U.S. Department of Labor

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

BRB No. 19-0491 BLA

RONNIE H. WOODARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/21/2020
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits (2017-BLA-05617) rendered on a claim filed on November 20, 2015 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 15.66 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(4). He 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).[1] 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 failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.[2]

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 into the Act 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, the burden shifted to Employer to establish that he has neither legal nor clinical pneumoconiosis,[4] or that "no

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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 determination that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-13; Director's Exhibit 3.

[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

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 failed to establish rebuttal by either method. Decision and Order at 20-24.

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).

Employer relies on the opinions of Drs. Fino and Tuteur to disprove legal pneumoconiosis. Dr. Fino indicated Claimant has emphysema and Dr. Tuteur concluded he has chronic obstructive pulmonary disease (COPD), but both opined Claimant's impairment is caused entirely by cigarette smoking and is unrelated to coal mine dust exposure. Director's Exhibit 19; Employer's Exhibits 1, 9-12, 14-15. The administrative law judge found neither physician's opinion sufficiently reasoned or documented to satisfy Employer's burden of proof. Decision and Order at 21-24.

Employer contends the administrative law judge mischaracterized and improperly discredited the opinions of Drs. Fino and Tuteur. Employer's Brief at 17-21. We disagree.

As the administrative law judge accurately noted, Dr. Fino opined Claimant's emphysema is due to smoking in part because Claimant's pulmonary function studies showed a reduction in his FEV1 values greater than the average expected loss due to coal mine dust exposure. Decision and Order at 22; Director's Exhibit 19 at 9-11. Citing medical literature, Dr. Fino concluded coal mine dust exposure could be responsible for no more than a seven percent annual reduction in Claimant's FEV1 values. *Id.* The administrative law judge further noted Dr. Tuteur similarly supported his opinion that Claimant's COPD is solely due to smoking by relying on medical literature showing that smoking produces a greater risk of developing COPD than coal mine dust exposure does. Decision and Order at 23; Employer's Exhibit 1 at 3. Contrary to Employer's contention, the administrative law judge permissibly found their opinions unpersuasive because both

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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).

focused on generalized statistics without adequately explaining how the figures apply to Claimant's specific situation. Decision and Order at 23; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir. 2020); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

The administrative law judge also permissibly discredited the opinions of Drs. Fino and Tuteur because they failed to adequately explain why Claimant's 15.66 years of coal mine dust exposure was not an additive factor, along with his smoking, to his COPD and emphysema.[5] Decision and Order at 23, *citing* 65 Fed. Reg. 79,920, 79,938-40 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Tuteur, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), we affirm his finding Employer failed to establish

[5] 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 (DOL) resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). The administrative law judge accurately characterized the scientific evidence the DOL cited when it revised the definition of legal pneumoconiosis, and he permissibly evaluated the medical opinions in light of the DOL's acceptance of studies indicating that the risk of developing airways obstruction from coal mine dust exposure is additive with the risk of it developing from smoking. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 (4th Cir. 2017).

Claimant does not have legal pneumoconiosis,[6] precluding a rebuttal finding that Claimant does not have pneumoconiosis.[7] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) 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 again discredited the opinions of Drs. Fino and Tuteur for the same reasons he discredited their opinions that Claimant does not have legal pneumoconiosis. Decision and Order at 24. Employer raises no specific arguments on disability causation, other than to assert Claimant does not have legal pneumoconiosis. Employer's Brief at 17-21. Because we have affirmed the administrative law judge's credibility findings on legal pneumoconiosis, we affirm his determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24. We therefore affirm the administrative law judge's determination that Claimant is entitled to benefits. 30 U.S.C. §921(c)(4) (2018).

[6] Because the administrative law judge provided valid reasons for discrediting Drs. Fino's and Tuteur's opinions, we need not address Employer's arguments regarding the additional reasons he gave for rejecting their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22-23.

[7] In light of our affirmance of the administrative law judge's finding Employer failed to disprove legal pneumoconiosis, we need not address its challenges to his determination that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20-21; Employer's Brief at 15-16.

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