U.S. Department of Labor

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

BRB No. 19-0477 BLA

GARY L. WILKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	DATE ISSUED: 09/18/2020
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 on Remand of Drew A. Swank, Administrative Appeals Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05356) rendered on a claim filed on

March 30, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for the second time.

The Board previously affirmed, as unchallenged, the administrative law judge's findings that Claimant established 19.32 years of coal mine employment, has a totally disabling respiratory or pulmonary impairment, and 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); 20 C.F.R. §718.204(b)(2); *see Wilkins v. Helvetia Coal Co.*, BRB No. 18-0056 BLA, slip op. at 2, n.2 (Nov. 29, 2018) (unpub.). However, the Board vacated the administrative law judge's determination that Employer did not rebut the presumption because he erred in relying on 20 C.F.R. §718.305(d)(3)[2] to discredit Drs. Basheda's and Rosenberg's opinions on legal pneumoconiosis and did not adequately explain his findings as required by the Administrative Procedure Act (APA).[3] *Id*. at 3-4. Thus, the Board affirmed in part and vacated in part the administrative law judge's award of benefits, and remanded the case for further consideration of rebuttal. *Id*. at 5. On remand, the administrative law judge again found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted. Claimant responds, urging affirmance of the

[1]Under Section 411(c)(4) of the Act, Claimant is entitled to a presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[2] The regulation at 20 C.F.R. §718.305(d)(3) provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). Because neither Dr. Rosenberg nor Dr. Basheda opined Claimant has an obstructive respiratory or pulmonary disease, the Board agreed with Employer that the administrative law judge erred in discrediting their opinions pursuant to 20 C.F.R. §718.305(d)(3). *Wilkins v. Helvetia Coal Co.*, BRB No. 18-0056 BLA, slip op. at 4 (Nov. 29, 2018) (unpub.); s*ee* Employer's Exhibits 4, 5.

[3] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he 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 under either method.[7]

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[4] Employer asserts Claimant is not totally disabled and is not entitled to the Section 411(c)(4) presumption. Because the Board previously affirmed the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption, we reject Employer's arguments as the prior holding constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Wilkins*, BRB No. 18-0056 BLA, slip op. at 2, n.2.

[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 3, 5.

[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). "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] The administrative law judge found Employer disproved Claimant has clinical pneumoconiosis. However, to establish rebuttal under the first method, Employer must disprove both clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Legal Pneumoconiosis

In order to disprove legal pneumoconiosis, Employer must establish Claimant does not suffer from a chronic lung disease or impairment that is "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). Employer relies on Drs. Rosenberg's and Basheda's opinions to disprove legal pneumoconiosis. They each opined Claimant's respiratory impairment is due to idiopathic pulmonary fibrosis (IPF), a disease of unknown cause, and is unrelated to coal mine dust exposure. Employer's Exhibits 1, 4, 7, 8. Contrary to Employer's contention, we see no error in the administrative law judge's finding their opinions inadequately reasoned to satisfy its burden of proof. Decision and Order on Remand at 13-14.

Dr. Rosenberg opined that Claimant has exercise-induced hypoxemia due to parenchymal lung disease. Employer's Exhibit 4 at 3-4. He indicated Claimant's x-rays were negative for clinical pneumoconiosis and showed linear fibrosis consistent with IPF. *Id*. He attributed Claimant's respiratory impairment to IPF because "no reliable medical studies show that coal dust causes primary linear interstitial lung disease without some micro-nodular changes." *Id*. at 3.

Similarly, Dr. Basheda opined that Claimant has significant exercise-induced hypoxemia and a moderate diffusion impairment. Employer's Exhibit 1 at 15. He opined that Claimant's impairment is related to chronic interstitial lung disease consistent with IPF and is not legal pneumoconiosis. *Id*. at 14. He noted Claimant's x-ray changes with linear fibrosis in the lower lung and honey-combing was "classic" for IPF. *Id*. He testified coal mine dust exposure does not cause IPF and that smoking did not play a role in Claimant's lung disease. Employer's Exhibit 7 at 22-23. He indicated that he diagnosed IPF because the etiology of Claimant's pulmonary fibrosis is unknown. *Id*. at 23-24.

In determining the weight to accord the opinions of Drs. Rosenberg and Basheda, the administrative law judge observed correctly that legal pneumoconiosis can exist in the absence of positive radiographic evidence for clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); Decision and Order at 13. He permissibly found that while Drs. Rosenberg and Basheda "discussed differences in typical radiological appearance of [IPF] and pneumoconiosis," neither physician persuasively explained why they excluded Claimant's 19.32 years of coal mine dust exposure as a contributing factor for his fibrosis or his impairment. Decision and Order on Remand at 13; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78 (3d Cir. 1997).

Further, as noted by the administrative law judge, Dr. Rosenberg stated that Claimant's development of lung disease "15 years after leaving his coal mine employment unlikely represents the existence of [coal workers' pneumoconiosis]." Employer's Exhibit 4 at 5. Although Dr. Rosenberg asserts medical literature shows latent and progressive pneumoconiosis is rare, the administrative law judge permissibly found Dr. Rosenberg did not adequately explain why claimant was not one of those rare cases. *See Balsavage*, 295 F.3d at 396; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 13; Employer's Exhibit 4 at 4.

Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Basheda,[8] we affirm his finding that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A); *Kramer*, 305 F.3d at 211; *Balsavage*, 295 F.3d at 396; Decision and Order on Remand at 15. Employer's failure to disprove legal pneumoconiosis, precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Total Disability Causation

The administrative law judge found the opinions of Drs. Rosenberg and Basheda insufficient to establish no part of Claimant's total respiratory disability was due to legal pneumoconiosis. Decision and Order on Remand at 17. Employer raises no specific error with regard to the administrative law judge's finding it did not disprove disability causation, other than to reassert Claimant does not have legal pneumoconiosis. As we rejected Employer's arguments on legal pneumoconiosis, we affirm the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 17.

[8] Because Employer has the burden of proof on rebuttal and the administrative law judge provided valid reasons for discrediting Drs. Rosenberg's and Basheda's opinions, we need not address employer's contentions of error regarding the administrative law judge's weighing of Drs. Klayton's and Zlupko's opinions that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-17.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge