U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0292 BLA

BENNIE L. WORKMAN Claimant-Respondent v. LIGHTNING CONTRACT SERVICES, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/05/2016 DECISION and ORDER

Appeal of the Decision and Order on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (11-BLA-5088) of Administrative Law Judge John P. Sellers, III, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 17, 2009, and is before the Board for the second time.[1]

Previously, upon review of employer's appeal, the Board affirmed the administrative law judge's findings that claimant established 25.66 years of underground coal mine employment,[2] a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] *Workman v. Light[n]ing Contract Servs., Inc.*, BRB No. 13-0371 BLA (Mar. 24, 2014)(unpub.). Regarding rebuttal of the presumption, the Board affirmed the administrative law judge's finding that employer established that claimant does not have clinical pneumoconiosis.[4] *Id.* at 3 n.3. The Board, however, vacated the administrative law judge's finding that

[1] The Board previously set forth the full procedural history of this case. *Workman v. Light[n]ing Contract Servs., Inc.*, BRB No. 13-0371 BLA (Mar. 24, 2014)(unpub.). It has already been determined that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *Id*. at 5.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 6; Hearing Tr. at 11-12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Clinical pneumoconiosis is defined as "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).

employer failed to establish that claimant does not have legal pneumoconiosis,[5] and thus failed to rebut the Section 411(c)(4) presumption. *Id.* at 7.

Specifically, the Board held that the administrative law judge failed to provide a valid reason for discrediting the opinions of Drs. Castle and Zaldivar that claimant does not have legal pneumoconiosis, but has a restrictive lung impairment due solely to injuries he suffered in 2002 when struck by a falling tree. The Board noted that the administrative law judge analyzed the results of pulmonary function studies administered to claimant between 2002 and 2009, and found that the progressive worsening of claimant's impairment demonstrated by the studies was "inconsistent with an impairment due to traumatic injury." *Id.* at 9, quoting Decision and Order at 37. The Board held that, in discrediting the opinions of Drs. Castle and Zaldivar as inconsistent with the pulmonary function study results, the administrative law judge impermissibly interpreted medical data and substituted his opinion for those of the physicians. *Id.*

Therefore, the Board remanded the case for the administrative law judge to reconsider whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis, or that his total disability is unrelated to pneumoconiosis. The Board instructed the administrative law judge, on remand, to analyze the physicians' opinions by considering "the explanations for [the physicians'] conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses." *Id.* at 10, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

On remand, the administrative law judge reconsidered the opinions of Drs. Castle and Zaldivar, and concluded that their opinions "attributing the [c]laimant's impairment to his 2002 tree-fall accident lack[ed] the necessary objective proof and documentation to be persuasive." Decision and Order on Remand at 28. Specifically, the administrative law judge found that Dr. Castle provided no objective evidence to support his opinion that claimant's disabling restrictive impairment developed quickly, between March and June of 2002, coincident with the accident. Additionally, the administrative law judge found that Dr. Zaldivar did not identify objective proof to support his opinion that claimant's "accident-related curvature of the spine got worse over time, thus explaining

[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 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).

the progressive severity of his restrictive impairment."[6] Decision and Order on Remand at 26. Finding that the opinions of Drs. Castle and Zaldivar "lack[ed] the power to persuade," *Id.*, the administrative law judge determined that they did not meet employer's burden to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis, or that his total disability is not due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in discounting Dr. Zaldivar's opinion because the physician did not identify objective evidence to support his opinion regarding the cause of claimant's restrictive impairment. Employer further asserts that the administrative law judge erred in discounting Dr. Zaldivar's opinion because the physician failed to account for claimant's respiratory symptoms before the 2002 accident.[7] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or 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

[6] In addition, the administrative law judge found that neither Dr. Castle nor Dr. Zaldivar adequately accounted for respiratory symptoms claimant had before the 2002 accident. Decision and Order on Remand at 22-23, 26.

