U.S. Department of Labor

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

BRB No. 17-0358 BLA

LONNIE D. STRUNK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BECKY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/16/2018
	)	
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 of William T. Barto, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05694) of Administrative Law Judge William T. Barto, rendered on a subsequent claim filed on September 2, 2014, 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 credited claimant with at least twenty years and eleven months of coal mine employment[2] pursuant to the parties' stipulation, and found that at least fifteen years of that employment occurred in underground coal mines. Decision and Order at 4, 9-10. He also found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2),[3] invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[1] Claimant's initial claim for benefits, filed on April 10, 1998, was finally denied by the district director on August 4, 1998, because the evidence did not establish any element of entitlement. Director's Exhibit 1.

[2] Claimant was last employed in the coal mining industry in Kentucky. Decision and Order at 2; Employer's Exhibit 7 at 25-26. Accordingly, the Board will apply the law 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).

[3] Because the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 14.

[4] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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), as implemented by 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or that "no part of the [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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not challenge the administrative law judge's determination that the x-ray evidence and medical opinion evidence failed to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 17-18. Accordingly, we affirm his finding that employer failed to disprove clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address the administrative law judge's finding that employer also failed to establish that claimant does not have legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that claimant does not have 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); *see Minich*, 25 BLR at 1-155 n.8. The administrative law judge considered the medical opinions of Drs.

[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 that is 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).

Dahhan, Goldstein, and Rosenberg, who opined that claimant does not have legal pneumoconiosis, but suffers from asthma that is unrelated to coal mine dust exposure.[7] Decision and Order at 20-22. He found their opinions to be unpersuasive and assigned them little weight. *Id.*

The administrative law judge discounted each opinion as contrary to the Department of Labor's recognition that pneumoconiosis is a latent and progressive disease. Decision and Order at 20-22. Specifically, Dr. Dahhan explained that claimant left coal mine work in 1988, and that enough time had passed "to cause cessation of any industrial bronchitis that he might have had." Employer's Exhibit 2 at 2. Dr. Goldstein opined that claimant's asthma did not arise out of coal mine employment because it did not develop while claimant was working in the mines. Director's Exhibit 13; Employer's Exhibit 4 at 33. Dr. Rosenberg excluded legal pneumoconiosis because progression of the disease is "rare," and because "when coal mine dust exposure is below $2mg/m^3$ . . . it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Employer's Exhibit 6 at 5.

Contrary to employer's argument, Employer's Brief at 6, the administrative law judge permissibly found the physicians' reasoning inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 20-22. Further, to the extent that Dr. Rosenberg opined that it is rare for pneumoconiosis to be progressive, the administrative law judge permissibly found that he did not explain why claimant was not one of the rare cases. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 21.

[7] The administrative law judge also considered the opinion of Dr. Meyer, who diagnosed claimant with usual interstitial pneumonia (UIP), based on an x-ray reading. Decision and Order at 19-20; Employer's Exhibit 5. The administrative law judge found that Dr. Meyer's opinion was too equivocal to establish that claimant's UIP is not legal pneumoconiosis. Decision and Order at 19-20. As employer does not challenge this finding, it is affirmed. *Skrack*, 6 BLR at 1-711. Additionally, the administrative law judge considered, but discounted, the opinions of Drs. Green and Silman, who diagnosed claimant with chronic obstructive pulmonary disease due to coal mine dust exposure. Decision and Order at 19; Claimant's Exhibits 1, 2.

The administrative law judge provided additional reasons for finding Drs. Dahhan, Goldstein, and Rosenberg not sufficiently credible. Decision and Order at 20-22. Employer, however, alleges no other specific errors in his analysis of their opinions. Employer's Brief at 3-6; *see* 20 C.F.R. §802.211(b). We therefore affirm the administrative law judge's credibility determinations, *see Skrack*, 6 BLR at 1-711, and his finding that employer failed to establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).[8]

Upon finding that employer was unable to disprove legal pneumoconiosis, the administrative law judge addressed whether employer could establish 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 permissibly found that the same reasons for which he discredited the opinions of Drs. Dahhan, Goldstein, and Rosenberg that claimant does not have legal pneumoconiosis also undercut their opinions that claimant's totally disabling respiratory or pulmonary impairment was not caused by pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431,

[8] Moreover, even if employer's brief could be read as having raised additional arguments, we would uphold the administrative law judge's credibility determinations. Dr. Goldstein initially opined that claimant's asthma is unrelated to coal mine dust exposure. Director's Exhibit 11. As the administrative law judge noted, however, when Dr. Goldstein was later deposed, he testified both that claimant does, and does not, have legal pneumoconiosis. Employer's Exhibit 4 at 11, 33. The administrative law judge permissibly found Dr. Goldstein's opinion to be "unclear and equivocal." Decision and Order at 20; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995). The administrative law judge further permissibly found that Dr. Rosenberg did not adequately explain why claimant's partial response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 21. Additionally, the administrative law judge permissibly found that Dr. Rosenberg's opinion was based more on generalizations regarding coal mine dust exposure levels and the risk of developing pneumoconiosis than on an analysis of claimant's specific conditions. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21. Finally, the administrative law judge reasonably determined that the opinions of Drs. Goldstein and Dahhan that asthma is not a disease that is related to coal mine dust exposure was contrary to the Department of Labor's view that chronic obstructive pulmonary disease, which can be caused by coal mine dust exposure, "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma." *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); Decision and Order at 20-21 & n.133.

2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); Decision and Order at 24-27. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii),[9] and affirm the award of benefits.

[9] To the extent it can be considered to have been raised, Employer's Brief at 3, 5, we need not address employer's argument that the administrative law judge erred in determining claimant's smoking history. Any error in that finding is harmless given our affirmance of his rationale for discrediting the physicians' opinions, which does not concern the length of claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge