U.S. Department of Labor

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

BRB No. 14-0413 BLA

TERRY R. RHODES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPARTAN MINING COMPANY	)	DATE ISSUED: 08/27/2015
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6168) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on June 28, 2010, 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

[1] Claimant filed an initial claim for benefits on July 27, 2004, which was denied by the district director on March 15, 2005, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibit 2.

with at least thirty-five years of coal mine employment and determined that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on the filing date of the claim, and his determinations that claimant worked at least fifteen years in underground coal mine employment, and also has a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Further, the administrative law judge found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has 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, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

[2] Under amended 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 coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least thirty-five years of coal mine employment, with at least fifteen of those years in underground coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 18, 27-29, 32.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

In order to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have both legal[5] and clinical[6] pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray, CT scan and medical opinion evidence. Decision and Order at 21, 23-26.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's physicians, Drs. Zaldivar and Basheda, that claimant has an obstructive respiratory impairment due entirely to asthma, with no contribution from claimant's thirty-five year coal mine employment. Decision and Order at 26. The administrative law judge explained:

> There is little question that employer's experts have established that the miner suffered from some degree of asthma. It may be that the lungs have remodeled and that the asthma is persistent. It may also be that this miner

---

[5] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* The regulation also provides that "a disease 'arising out of coal mine employment' includes 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) (emphasis added).

[6] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconiosis, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

> has breathing problems related to his overweight and deconditioning as well. However, the determining factor in this claim is the continued insistence of both Dr. Zaldivar and [Dr.] Basheda that, both as a general matter and in this case, asthma is a disease of the general population unrelated to coal mine dust exposure and that coal mine dust exposure neither causes nor aggravates one's asthma. While Dr. Basheda admitted on further examination in his deposition that coal mine dust could aggravate one's asthma, he could not say whether it did or not in this case without reviewing the miner's treatment records. After reviewing treatment records, he adhered to his earlier diagnosis, but failed to explain why coal mine dust exposure did not aggravate or exacerbate this miner's asthma. Both opined that since the objective testing was both reversible with use of bronchodilators and variable [over time] the miner cannot have pneumoconiosis, a fixed and irreversible, progressive lung disease. Both of these views have been discredited by the Department of Labor as set forth in the Preamble to the 2001 regulations. Moreover, both [Drs.] Zaldivar and Basheda erroneously appear to believe that the negative x-rays exclude legal pneumoconiosis as a possible diagnosis. Finally, Dr. Basheda injected unsupported general statistics and conclusions into his opinion . . . .

Id. at 24 (footnotes omitted), *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Based on the above-stated reasons, the administrative law judge found that employer failed to affirmatively establish that claimant does not have legal pneumoconiosis. Decision and Order at 24. Because neither Dr. Zaldivar, nor Dr. Basheda, diagnosed legal pneumoconiosis, the administrative law judge also found that their opinions were insufficient to establish that claimant's respiratory disability was unrelated to his presumed pneumoconiosis. *Id*. at 35.

Employer argues that the administrative law judge erred in finding that Drs. Zaldivar and Basheda expressed views on asthma that are inconsistent with the preamble. Employer asserts that the administrative law judge's citation to *Swiger* is misplaced, as that decision "does not support the proposition that bronchodilator responsiveness and pulmonary variability is contrary to the regulatory preamble or that they cannot be used as parts of a series of reasons to reach a diagnosis." Employer's Brief in Support of Petition for Review at 9. Employer contends that, in rejecting the explanations given by Drs. Zaldivar and Basheda as to why claimant's clinical presentation and medical history are consistent with asthma and not legal pneumoconiosis, the administrative law judge improperly substituted his opinion for that of the medical experts. Employer further argues that the administrative law judge failed to adequately explain why he discounted the explanations given by Drs. Zaldivar and Basheda, that airway remodeling, resulting from untreated asthma, is the cause of any irreversible obstruction seen on claimant's

pulmonary function tests. Employer's assertions of error are rejected as they have no merit.

As noted by the administrative law judge, the Department of Labor (DOL), in the preamble to the 2001 revised regulations, recognized that the "term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and *asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added); *see* Decision and Order at 20. The DOL further found that "the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease." 65 Fed. Reg. at 79,994. Because claimant invoked the amended Section 411(c)(4) presumption, employer was required to affirmatively establish that claimant's obstructive impairment, in the form of asthma, was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §718.201(b); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015).

We specifically reject employer's argument that the administrative law judge erred in applying *Swiger* to the facts of this case, and that he improperly substituted his opinion for that of a medical expert. The administrative law judge observed correctly that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "reversibility of [pulmonary function study] values, post-bronchodilator, does not (necessarily) rule out the presence of disabling [coal workers' pneumoconiosis] (where, as here, the miner continued to evidence a fully disabling residual impairment, sugges[ting] coal mine dust was a contributing factor)." Decision and Order at 28 n. 45, *citing Swiger*, 98 F. App'x at 237. Although employer maintains that both Dr. Zaldivar and Dr. Basheda have adequately explained why the residual and non-reversible portion of claimant's obstruction is due to airway remodeling from asthma and not coal mine dust exposure, the credibility of the evidence and the weight to accord it, is within the discretion of the trier of fact. *See 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, 2-275-76 (4th Cir. 1997). We conclude that the administrative law judge acted within his discretion in finding that neither Dr. Zaldivar, nor Dr. Basheda, persuasively explained why claimant's obstructive respiratory impairment was not substantially aggravated by his coal mine dust exposure, even if his primary respiratory condition is asthma and he suffers from airway/lung remodeling. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 24.

The administrative law judge also addressed the additional reasons provided by Dr. Basheda in excluding legal pneumoconiosis. Dr. Basheda stated that "[a]pproximately six to eight percent of coal miners can develop airway obstruction" and that "[w]hen evaluating coal dust-induced obstructive lung disease, one must consider the

pathologic findings. Coal dust deposition in the respiratory bronchioles results in fibrotic changes and dilation of the airways." Employer's Exhibit 3; *see* Decision and Order at 13. The administrative law judge noted that, in his August 8, 2012 deposition, Dr. Basheda "reiterated, *without citing authority*, that only 10 to 25 percent of coal miners would develop pneumoconiosis and that depends on both the type of coal and exposure." Decision and Order at 14 (emphasis added); *see* Employer's Exhibit 5 at 6-7. To the extent that the administrative law judge found that "Dr. Basheda injected unsupported general statistics and conclusions into his determination," that claimant does not have legal pneumoconiosis, we affirm the administrative law judge's decision to give Dr. Basheda's opinion little weight. Decision and Order at 24; *see Hicks*, 138 F.3d 524 at 533, 21 BLR at 2-335; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight, taking into consideration the views of the DOL as set forth in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that claimant does not have legal pneumoconiosis and is unable to rebut the amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[7]

Lastly, as neither Dr. Zaldivar nor Dr. Basheda diagnosed legal pneumoconiosis, the administrative law judge properly concluded that their opinions were not credible to disprove the presumed fact of disability causation. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 34. Thus, we affirm the administrative law judge's finding that employer failed to rebut the amended Section

[7] Because the administrative law judge provided valid bases for rejecting the opinions of Drs. Zaldivar and Basheda, it is not necessary that we address employer's contention that the administrative law judge erred in failing to identify where, in the record, either doctor excluded legal pneumoconiosis, based on negative x-rays. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

411(c)(4) presumption, pursuant to 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of claimant's respiratory disability was due to pneumoconiosis.

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