[7] Employer does not challenge the administrative law judge's decision to discredit Dr. Castle's opinion that claimant's restrictive impairment is due solely to the tree-fall accident, because Dr. Castle did not identify objective evidence to support his view that the impairment developed quickly. That credibility determination is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In view of our affirmance of the administrative law judge's unchallenged reason for discrediting Dr. Castle's opinion, we need not address employer's remaining arguments regarding the weight accorded to Dr. Castle's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In considering whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge reconsidered the opinion of Dr. Zaldivar, who examined claimant and reviewed his medical records. Employer's Exhibits 1, 9. Dr. Zaldivar concluded that claimant's restrictive lung impairment is fully explained by injuries that resulted from his 2002 accident. Employer's Exhibit 1 at 8. Specifically, Dr. Zaldivar opined that the 2002 traumatic injury damaged claimant's vertebrae, causing curvature of the spine which, in turn, prevents claimant's lungs from expanding to their normal volume. *Id.*; Employer's Exhibit 9 at 17, 28-30. According to Dr. Zaldivar, the curvature of the spine worsened over time due to osteoporosis, causing claimant's restrictive impairment to progressively worsen, leading to a disabling restrictive impairment unrelated to coal mine dust exposure. Employer's Exhibit 9 at 17.

The administrative law judge noted that Dr. Zaldivar offered a "plausible theory" for the cause of claimant's impairment, but found that Dr. Zaldivar did not identify the objective evidence "substantiat[ing] his theory that the curvature of the [c]laimant's spine" in fact became progressively worse over time. Decision and Order on Remand at 21. Because Dr. Zaldivar did not support his opinion with sufficient "objective proof to be persuasive," *Id.* at 26, the administrative law judge found that his opinion did not meet employer's burden to establish that claimant's restrictive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.

Employer contends that the administrative law judge erred in requiring Dr. Zaldivar to identify objective evidence documenting that claimant's spinal condition worsened over time, thus explaining the progression of claimant's restrictive impairment. Employer's Brief at 6-9. Employer argues that it was the administrative law judge's duty to review claimant's treatment records and detect the objective support for this aspect of Dr. Zaldivar's opinion, rather than the doctor's obligation to identify and explain the objective data that supported his opinion. *Id*. Employer's argument lacks merit.

The Board instructed the administrative law judge, on remand, to consider "the explanations for [the physicians'] conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses." *Workman*, slip op. at 10, citing *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The administrative law judge complied with that instruction, and reasonably considered that Dr. Zaldivar did not identify objective evidence demonstrating that progressive worsening of claimant's spinal condition had actually occurred,

explaining the progressive severity of claimant's restrictive impairment.[8] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997).

Given that it was employer's burden to rebut the Section 411(c)(4) presumption, the administrative law judge reasonably analyzed Dr. Zaldivar's opinion, and permissibly found that it was not sufficiently persuasive to establish that claimant does not have legal pneumoconiosis. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-31; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Substantial evidence supports the administrative law judge's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we reject employer's allegation of error, and affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[9] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the presumption that claimant's disability is due to pneumoconiosis. The administrative law judge rationally found that the same reasons he provided for discrediting the opinions of Drs. Castle and Zaldivar that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling respiratory impairment is unrelated to pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, BLR (4th

[8] Employer argues that the administrative law judge should have considered whether numerous x-ray readings, CT-scan readings, and treatment notes contained in claimant's medical records supported Dr. Zaldivar's opinion that claimant's spinal condition progressively worsened. Employer's Brief at 8-10. Employer, however, ignores the administrative law judge's statement that "[n]ot being a physician, I do not know how one documents that a person's curvature of the spine has gotten worse—whether this is done by simple measurement of the curvature, or whether it is something detectable by comparing x-rays." Decision and Order on Remand at 21. Given that the administrative law judge was not authorized to interpret objective data, *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), he reasonably looked to Dr. Zaldivar to identify objective evidence that worsening of the curvature of claimant's spine actually occurred. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997).

[9] Because the administrative law judge provided a valid reason for discounting Dr. Zaldivar's opinion that claimant does not have legal pneumoconiosis, we need not address employer's challenges to the administrative law judge's other reasons for discounting Dr. Zaldivar's opinion on that issue. *See Kozele*, 6 BLR at 1-382 n.4.

Cir. 2015); Decision and Order on Remand at 29. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge