U.S. Department of Labor

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

BRB Nos. 17-0509 BLA
and 17-0509 BLA-A

TROY BLACKBURN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION/MAPCO	)	DATE ISSUED: 08/10/2018
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2013-BLA-05024) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed on February 3, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-four years of coal mine employment, as stipulated by the parties, and found that all of claimant's coal mine employment took place at underground coal mines. The administrative law judge further found that claimant has a totally disabling respiratory or pulmonary impairment and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).[1] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge applied an incorrect standard when addressing rebuttal of legal pneumoconiosis and did not properly weigh the medical opinions of its experts. Claimant has filed a response, urging affirmance of the award of benefits. Claimant has also filed a cross-appeal, asserting that the administrative law judge erred in considering the report of Dr. Vuskovich in its entirety, contending that a substantial portion of his report exceeded the evidentiary limitations. In response to claimant's cross-appeal, employer maintains that the administrative law judge's consideration of Dr. Vuskovich's opinion was, at worst, harmless error. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the evidence 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] 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.*

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 claimant has neither legal nor clinical pneumoconiosis,[4] or that "no part of [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)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis, but failed to rebut the presumed facts of legal pneumoconiosis and disability causation. Decision and Order at 21-25.

Employer contends that the administrative law judge erred in determining that the opinions of its experts are insufficient to establish rebuttal of the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). Employer also alleges that the administrative law judge applied an incorrect standard when addressing legal pneumoconiosis by requiring it to "rule out" or "exclude" coal mine dust as a cause of claimant's impairment. Employer's Brief at 6-8 (unpaginated), *quoting* Decision and Order at 23. Employer's allegations of error do not have merit.

In determining whether employer rebutted the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Westerfield, Vuskovich, and Jarboe. Dr. Westerfield examined claimant on May 2, 2012, and diagnosed an impairment caused by: asthma; the loss of tissue from claimant's lung cancer surgery on March 5, 2010; and cigarette smoke-induced chronic obstructive pulmonary disease. Director's Exhibit 15; Employer's Exhibit 3. Dr. Westerfield concluded that coal dust exposure was not a causal factor in claimant's impairment because the impairment developed after claimant left the coal mines. *Id*. Dr. Vuskovich reviewed a February 21, 2012 medical report prepared by Dr. Rasmussen, and opined that claimant has airways

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Director, OWCP, 12 BLR 1-200 (1989) (en banc); Decision and Order at 2; Director's Exhibit 3.

[4] 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).

obstruction caused by surgery to resect a portion of his left lung containing lung cancer. Director's Exhibit 14. In support of his opinion, Dr. Vuskovich relied on claimant's February 21, 2012 post-surgery, post-bronchodilator FEV1 value, which showed a moderate obstructive impairment, to extrapolate a pre-surgery FEV1, which he determined would have been normal.[5] *Id*. Dr. Vuskovich concluded, therefore, that claimant's impairment was related to his cancer surgery, rather than coal dust exposure. *Id*. Dr. Jarboe examined claimant on April 7, 2016, and reviewed claimant's medical records. Employer's Exhibit 2. He opined that claimant suffers from moderately severe airflow obstruction caused by cigarette smoking and bronchial asthma. *Id*. Citing the reversibility of claimant's obstructive impairment after the administration of a bronchodilator, Dr. Jarboe further opined that these conditions are not related to coal dust exposure. *Id*.

The administrative law judge rationally determined that the opinion of Dr. Westerfield is entitled to little weight, as his reasoning for opining that coal dust exposure is not a causal factor in claimant's impairment is 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 Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739 (6th Cir. 2014); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 22. In addition, the administrative law judge permissibly concluded that Dr. Vuskovich's opinion that claimant's obstructive impairment is entirely attributable to his lung resection is not well-documented, as he relied on a "predicted" pre-surgery FEV1, and did not review the 2016 pulmonary function study, which showed a loss in FEV1 when compared to the 2012 pulmonary function studies.[6] Decision and Order at 22-23; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). The administrative law judge

[5] The record does not contain any pulmonary function studies performed before claimant's lung surgery on March 5, 2010. Director's Exhibit 13. The pulmonary function studies of record are dated February 21, 2012, May 2, 2012, and April 7, 2016. Director's Exhibits 12, 15; Employer's Exhibit 2. They all produced qualifying values both before and after the administration of a bronchodilator, and were characterized as revealing an obstructive impairment.

[6] The administrative law judge reasoned that the further reduction seen in claimant's 2016 FEV1 undercuts Dr. Vuskovich's view that the obstructive impairment shown on the May 2, 2012 post-surgery pulmonary function study is entirely due to claimant's lung surgery. Decision and Order at 23. The administrative law judge stated, "[w]ithout addressing a cause for this loss of function, the presumption stands that [c]laimant's total disability is due to pneumoconiosis." *Id*.

also permissibly discounted the opinion of Dr. Jarboe because he failed to explain why coal mine dust exposure was not a cause of the totally disabling impairment that remained after bronchodilation. *See* 20 C.F.R. §718.201(a)(2); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 23.

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 to assign those opinions appropriate weight. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-734 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). 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 the administrative law judge provided valid reasons for his credibility determinations, we affirm his decision to accord little weight to the opinions of Drs. Westerfield, Vuskovich and Jarboe on the issue of the existence of legal pneumoconiosis.[7] *See Napier*, 301 F.3d at 713-714; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

Moreover, contrary to employer's assertion, the administrative law judge did not find the opinions of Drs. Westerfield, Vuskovich and Jarboe insufficient to disprove the existence of legal pneumoconiosis because they failed to "rule out" coal dust exposure as a causal factor in claimant's respiratory or pulmonary impairment. Rather, the administrative law judge found that their opinions were not credible as to whether coal dust exposure was a causal factor in claimant's obstructive impairment. Decision and Order at 22-23. Because the administrative law judge permissibly discounted the opinions of Drs. Westerfield, Vuskovich and Jarboe, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis and, thus, failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 23.

Employer also generally asserts that the administrative law judge erred in finding that it did not rebut the presumption that pneumoconiosis caused claimant's total disability pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge

[7] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Westerfield, Vuskovich and Jarboe, we need not address employer's remaining arguments challenging his weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8 (unpaginated).

rationally discredited the opinions of Drs. Westerfield, Vuskovich, and Jarboe, that claimant's totally disabling respiratory impairment was not caused by pneumoconiosis, because none of these physicians diagnosed legal pneumoconiosis, which is contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 24. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). Thus, we further affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.[8] *See Morrison*, 644 F.3d at 480.

[8] In view of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge