U.S. Department of Labor

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

BRB No. 16-0597 BLA

BILLY RALPH FURGERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	
	)	DATE ISSUED: 08/07/2017
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilberston (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05934) of Administrative Law Judge Adele Higgins Odegard 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 subsequent claim filed on September 17, 2012.[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 18.25 years of underground coal mine employment and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Employer also contends that the administrative law judge erred in

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on June 18, 1999, was denied in a Decision and Order issued on December 12, 2005 by Administrative Law Judge Thomas F. Phalen, Jr., who found that even though claimant established total respiratory disability, he failed to establish the existence of pneumoconiosis and disability causation. Director's Exhibit 1 at 222. Claimant appealed and employer cross-appealed this decision. Director's Exhibit 1 at 216, 219. On May 25, 2006, the Board dismissed both parties' respective appeals and remanded the case for modification proceedings. *Furgerson v. Jericol Mining, Inc.*, BRB No. 06-0317 BLA (May 25, 2006) (unpub. Order); Director's Exhibit 1 at 212. Subsequently, claimant filed a request for modification on September 28, 2006, which the district director denied based on claimant's failure to establish pneumoconiosis and total disability. Director's Exhibits 1-87, 1-148. Claimant filed a second request for modification on November 7, 2007, which the district director denied on January 7, 2008 for failure to establish total disability. Director's Exhibit 1 at 4, 30. Claimant did not further pursue the denial of his 1999 claim. On September 17, 2012, claimant filed his fourth claim, which is pending herein. Director's Exhibit 3.

[2] 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 at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and where a totally disabling respiratory or pulmonary impairment is established. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

weighing the medical evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Change in an Applicable Condition of Entitlement

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The administrative law judge determined that claimant's prior claim was denied on modification because claimant failed to establish total respiratory or pulmonary disability. Decision and Order at 36. The administrative law judge found that because the new evidence established that claimant has a totally disabling respiratory impairment, claimant established a change in an applicable condition of entitlement. *Id.*

Employer contends that the administrative law judge misidentified the element of entitlement previously adjudicated against claimant. Employer's Brief at 7-12. Employer maintains that Administrative Law Judge Thomas F. Phalen, Jr., denied benefits in the prior claim on the ground that claimant failed to establish either the existence of pneumoconiosis or disability causation, even though claimant established total respiratory disability. Director's Exhibit 1 at 229, 237. Although the district director subsequently denied modification of Judge Phalen's denial for failure to establish

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-22.

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

total disability, employer contends that the applicable conditions of entitlement previously adjudicated against claimant were the existence of pneumoconiosis and disability causation, rather than total respiratory disability as found by the administrative law judge. Employer's Brief at 9.

Employer's arguments are unavailing. Because the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, claimant satisfied his burden of demonstrating a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-512, 25 BLR 2-743, 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, 795, 25 BLR 2-285, 2-292 (7th Cir. 2013) (holding that the existence of pneumoconiosis and disability causation may be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309). Because we affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence demonstrates total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore invocation of the Section 411(c)(4) presumption, we further affirm the administrative law judge's finding that claimant 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); Decision and Order at 11-22, 36.

Rebuttal of the Section 411(c)(4) Presumption

In order to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have legal and clinical pneumoconiosis,[5] or 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 25 BLR 2-689

[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 respiratory or pulmonary disease or impairment "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).

(4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

In finding that employer failed to rebut the presumed fact of legal pneumoconiosis, the administrative law judge considered the medical opinion of Dr. Dahhan that claimant does not have legal pneumoconiosis and that his disabling obstructive impairment was caused by smoking. Decision and Order at 27-28; Director's Exhibit 16; Employer's Exhibit 11. The administrative law judge found that Dr. Dahhan's opinion was neither persuasive nor well-reasoned, and was entitled to little weight. Decision and Order at 30-31.

Employer contends that the administrative law judge erred in failing to adequately weigh all of the prior claim medical evidence, particularly Dr. Castle's opinion, in finding that employer failed to disprove the presumed facts of legal pneumoconiosis and disability causation. Employer's Brief at 20-21, 30. Employer further contends that the administrative law judge erred in her consideration of Dr. Dahhan's opinion, arguing that it is entitled to enhanced weight based on Dr. Dahhan's expert qualifications and status as a treating physician. *Id.* at 16-19. Employer maintains that because Dr. Dahhan explained why claimant's respiratory disability was caused primarily by smoking, and made it clear that coal dust exposure was not a substantially contributing factor in claimant's condition, the administrative law judge erred in requiring a greater explanation as to how he eliminated claimant's years of coal dust exposure as a contributing or aggravating cause of claimant's obstruction. *Id.* at 27.

Contrary to employer's arguments, the administrative law judge permissibly found that since claimant's most recent prior claim was filed in 1999 and finally denied in 2008, the evidence filed in support of claimant's subsequent 2012 claim was entitled to greater weight as it more accurately represented claimant's current respiratory condition. Decision and Order at 36; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In light of the progressive nature of pneumoconiosis, the administrative law judge's reliance on the more recent evidence was proper. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997).

In evaluating Dr. Dahhan's opinion, the administrative law judge determined that Dr. Dahhan "treated claimant on multiple occasions" and, as his treating physician, Dr. Dahhan's opinion "may be entitled to greater weight as compared to the other medical opinions." Decision and Order at 21. Considering the criteria set forth at 20 C.F.R. §718.104(d), the administrative law judge reviewed claimant's treatment records from multiple physicians and found that Dr. Dahhan evaluated claimant "intermittently" between 2011 and 2014 on an "as-needed basis" when claimant's symptoms worsened.

The administrative law judge further determined that Dr. Echeverria, rather than Dr. Dahhan, prescribed claimant's supplemental oxygen. *Id.* Finding that Dr. Dahhan did not treat claimant on a frequent and regular basis, the administrative law judge declined to accord preferential weight to Dr. Dahhan's opinion pursuant to 20 C.F.R. §718.104(d).[6] *Id.*; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). This determination is dubious, at best, since Dr. Dahhan treated claimant six times, including four times in 2014, the year in which the other physicians examined claimant solely for the purpose of rendering an opinion in this litigation.[7] However, error in this respect is harmless, since the weight to be given a physician's opinion is also determined by its credibility, and, as discussed *infra*, the administrative law judge found Dr. Dahhan's opinion with respect to the existence of legal pneumoconiosis and disability causation not credible.

Next, the administrative law judge determined that Dr. Dahhan indicated that any bronchitis due to coal dust inhalation would have ceased after claimant left coal mining in 1983. Noting that the regulations recognize that pneumoconiosis is a latent and progressive disease, the administrative law judge rationally found that claimant's lack of coal dust exposure for an extended period of time does not preclude the existence of legal pneumoconiosis. Decision and Order at 30; *see* 20 C.F.R. §718.201(c); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 25 BLR 2-675 (6th Cir. 2014). The administrative law judge further determined that Dr. Dahhan relied on claimant's loss of 1,500 cubic centimeters (cc) in his FEV1 value and response to bronchodilators to support his opinion that claimant's disabling obstructive impairment was caused primarily by his thirty-four pack-year smoking history. Decision and Order at 30; Director's Exhibit 16; Employer's Exhibit 11. Dr. Dahhan cited to medical literature stating that a susceptible smoker will lose up to 90 cc of the FEV1 value per pack year, and indicated that claimant's sixteen years of coal dust exposure could result in a loss of only 5-9 cc per year, which could not account for claimant's considerable reduction in FEV1 value. *Id.* The administrative law judge found that Dr. Dahhan's opinion did not disprove the existence of legal pneumoconiosis, as the physician did not "affirmatively explain why coal dust exposure

[6] The regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). As discussed *infra*, the administrative law judge found that Dr. Dahhan's opinion was not credible.

[7] Dr. Dahhan treated claimant's COPD and respiratory infection in March 2011; he also treated his respiratory condition in January, 2012, and in January, April, July and November of 2014. Employer's Exhibits 3-7.

had no impact on the reduction." Decision and Order at 30.[8] Further, while Dr. Dahhan indicated that claimant's response to bronchodilator treatments is inconsistent with the irreversible nature of pneumoconiosis, the administrative law judge noted that claimant's post-bronchodilator FEV1 values still qualified for disability and that partial reversibility did not preclude the presence of legal pneumoconiosis. *Id.*; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Thus, the administrative law judge permissibly discounted Dr. Dahhan's opinion for failure to persuasively explain how he eliminated claimant's coal dust exposure as a significantly contributing or substantially aggravating cause of claimant's obstruction. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015).

Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9. 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.

The administrative law judge permissibly found that the same reasons for which she discredited Dr. Dahhan's opinion that claimant does not suffer from legal pneumoconiosis also undercut his opinion that claimant's disabling respiratory or pulmonary impairment was not caused by pneumoconiosis. Decision and Order at 30-31, 35, 37; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). 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 with proof that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

[8] Employer raises no issue concerning the rebuttal standard employed by the administrative law judge.

[9] Consequently, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge