U.S. Department of Labor

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

BRB No. 16-0309 BLA
Case No. 13-BLA-5726

WILBUR GREENE Claimant-Respondent v. ISLAND CREEK COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2017 DECISION and ORDER on RECONSIDERATION EN BANC

Appeal of the Decision and Order of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) has filed a timely motion for reconsideration en banc of the Board's decision in *Greene v. Island Creek Coal Co.*, BRB No. 16-0309 BLA (Mar. 28, 2017)(unpub.), affirming the award of benefits in this subsequent claim. Claimant responds in opposition to employer's motion. We deny the motion and affirm the Board's decision.[1]

In its motion, employer contends that the Board erred in rejecting its argument that the administrative law judge did not consider relevant evidence contained in claimant's prior denied claims when she found that employer did not rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). We reject this contention.

In its decision, the Board rejected employer's arguments that the administrative law judge erred in discounting medical opinions from Drs. Selby and Tuteur because of flaws in the physicians' reasoning and explanation. *Greene*, slip op. at 4-5. The Board therefore affirmed the administrative law judge's findings that employer failed to establish both that claimant does not have pneumoconiosis, and that no part of his total disability was caused by pneumoconiosis. *Id.*; *see* 20 C.F.R. §718.305(d)(i),(ii).

In a footnote, the Board addressed employer's additional argument that the administrative law judge did not consider relevant evidence in claimant's prior denied claims. The Board held that "on the facts of this case," employer identified no error because it did not explain "how medical evidence from the prior claim[s], which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption." *Greene*, slip op. at 4 n.8, *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988).[2]

[1] Employer's motion to strike claimant's response is denied. 20 C.F.R. §§802.219(e), 802.217(a). We also deny employer's request for oral argument. 20 C.F.R. §802.306.

[2] In *Cooley*, the United States Court of Appeals for the Sixth Circuit, the law of which applies to this case, held that "[t]he presumptions contained in the . . . Act would be of little value if they could be rebutted by evidence consisting of medical opinions reached as a result of examinations of a claimant conducted at a time before the claimant

We reject employer's argument that the Board erred in its holding. As an initial matter, we note that the administrative law judge did not ignore the older evidence from the prior claims; she acknowledged it, but reasonably found that the medical evidence developed in the current claim more accurately reflects claimant's current physical condition. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993); Decision and Order at 6. Employer concedes that earlier medical testing may not reflect claimant's current physical condition, but contends that "it is not irrelevant, as it may help physicians determine the causation of disease or associated impairment." Motion at 9. Employer, however, does not explain how its physicians' review of medical evidence from the prior claims alters the outcome. The administrative law judge found that the opinions of Drs. Selby and Tuteur were not sufficiently credible to rebut the presumption because neither physician adequately explained how he eliminated claimant's twenty-two years of coal mine dust exposure as a cause of claimant's disabling obstructive lung disease, and because Dr. Tuteur relied, in part, on generalizations. *Greene*, slip op. at 4-5. The Board affirmed those credibility determinations as supported by substantial evidence. *Id.* Therefore, we reject employer's allegation of error in the Board's decision.[3]

---

had established the conditions required to trigger the presumptions." *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988).

[3] The Board considered employer's remaining arguments and declines to grant reconsideration. 20 C.F.R. §§802.407(d), 802.409.

Accordingly, employer's motion for reconsideration en banc is denied. The Board's March 28, 2017 decision is affirmed. 20 C.F.R. §§801.301(c), 802.407(d), 802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge