BRB No. 13-0335 BLA

JERRY R. TRIMBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BULL CREEK COAL CORPORATION	)	DATE ISSUED: 04/21/2014
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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-Award of Benefits in a Subsequent Claim of Administrative Law Judge Larry S. Merck, United States Department of Labor.

Stephen A. Sanders and Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Christopher L. Wildfire, Pittsburgh, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order-Award of Benefits in a Subsequent Claim (2010-BLA-05501) of Administrative Law Judge Larry S. Merck issued pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act).[1] The administrative law judge accepted the parties' stipulation to twenty-six years of coal mine employment, as supported by the evidence of record, and found that claimant established at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine. The administrative law judge found that claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption.[2] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.[3]

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,

[1] Claimant filed his first claim on April 21, 1992, which was finally denied by the district director on September 29, 1992, as claimant did not establish any of the elements of entitlement. Director's Exhibit 1. On April 10, 2001, claimant filed his second claim which was finally denied by the district director on December 17, 2002, as claimant did not establish any of the elements of entitlement. Director's Exhibit 2. Claimant filed his present subsequent claim on March 30, 2009. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(b)).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 8-9, 20; Hearing Transcript at 8-10.

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).

Employer argues that the administrative law judge selectively analyzed the medical opinion evidence relevant to the existence of legal pneumoconiosis and total disability due to pneumoconiosis. In support of this allegation of error, employer maintains that the administrative law judge required Drs. Fino and Rosenberg to explain why they excluded coal dust exposure as a cause of claimant's disabling respiratory impairment, but did not require Dr. Ammisetty to explain why he ruled out asbestos-related disease as a causal factor. Employer further alleges that the administrative law judge should have accorded greatest weight to the opinions of Drs. Fino and Rosenberg, because they adequately explained their diagnoses, and reviewed more evidence than Dr. Ammisetty. Employer's contentions lack merit.

Contrary to employer's initial argument, if the administrative law judge provides valid rationales for discrediting the evidence supportive of a finding of rebuttal, he need not address the sufficiency of the contrary evidence, as employer bears the burden of affirmatively disproving the existence of both clinical and legal pneumoconiosis, or establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). In this case, the administrative law judge set forth valid reasons for determining that the opinions of Drs. Fino and Rosenberg were insufficient to establish rebuttal of the amended presumption under either method.

In evaluating whether employer disproved the existence of legal pneumoconiosis,[5] the administrative law judge considered all the relevant evidence of record, including the opinions of Drs. Fino and Rosenberg. Dr. Fino determined, based on the x-ray evidence

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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).

[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 respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

and the presence of a restrictive impairment, that claimant suffers from asbestosis and has no impairment related to coal dust exposure. Director's Exhibit 17; Employer's Exhibit 4. Dr. Rosenberg opined that claimant does not have clinical or legal pneumoconiosis, that he is not disabled from a pulmonary condition, and that if he is determined to have a disabling restriction or gas exchange abnormalities, it would be related to the presence of asbestosis rather than coal dust exposure. Employer's Exhibit 8.

The administrative law judge acted within his discretion in finding that Dr. Fino's opinion on the existence of legal pneumoconiosis was not well reasoned, as he "relied on [c]laimant's exposure to asbestos for four years in the 1950s, apparently without considering whether coal dust exposure had a concurrent effect in causing [c]laimant's respiratory impairment." Decision and Order at 27; *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Similarly, the administrative law judge rationally determined that Dr. Rosenberg's opinion ruling out legal pneumoconiosis was not well reasoned, because he did not address pulmonary function study results indicating that claimant has a restrictive impairment and did not "adequately explain or consider whether [c]laimant's pulmonary disease was contributed to, or aggravated by, his extensive exposure to coal dust." Decision and Order at 28; *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483. Accordingly, we affirm the administrative law judge's finding that employer did not meet its burden to affirmatively establish the absence of legal pneumoconiosis.[6] *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

We also reject employer's allegation that the administrative law judge erred in finding that it failed to rebut the amended Section 411(c)(4) presumption by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. The administrative law judge rationally determined that the opinions of Drs. Fino and Rosenberg on the issue of the cause of claimant's totally disabling impairment were entitled to little weight for the same reasons that he discredited their opinions on the issue of legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*,

[6] The administrative law judge found that employer established, by a preponderance of the evidence, that claimant does not have clinical pneumoconiosis. Decision and Order at 29-30. This finding does not alter the determination that employer failed to satisfy the first method of rebuttal, however, as employer is required to disprove the presumed existence of both clinical and legal pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (to be codified at 20 C.F.R. §718.305(d)(1)); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Skukan v. Consolidated Coal Co., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 31. We, therefore, affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. 78 Fed. Reg. 59,102, 59,114 (to be codified at 20 C.F.R. §718.305(d)(1)); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 31.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge