U.S. Department of Labor

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

BRB No. 20-0055 BLA

ANTHONY S. DEPETRO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARPENTERTOWN COAL AND COKE COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 10/30/2020
	)	
BIRMINGHAM FIRE INSURANCE/AIG	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher L. Wildfire (Margolis Edelstein), Pittsburgh, Pennsylvania, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-05874) 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 October 18, 2016.[1] 20 C.F.R. §725.309(c).

The administrative law judge found Claimant has 16.5 years of coal mine employment, including more than fifteen years in underground mines, and a totally disabling respiratory or pulmonary impairment at 20 C.F.R §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309[2] and 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).[3] The

[1] On March 10, 2015, the district director denied Claimant's prior claim, filed on July 17, 2014, because he did not establish a totally disabling respiratory impairment. Director's Exhibit 1. Claimant took no further action until filing the present claim on October 18, 2016. Director's Exhibit 3.

[2] When 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 he finds "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); *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). The district director denied Claimant's prior claim because he failed to establish a totally disabling respiratory or pulmonary impairment; therefore, to obtain review of the merits of his subsequent claim, he had to establish this element of entitlement. Director's Exhibit 1.

[3] 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.

administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and therefore the constitutionality and applicability of the Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in finding it did not rebut the presumed existence of legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board to reject Employer's arguments concerning the constitutionality of the ACA.[4]

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 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 Associates, Inc.*, 380 U.S. 359 (1965).

Constitutional Challenges

We reject Employer's contention that, pursuant to *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), the ACA, Pub. L. No. 111-148, §1556 (2010), including its provisions reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 3-4. The United States Court of Appeals for the Fifth Circuit held one aspect of the ACA unconstitutional (the individual requirement to maintain health insurance), but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, 140 S.Ct. 1262 (2020). Further, the United

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established more than fifteen years of underground coal mine employment, a totally disabling respiratory impairment 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 6, 10, 16. As Claimant established a totally disabling respiratory impairment, he established a change in an applicable condition of entitlement as a matter of law. 20 C.F.R. §725.309.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 8, 9, 10.

States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

We also reject Employer's general assertion that the "[c]onstitutionality of the Federal Black Lung Act is also challenged under Article II, Section 2 of the U.S. Constitution," as it failed to provide any specific argument for this constitutional objection. 20 C.F.R. §802.211(b); *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); Employer's Brief at 4.

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). The administrative law judge found Employer failed to establish rebuttal by either method.[7]

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),

[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 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).

[7] Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined Employer rebutted the presumption that Claimant has clinical pneumoconiosis, but did not rebut the presumption he has legal pneumoconiosis. Decision and Order at 23, 24.

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 administrative law judge addressed the opinions of Drs. Zlupko, Saludes, and Basheda. Dr. Zlupko opined that Claimant has a moderate restrictive impairment on his pulmonary function study but did not address its cause. Director's Exhibit 16. Drs. Saludes and Basheda opined that Claimant does not have legal pneumoconiosis but has a restrictive lung disease unrelated to coal dust exposure. Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge found the opinions of Drs. Zlupko, Saludes, and Basheda are not well-reasoned. Decision and Order at 23. He therefore found Employer did not disprove the existence of legal pneumoconiosis.[8]

Employer asserts the administrative law judge erred in rejecting the opinions of Drs. Zlupko, Saludes, and Basheda. Employer's Brief at 10-12. We disagree. The administrative law judge permissibly found Dr. Zlupko's opinion not well-reasoned because he did not provide an opinion on the etiology of Claimant's restrictive impairment. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 23. Further, the administrative law judge noted Drs. Saludes and Basheda opined that Claimant's restrictive lung disease is not related to coal dust exposure because his chest x-rays did not indicate parenchymal lung disease. Decision and Order at 23. He permissibly found their opinions inconsistent with the premise that a miner can suffer from legal pneumoconiosis in the absence of a positive chest x-ray.[9] *See* 20 C.F.R. §718.202(a)(4) (recognizing a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative chest x-ray reading); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir.

[8] The administrative law judge found the new evidence submitted in conjunction with Claimant's current claim more probative of his current condition and, therefore, entitled to greater weight than the old evidence. Decision and Order at 4; *see Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc) (McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc).

[9] Dr. Saludes stated, "Although this patient has a history of coal dust exposure, his Chest x-ray does not show any evidence for radiographic pneumoconiosis. Therefore, this would not relate to the restrictive lung disease noted on pulmonary function test." Claimant's Exhibit 1. Dr. Basheda excluded coal mine dust as a cause of Claimant's restrictive impairment because "[t]here is no evidence of parenchymal lung disease on my chest x-ray B reading of the most recent chest x-ray." Employer's Exhibit 2.

2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); Decision and Order at 23. The administrative law judge also permissibly found that, although Drs. Saludes and Basheda provided a variety of explanations for Claimant's impairment, they did not adequately explain why his 16.5 years of coal mine dust exposure did not significantly contribute, along with those other conditions, to his restrictive impairment. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming rejection of medical opinion which failed to adequately explain why coal dust exposure did not exacerbate smoking-related impairments); Decision and Order 23-26.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign them weight; the Board may not reweigh the evidence or substitute its own inferences for the administrative law judge's. *See Balsavage*, 295 F.3d at 396; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge permissibly discredited the only medical opinions supportive of a finding that Claimant does not have pneumoconiosis,[10] we affirm his finding that Employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 23-24. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether Employer rebutted the presumption by establishing "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). Employer generally avers that the opinions of Drs. Zlupko, Saludes and Basheda establish the absence of any disability caused by pneumoconiosis. We reject this contention. The administrative law judge permissibly discounted Dr. Zlupko's opinion because he did not find Claimant totally disabled, contrary to the administrative law judge's finding that Claimant is totally disabled. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Further, he permissibly discounted Dr. Saludes's

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zlupko, Saludes, and Basheda on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding his weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

and Dr. Basheda's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Soubik*, 366 F.3d at 234; *see also Scott*, 289 F.3d at 269; *Toler*, 43 F.3d at 116; *Trujillo*, 8 BLR at 1-473; Decision and Order at 26. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that Employer failed to disprove disability causation. 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 it, Claimant established his entitlement to benefits.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge