U.S. Department of Labor

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

BRB No. 17-0512 BLA

MICHAEL P. ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH BRANCH COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 08/06/2018
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince and John R. Sigmond (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Maia S. 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05567) of Administrative Law Judge Morris D. Davis awarding benefits on a claim filed pursuant to 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 November 24, 2010.[1]

The administrative law judge accepted employer's concessions that claimant has 18.5 years of coal mine employment,[2] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He further found that all of claimant's coal mine employment was underground. Thus, he determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c). He further found that employer did not rebut the presumption, and awarded benefits accordingly.

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[1] Claimant filed two previous claims, both of which were finally denied. Claimant's more recent prior claim, filed on May 15, 2003, was denied on December 6, 2006, by Administrative Law Judge Thomas M. Burke because the evidence failed to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1.

[2] Claimant's coal mine employment was in Virginia and West Virginia. Hearing Transcript at 24. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[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 evidences establishes fifteen or more 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) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in discounting the disability causation opinions of its medical experts.[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. 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[6] or that

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[4] Five months after filing its brief in support of the petition for review, employer argued for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-4. The Director, Office of Workers' Compensation Programs (the Director), responded that employer waived the argument by failing to raise it in its opening brief. We agree with the Director. The Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). Because employer did not raise the Appointments Clause argument in its opening brief, it waived the issue. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case").

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and 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).

[6] "'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

"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). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not challenge the administrative law judge's determination that the x-rays, biopsies, CT scans, and medical opinions failed to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 17-20. Accordingly, we affirm his finding that employer failed to disprove clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address the administrative law judge's finding that employer also failed to establish that claimant does not have legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-1-55 n.8. The administrative law judge considered the medical opinions of Drs. Rosenberg and Castle,[7] who opined that claimant does not have legal pneumoconiosis, but suffers from a severe restrictive impairment that is due to the effects of treatment for his metastatic cancer of the tear duct. Director's Exhibits 21, 22; Employer's Exhibits 1, 2, 6. Specifically, Drs. Rosenberg and Castle noted that when claimant's tear duct cancer spread to other parts of his body, he had to undergo multiple surgeries to his head, neck, and right lung. The physicians opined that two complications from those surgeries fully explain claimant's impairment: the surgery to claimant's right lung caused some restriction, and a

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of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] The administrative law judge also considered the opinions of Drs. Alam and Perper diagnosing claimant with legal pneumoconiosis. Decision and Order at 16-17; Director's Exhibit 49; Claimant's Exhibit 3. Additionally, he summarized medical treatment records from claimant's treating pulmonary physician, Dr. Smiddy. Decision and Order at 16; Claimant's Exhibit 7.

fistula[8] between his nasal passage and face just below his right eye caused an air leak that in turn caused a reduction of lung volumes measured on claimant's pulmonary function studies. *Id.*

The administrative law judge found that Drs. Rosenberg and Castle "relied heavily on the absence of valid objective test results" caused by the lung resection and the air leak from claimant's fistula "to preclude coal dust as a significant factor in [c]laimant's disabling condition." Decision and Order 17. The administrative law judge found, however, that "neither physician [otherwise] provided much justification for excluding legal pneumoconiosis." *Id.* He therefore found that the medical opinion evidence was, at best, in equipoise, and that employer thus failed to establish that claimant does not have legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge did not adequately explain his finding, and contends that substantial evidence does not support his determination that Drs. Rosenberg and Castle did not adequately explain their opinions.[9] Employer's Brief at 7-9. We disagree.

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[8] A fistula is defined as "an abnormal passage or communication, usually between two internal organs, or leading from an organ to the surface of the body." Dorland's Illustrated Medical Dictionary 711 (32d ed. 2012).

[9] In support of its argument, employer quotes Drs. Rosenberg's statement that:

> [W]hile [claimant] has severe impairment, this relates to his underlying lung and rib resections resulting in a restrictive phenomenon. Also, his recorded restriction relates in part to artifactually lowered lung volumes because of an air leak occurring through his nasopharyngeal fistula. Any recorded restriction does not relate to past coal mine dust exposure in whole or in part.

Employer's Brief at 7-8, *quoting* Employer's Exhibit 1 at 2. Additionally, employer quotes a portion of Dr. Castle's opinion:

> Resection of lung tissue, namely a right upper lobectomy, and resection of part of the middle lobe as well as a rib results in significant symptoms including shortness of breath. This also causes physiological restrictions on pulmonary function test because of the removal of viable lung tissue. Furthermore, the air leakage through a nasocutaneous fistula also results in apparent reduction in lung volumes as well as other physiologic parameters. All these findings were due to his metastatic cancer and treatment thereof.

The administrative law judge set forth fully the opinions of Drs. Rosenberg and Castle regarding the etiology of claimant's respiratory impairment. Decision and Order at 8-9, 20-21. He found that both physicians "explained in detail how [c]laimant's cancer and surgeries to address his cancer impacted his respiratory impairment . . . ." Decision and Order at 21. He further found, however, that despite acknowledging claimant's history of over eighteen years of coal mine employment, neither physician "adequately explained [his] opinion that [c]laimant's years of coal mine dust exposure did not contribute to[,] or aggravate[,] his respiratory impairment." *Id*. Contrary to employer's argument, and given that it was employer's burden to rebut the presumed fact of legal pneumoconiosis, the administrative law judge permissibly found that Drs. Rosenberg and Castle did not adequately explain why claimant's restrictive lung impairment was not aggravated by his more than eighteen years of coal mine dust exposure. *See* 20 C.F.R. §718.201(b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Substantial evidence supports the administrative law judge's decision to discredit the opinions of Drs. Rosenberg and Castle, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).[10]

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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)(ii). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich*, 25 BLR at 1-159. The administrative law judge found that, for the same reasons discussed above, Drs. Rosenberg and Castle "did not adequately explain how they ruled out any impact from [claimant's] pneumoconiosis" on his respiratory or pulmonary total disability. Decision and Order at 21. Additionally, the administrative law judge considered Dr. Caffrey's opinion that, based on a review of the biopsy evidence obtained from claimant's right lung, he was unable to state whether the

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Employer's Brief at 8-9, *quoting* Employer's Exhibit 2 at 22.

[10] We need not address employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Alam and Perper, because those opinions do not assist employer in establishing that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 17; Employer's Brief at 9-11.

degree of clinical pneumoconiosis claimant has would cause any disability.[11] The administrative law judge discounted Dr. Caffrey's opinion as "indefinite on the cause of [c]laimant's impairment . . . ."[12] Decision and Order at 21.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Castle for the reasons he gave because by doing so, he essentially discredited their disability causation opinions because they did not diagnose claimant with legal pneumoconiosis. Employer's Brief at 11-12. Employer argues that such analysis is improper where legal pneumoconiosis is only presumed, and not "a found fact." *Id*. This argument lacks merit. Because Drs. Rosenberg and Castle did not diagnose legal pneumoconiosis, contrary to the administrative law judge's determination that employer failed to rebut the presumed fact of legal pneumoconiosis, he reasonably discounted their disability causation opinions. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). We therefore reject employer's argument and affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's disability is caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[11] As summarized by the administrative law judge, Dr. Caffrey added that, "[i]f indeed the left lung also shows numerous lesions of simple [coal worker's pneumoconiosis], then it is possible the patient may have some respiratory disability due to the simple [coal worker's pneumoconiosis]." Decision and Order at 21, *quoting* Employer's Exhibit 3.

[12] Employer does not challenge the administrative law judge's decision to discount Dr. Caffrey's opinion. Nor does it challenge the administrative law judge's decision to accord the "greatest weight" to Dr. Smiddy's opinion that claimant's clinical pneumoconiosis contributes to his total disability, because Dr. Smiddy explained how the clinical pneumoconiosis "reduced [claimant's] ability to regain greater use of [his] lungs after the lung resection surgery." Decision and Order at 22; Claimant's Exhibit 7. Both of those findings are therefore affirmed. *See Skrack*, 6 BLR at 1-711.

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