U.S. Department of Labor

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

BRB No. 20-0121 BLA

HARVEY J. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAY BRANCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/30/2020
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (Kate S. O'Scannlain, 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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-05799) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on January 18, 2017.[1]

The administrative law judge found Claimant has at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer summarily contends that Section 1556 of the Patient Protection and Affordable Care Act (ACA), which revived the Section 411(c)(4) presumption, "violates Article II of the United States Constitution." Employer's Brief at 2; Pub. L. No. 111-148, §1556 (2010). On the merits of entitlement, Employer argues the administrative law judge erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also asserts the administrative law judge erred in concluding it did not rebut the presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's contention that the Section 411(c)(4) presumption is unconstitutional.[3]

The 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] Claimant filed a prior claim, but subsequently withdrew it. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty years of qualifying coal mine employment. *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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Constitutionality of Section 411(c)(4)

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 sets forth a one sentence, unsupported conclusion that revival of the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 2. The Board's procedural rules require the brief accompanying a petition for review to contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). Because Employer's assertion does not satisfy this requirement, we decline to address it. *Id*.; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Moreover, we agree with the Director's position that the Section 411(c)(4) presumption remains applicable to this case. Director's Brief at 2. Employer's brief does not acknowledge that 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) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, 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), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional.

[4] Because Claimant's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 8; Employer's Exhibit 4 at 33.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Drs. Alam, Dahhan, and Rosenberg offered medical opinions on the issue of total disability.[6] The administrative law judge credited Dr. Rosenberg's opinion that Claimant is unable to perform his previous coal mining job from a pulmonary perspective, thus relying on it to find Claimant established a totally disabling respiratory impairment. Decision and Order at 18-19; Employer's Exhibit 1 at 5.

Employer argues the administrative law judge erred in relying on Dr. Rosenberg's opinion "to the exclusion of all other evidence touching on disability" and "failed to take into account the totality of the evidence of pulmonary disability." Employer's Brief at 4. Dr. Rosenberg examined Claimant on January 15, 2018 and opined he is totally disabled based on his severe airflow obstruction, evidenced by a marked reduction of his FEV1 and severely reduced FEV1 to FVC ratio on his pulmonary function study. Employer's Exhibit 1 at 5. He also noted Claimant's previous coal mine employment as a general laborer is associated with medium to heavy exertional demands, and he would not be able to perform that work because of his ventilatory limitation. *Id.*

[5] The administrative law judge found the pulmonary function studies and blood gas studies did not establish total disability. Decision and Order at 7-9. He further found no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 9.

[6] We affirm, as unchallenged on appeal, the administrative law judge's discrediting of Dr. Dahhan's opinion that Claimant retains the ability to perform his previous coal mine work. *See Skrack*, 6 BLR at 1-711; Decision and Order 18-19. Additionally, we decline to address Employer's argument that the administrative law judge correctly discredited Dr. Alam's opinion that Claimant is totally disabled in view of our disposition of the case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 18-19; Employer's Brief at 3.

The administrative law judge found Dr. Rosenberg's opinion well-reasoned because he explained the significance of Claimant's pulmonary function study results to his finding of total disability. Decision and Order at 19. Contrary to Employer's argument, the administrative law judge addressed Dr. Rosenberg's opinion at length, as well as Claimant's pulmonary function studies, arterial blood gas studies, and the medical opinions of Drs. Alam and Dahhan. *Id.* at 7-19. He concluded that, weighing all of the medical evidence as a whole, Claimant established he has a totally disabling respiratory impairment. *Id.* at 19. Because Employer has not pointed to any evidence the administrative law judge excluded or failed to consider, we reject this argument. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As Employer has not specifically challenged any of the reasons the administrative law judge provided for crediting Dr. Rosenberg's opinion, we affirm his finding that Dr. Rosenberg's opinion establishes a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; Decision and Order at 19. Consequently, we also affirm his finding that Claimant is totally disabled based on all the relevant evidence and the Section 411(c)(4) presumption was invoked. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 19.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumption by establishing that Claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20

[7] "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 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).

C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to rebut the presumption by either method.[8] Decision and Order at 30.

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) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds that 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). The "in part" standard requires Employer to establish coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

The administrative law judge addressed Dr. Rosenberg's opinion that Claimant has chronic obstructive pulmonary disease (COPD) caused by his smoking history and unrelated to his coal mine dust exposure.[9] Decision and Order at 24-29; Employer's Exhibit 1. He found Dr. Rosenberg's opinion not well-reasoned and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 29.

Employer argues the administrative law judge's opinion "ignores the fact that the relationship to coal mine dust exposure must be 'significant' or 'substantial.'" Employer's Brief at 5. We disagree. As Employer admits in its brief, the administrative law judge recognized "the definition of legal pneumoconiosis encompasses only those diseases or impairments that are 'significantly related to or substantially aggravated by, dust exposure in coal mine employment.'" Employer's Brief at 4, *quoting* Decision and Order at 24 (citing *Kiblinger v. Performance Coal Co.*, BRB No. 0126 BLA, slip op. at 10 (Jan. 29 2016) (unpub.), *quoting* 20 C.F.R. 718.201(a)(2), (b)). The administrative law judge then discredited Dr. Rosenberg's opinion for failing to adequately explain why Claimant's "very significant history of coal dust exposure was not a contributing or aggravating factor to his respiratory impairment," considering the additive nature of smoking and coal mine dust

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant has clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22.

[9] We affirm, as unchallenged on appeal, the administrative law judge's discrediting of Dr. Dahhan's opinion that Claimant does not have legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-29.

exposure.[10] *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Colliers, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 25-28. Additionally, he found Dr. Rosenberg's reasoning to be inconsistent with the preamble to the 2001 revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); Decision and Order at 25-28. As Employer does not challenge these credibility determinations, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because the administrative law judge permissibly discredited Dr. Rosenberg's opinion, we affirm his finding Employer failed to disprove legal pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 24-29. In light of the above, Employer has failed to rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the presumption by establishing that "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). He discredited Drs. Rosenberg's and Dahhan's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Big Branch Resources, 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 29-30.[11] Further, the administrative law judge found the same reasons for which he discredited Drs. Rosenberg's and Dahhan's opinions that Claimant does not have legal pneumoconiosis also undercut their opinions that Claimant's disabling respiratory impairment is unrelated to pneumoconiosis. Decision and Order at 29-30. Employer has not raised any specific challenge to these findings. *See* 20 C.F.R.

[10] Dr. Rosenberg determined there was no contribution to Claimant's respiratory or pulmonary impairment by coal dust exposure. We note the Sixth Circuit has interpreted the requirement in question as whether there was contribution "in part." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

[11] Drs. Rosenberg and Dahhan did not offer an explanation for Claimant's total disability apart from their determinations that there was no legal pneumoconiosis in this case.

§§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. Therefore, we affirm the administrative law judge's finding that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and Employer did not rebut the presumption, Claimant has established his entitlement to benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge