U.S. Department of Labor

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

BRB No. 16-0667 BLA

JIM H. BANKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2017
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 Steven B. Berlin, 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. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-5488) of Administrative Law Judge Steven B. Berlin 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).[1] This case involves a miner's subsequent claim[2] filed on March 5, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] the administrative law judge credited claimant with twenty-one years of underground coal mine employment. The administrative law judge found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[4] and entitling claimant to invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of

[1] The parties agreed to cancel the hearing and requested a decision on the record. Decision and Order at 1; Order dated March 4, 2016.

[2] This is claimant's third claim for benefits. His most recent prior claim, filed on September 14, 2009, was denied on May 10, 2010 by the district director, who found that although claimant established that he has pneumoconiosis arising out of coal mine employment, he did not establish that he has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the 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.

[4] 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 award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief reiterating its contentions.[5]

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.[6] 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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner'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 establish rebuttal by either method.

A. Legal Pneumoconiosis

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-one years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment pursuant to 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 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, 1-711 (1983).

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

[7] "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).

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[8] Employer's Brief at 5-15. In addressing this issue, the administrative law judge considered Dr. Jarboe's medical opinion.[9] Decision and Order at 8-14; Director's Exhibit 14-34; Employer's Exhibit 10. Dr. Jarboe opined that claimant does not have legal pneumoconiosis, but suffers from a disabling restrictive impairment due to congestive heart failure, end-stage renal disease, and obesity. Employer's Exhibit 10. The administrative law judge noted that "[i]t is clear from claimant's medical records that he suffers from severe chronic congestive heart failure, severe renal disease, and obesity." Decision and Order at 24. The administrative law judge further noted that, "the fact that these conditions 'can' result in restrictive lung disease or that they were the 'primary' cause of [claimant's] restrictive lung disease does not rule out his history of coal dust exposure as a factor in the development of his restrictive disease." *Id.*; *see* Employer's Exhibit 10 at 19. The administrative law judge found that Dr. Jarboe's opinion was not well-reasoned and, therefore, did not rebut the presumed fact of legal pneumoconiosis.

Employer contends that the administrative law judge's use of the term "rule out" suggests that he applied an incorrect rebuttal standard in finding that employer failed to disprove that claimant has legal pneumoconiosis. Employer's Brief at 11-12; Reply Brief at 5-6. We disagree.

The administrative law judge correctly stated that "clinical and legal pneumoconiosis are distinct concepts, and employer must address both conditions in order to rebut the presumption . . . ." Decision and Order at 23. The administrative law judge also properly noted that legal pneumoconiosis includes lung diseases "that are significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see* Decision and Order at 23. Moreover, contrary to employer's assertion, the administrative law judge did not determine that Dr. Jarboe's opinion was insufficient to disprove the existence of legal pneumoconiosis on the basis

[8] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 22-23. Accordingly, we decline to address employer's contentions of error regarding the administrative law judge's findings on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The administrative law judge also considered the medical opinions of Drs. Habre, Green, and Al-Jaroushi. Decision and Order at 8-14, 24-25; Director's Exhibit 14; Claimant's Exhibits 1, 3. Because these doctors opined that claimant suffers from legal pneumoconiosis, the administrative law judge noted that their opinions do not assist employer in establishing rebuttal of the presumption. *Id.*

that he failed to "rule out" coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order at 24. Rather, the administrative law judge considered the explanation given by Dr. Jarboe for why he excluded coal mine dust exposure as a causative factor for claimant's impairment, and found that Dr. Jarboe's opinion was not credible. Decision and Order at 26. Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard relevant to the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Corp*., 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Employer contends that the administrative law judge did not satisfy the duty of rational explanation imposed by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by failing to provide a valid reason for finding Dr. Jarboe's opinion insufficient to rebut the presumption of legal pneumoconiosis.[10] Employer's Brief at 12-15; Reply Brief at 5-7. We disagree.

In his report dated March 6, 2016, Dr. Jarboe opined that claimant does not have legal pneumoconiosis but suffers from a severe restrictive disease "caused primarily by three factors: severe chronic congestive heart failure, severe end-stage renal disease, and obesity." Employer's Exhibit 10 at 19. Dr. Jarboe explained that if claimant's restriction was caused by the inhalation of coal dust, "there would be evidence of a fibrotic reaction to the coal dust in his radiographic studies." *Id*. at 18. Noting that the radiographic evidence does not show the presence of a fibrotic reaction to coal dust, Dr. Jarboe concluded that the restriction was caused by factors other than the inhalation of coal dust, and that the evidence did not show that claimant has clinical coal workers' pneumoconiosis. He further explained that claimant does not have legal pneumoconiosis, as claimant's pulmonary function study results indicated a purely restrictive ventilatory defect, but evidenced no obstruction. *Id*. at 19.

Contrary to employer's argument, we see no error in the administrative law judge's determination that Dr. Jarboe's opinion is based on an erroneous premise and is not sufficiently reasoned to disprove the presence of legal pneumoconiosis. Decision and

[10] Employer also argues that the administrative law judge failed to properly evaluate claimant's treatment records which, employer maintains, fully support Dr. Jarboe's diagnoses. Employer's Brief at 13-14. Contrary to employer's assertion, the administrative law judge specifically considered treatment records from Hazard Regional Medical Center, Mountain Comprehensive Health Corporation, Appalachian Regional Healthcare, and Whitesburg Appalachian Regional Hospital, and acknowledged that "[i]t is clear from the [c]laimant's medical records that he suffers from severe chronic congestive heart failure, severe renal disease, and obesity." Decision and Order at 14-20, 24.

Order at 26. Initially, the administrative law judge noted that the regulatory definition of legal pneumoconiosis includes both restrictive and obstructive impairments, but that "Dr. Jarboe's report indicates that he believes that only obstructive impairment[s] can be classified as 'legal pneumoconiosis,' and that the evidence does not show that the [c]laimant has [legal pneumoconiosis] because his pulmonary impairment is a pure restrictive ventilatory defect." Decision and Order at 24; *see* 20 C.F.R. §718.201(a)(2). Additionally, the administrative law judge permissibly found that even if claimant's severe restrictive disease was caused "primarily" by severe chronic congestive heart failure, severe end-stage renal disease, and obesity, Dr. Jarboe "[did] not adequately explain" his basis for excluding the contribution of claimant's twenty-one years of coal dust exposure to his disabling respiratory impairment. Decision and Order at 24, 26; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Jarboe's opinion does not satisfy employer's burden to disprove the existence of legal pneumoconiosis. *See Clark*, 12 BLR at 1-155. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal pursuant 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

B. Total Disability Causation

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge determined that Dr. Jarboe's opinion was insufficient to establish that the miner was not totally disabled due to pneumoconiosis because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. Decision and Order at 25-26. We affirm this finding as it is in accordance with applicable law. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). In light of our affirmance of the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii), we affirm the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge