U.S. Department of Labor

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

BRB No. 17-0346 BLA

JESSIE BROWNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE BEAR MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 04/25/2018
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5511) of Administrative Law Judge Larry S. Merck rendered 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 miner's subsequent claim filed on January 19, 2011.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with 15.64 years of underground coal mine employment and accepted employer's concession that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Further, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Neither claimant, nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[3]

---

[1] This is claimant's second claim. Director's Exhibit 3. Claimant's first claim, filed on December 31, 1997, was denied by reason of abandonment, and was administratively closed. Director's Exhibit 1. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the [miner] has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 15.64 years of underground coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 9-10. Thus, we further affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at

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.[4] 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 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,[5] or by establishing that "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)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.[6]

---

10. Moreover, invocation of the Section 411(c)(4) presumption satisfies claimant's burden to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12, 25 BLR 2-743, 2-754-55 (4th Cir. 2015) (holding that the fifteen-year presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 25 BLR 2-285, 2-292 (7th Cir. 2013).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 33; Director's Exhibit 5.

[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). "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).

[6] After finding that employer failed to rebut the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge declined to address whether employer could rebut the existence of clinical pneumoconiosis. Decision and

Employer asserts that the administrative law judge erred in requiring employer to "exclude" or "completely eliminate" coal dust exposure as a cause of claimant's impairment, in order to disprove the existence of legal pneumoconiosis. Employer's Brief at 12-15. We disagree.

Contrary to employer's assertion, the administrative law judge correctly stated that in order to rebut the presumed existence of legal pneumoconiosis, employer must show that claimant does not suffer from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure . . . ." Decision and Order at 10; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i).

Moreover, the administrative law judge did not determine that the opinions of Drs. Zaldivar and Fino were insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to exclude coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 11-14. Rather, the administrative law judge considered the explanations given by Drs. Zaldivar and Fino for why *they* each excluded coal mine dust exposure as a causative factor for claimant's impairment, and he found their opinions not credible. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504, 25 BLR 2-713, 2-720 (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 11-14. Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard relevant to the existence of legal pneumoconiosis.

Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Fino. We disagree. Dr. Zaldivar identified a combination of risk factors, including exposure to biomass smoke, a history of respiratory infections, hyperresponsive airways as indicated by use of bronchodilators, and a history of life-long smoking, to conclude that claimant "suffered from [chronic obstructive pulmonary disease] produced by smoking and exposure to biomass smoke as a youngster." Decision and Order at 11-12, *referencing* Employer's Exhibit 2 at 5-6. The administrative law judge correctly observed, however, that Dr. Zaldivar "failed to explain how he eliminated [c]laimant's significant coal dust exposure as a contributing or aggravating factor in his respiratory impairment." Decision and Order at 13-14. The administrative law judge therefore permissibly concluded that the opinion of Dr. Zaldivar was "not well-reasoned" and was

---

Order at 14. Employer does not raise any arguments relevant to rebuttal of clinical pneumoconiosis on appeal.

insufficient to rebut the presumed existence of legal pneumoconiosis.[7] *Id*.; *see* 20 C.F.R. §718.305(d)(1)(i); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24, 25 BLR 2-255, 2-263 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). As it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Zaldivar's opinion is not entitled to probative weight on the issue of legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 13-14.

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Fino's opinion. The administrative law judge noted that Dr. Fino relied on statistical averages and medical literature indicating that only a small percentage of miners develop clinically significant reductions in their FEV1 and FEV1/FVC ratio from coal dust exposure, and the damage from smoking is much greater than previously believed.[8] Decision and Order at 14; *see* Employer's Exhibit 5 at 10. The administrative law judge found that even if this were true, Dr. Fino failed to adequately explain why

[7] Employer asserts that the administrative law judge erred in finding that Dr. Zaldivar failed to explain how he excluded coal dust exposure as a contributing factor to claimant's impairment. Employer's Brief at 15. Employer asserts that Dr. Zaldivar stated that "the fact that [claimant's] lungs do not radiographically reveal any evidence of a reaction to any inhaled particle, mitigates against [claimant's] work environment having contributed [to] or caused the pulmonary impairment." *Id.*, *quoting* Employer's Exhibit 2 at 5. Employer has not explained, however, how the administrative law judge's failure to specifically address Dr. Zaldivar's reliance on the absence of positive x-ray evidence to exclude coal mine dust as a contributor or cause of claimant's impairment, constitutes reversible error. *See* 20 C.F.R. §718.202(b) ("[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray."); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-127 (4th Cir. 2012) (noting that the regulations recognize "that coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis").

[8] Dr. Fino opined that "[s]tatistically speaking, about 90% of [] miners suffered an average loss of FEV1," and studies show that the "average loss of FEV1 may be statistically significant, but that loss is not a clinically significant contribution to [a] miner's loss in lung function. In other words, it usually does not participate in impairment or disability." Employer's Exhibit 5 at 10.

claimant's particular "FEV1 function is in the 'average loss' category." Decision and Order at 14; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Thus, the administrative law judge permissibly found that Dr. Fino had "not sufficiently explained his rationale for excluding coal mine dust exposure in [c]laimant's pulmonary condition." Decision and Order at 14. As the administrative law judge's findings are supported by substantial evidence, they are affirmed. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Fino, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Finally, the administrative law judge addressed whether employer established the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally determined that the opinions of Drs. Zaldivar and Fino were "not persuasive" because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of pneumoconiosis. *See Epling*, 783 F.3d at 504-05, 25 BLR at 2-720-21; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 15. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 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 the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge