. We disagree. An administrative law judge is not required to assign greater weight to the x-ray interpretation of one physician over another based on their academic appointments but, rather, may permissibly accord them equal weight based on their dual qualifications as radiologists and B readers. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

The administrative law judge properly conducted both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' radiological qualifications, and permissibly found the June 26, 2017 x-ray positive for pneumoconiosis and the readings of the October 17, 2017 and September 24, 2018 x-rays in equipoise.[8] *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 15-16. Because the record contains one positive x-ray and readings of two others that are in equipoise, the administrative law judge rationally found the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 16.

In weighing the medical opinions, the administrative law judge correctly determined Drs. Tuteur and Jarboe excluded clinical pneumoconiosis because they assumed the x-rays are negative for the disease. Employer's Exhibits 3, 5, 7. He permissibly rejected their opinions as conflicting with his determination that the x-ray evidence is positive. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16-17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that

[7] Although Employer refers to a January 26, 2016 x-ray when discussing the readings of Drs. DePonte, Meyer, and Ramakrishnan, the record does not include any readings of an x-ray taken on this date. Employer's Brief at 11-14. We presume Employer intended to refer to the January 26, 2017 x-ray and its associated readings.

[8] The administrative law judge also reviewed the x-rays contained in Claimant's medical treatment records. Decision and Order at 16; Director's Exhibit 2; Employer's Exhibits 8 and 11. He found none of the x-rays address clinical pneumoconiosis and thus are not probative for determining the presence of the disease. Decision and Order at 16. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711.

Employer did not disprove clinical pneumoconiosis based on the x-ray and medical opinion evidence. 20 C.F.R. §718.305(d)(1)(i)(B).

Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we address the administrative law judge's findings on legal pneumoconiosis as they are relevant to rebuttal of the presumed fact of disability causation. 20 C.F.R. §718.305(d)(1)(i), (ii).

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 14-22. 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." 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). The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The administrative law judge weighed the opinions of Drs. Tuteur and Jarboe. Decision and Order at 18-20. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD). Employer's Exhibit 3 at 6-7. He stated the "clinical picture of COPD, whether caused by the inhalation of tobacco smoke or coal mine dust, is generally similar." *Id*. Therefore Dr. Tuteur conceded that "in an individual person, one cannot use available characteristics to differentiate between these two etiologies." *Id*. Nonetheless, he concluded Claimant's COPD is due to cigarette smoking and the lingering effects of childhood pneumonia, and is unrelated to coal mine dust exposure. *Id*. He explained studies establish that "never smoking coal miners develop COPD phenotype about 1% of the time or less," whereas "never mining cigarette smokers develop the COPD phenotype about 20% of the time." *Id*. Thus Dr. Tuteur concluded "it is possible, but highly unlikely, that coal mine dust influenced Claimant's COPD." *Id*.

The administrative law judge permissibly found Dr. Tuteur's opinion on the rarity of coal dust-induced COPD compared to smoking conflicts with the medical science set forth in the preamble to the 2001 revised regulations indicating that "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." Decision

and Order at 16, *citing Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *see also Young*, 947 F.3d at 408-09; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,938-79,971 (Dec. 20, 2000) (recognizing coal mine dust can cause clinically significant obstructive lung disease).[9] The administrative law judge also permissibly found Dr. Tuteur's opinion unpersuasive because he failed to adequately explain why coal mine dust exposure did not contribute to or aggravate Claimant's COPD along with smoking. *See Young*, 947 F.3d at 405-09; *Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; 20 C.F.R. §§718.201(a)(2), (b); Decision and Order at 16-17.

Dr. Jarboe diagnosed an obstructive respiratory impairment based on pulmonary function testing.[10] Employer's Exhibit 5 at 7-9. He opined the impairment is due to asthma and cigarette smoking, and unrelated to coal mine dust exposure. *Id*. He excluded legal pneumoconiosis, in part, because Claimant "had a completely normal [pulmonary function study five] years after leaving the mining industry," which indicates Claimant does "not have an individual susceptibility to the effects of coal [mine] dust." *Id*. The administrative law judge permissibly found this reasoning inconsistent with the regulations, which state pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *see also* 65 Fed. Reg. at 79,971 ("it is clear that a miner who may be asymptomatic and without significant impairment at retirement

[9] Contrary to Employer's contention, an administrative law judge may evaluate expert opinions in conjunction with the preamble to the revised regulations, as it sets forth the Department of Labor's resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-28 (9th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Employer's Brief at 14-22.

[10] Dr. Jarboe also diagnosed a restrictive impairment due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 5.

can develop a significant pulmonary impairment after a latent period"); Decision and Order at 19.

Dr. Jarboe also noted Claimant's obstructive impairment "has shown significant response to bronchodilating agents" and a "marked change" within a "short period of time." Employer's Exhibit 5 at 7-9. Because coal mine dust inhalation "causes a fixed impairment that does not respond to bronchodilation," Dr. Jarboe excluded legal pneumoconiosis. *Id*. The administrative law judge found, however, that "bronchodilators improved Claimant's condition" on "only one of his post-bronchodilator tests" and the record contains two other post-bronchodilator studies that produced qualifying values.[11] Decision and Order at 19. He rationally found Dr. Jarboe failed to adequately explain why Claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the irreversible portion of his impairment. *See 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); Decision and Order at 19.

Because the administrative law judge acted within his discretion in rejecting the opinions of Drs. Tuteur and Jarboe, we affirm his finding that Employer did not disprove legal pneumoconiosis and his determination that it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 20.

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 20-21. He rationally discounted the disability causation opinions of Drs. Tuteur and Jarboe because they did not diagnose clinical or legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of either disease.[12] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 20-21. 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.

[11] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

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

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge