U.S. Department of Labor

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

BRB No. 17-0520 BLA

BERNIE D. JOHNSON (deceased)[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 08/03/2018
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

[1] Claimant died on December 8, 2017, while this case was pending on appeal to the Board. Claimant's Brief at 2.

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05264) of Administrative Law Judge Christopher Larsen rendered on a miner's subsequent claim[2] filed on July 19, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Pursuant to employer's stipulation, the administrative law judge credited claimant with at least twenty-six years of coal mine employment, at least fifteen years of which were underground,[3] and found that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and 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) (2012).[4] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[5]

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[2] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. His most recent prior claim, filed on March 12, 2007, was denied on January 7, 2008, because he failed to establish that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3 at 6-7.

[3] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 6. Accordingly, the Board will apply the law 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[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); Decision and Order at 3, 20.

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 he had neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), 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). The administrative law judge found that employer failed to rebut the presumption by either method.

First, the administrative law judge determined that the x-ray evidence, the CT scan evidence, and the medical opinion evidence failed to establish that claimant did not have clinical pneumoconiosis. Decision and Order at 32. Next, he found that employer failed to establish that claimant did not have legal pneumoconiosis, giving "significant probative weight" to Dr. Alam's opinion that claimant had legal pneumoconiosis, and finding that the contrary opinions of Drs. Tuteur and Rosenberg "are not entitled to significant probative weight[.]" *Id*. at 26-32. Finally, the administrative law judge determined that employer failed to establish that no part of claimant's totally disabling respiratory impairment was due to clinical or legal pneumoconiosis. *Id*. at 32-34.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Rosenberg when he determined that employer failed to rebut the presumed fact of legal pneumoconiosis. Employer's Brief at 11-27. To prove that claimant did not have legal pneumoconiosis, employer had to demonstrate that claimant's pulmonary or respiratory impairment "was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Dr. Tuteur attributed claimant's restrictive impairment to heart disease, congestive heart failure, and obesity, but not to coal mine dust exposure. Employer's Exhibits 2 at 4-5; 5 at 19-20, 22. Similarly, Dr. Rosenberg attributed

[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). "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).

claimant's disabling restrictive impairment to heart failure, obesity, and general weakness, and not to his coal mine dust exposure. Employer's Exhibits 3 at 3, 15; 4 at 16-17.

Contrary to employer's contention, the administrative law judge permissibly discounted their opinions. The administrative law judge noted that in his initial report, Dr. Tuteur concluded that claimant did not have legal pneumoconiosis because "there is no significant airflow obstruction and no clinical picture of chronic obstructive pulmonary disease," or COPD. Employer's Exhibit 2 at 4; Decision and Order at 28. The administrative law judge also cited Dr. Tuteur's deposition testimony that claimant had a "minimal" obstructive abnormality and that legal pneumoconiosis is "typically manifested clinically by the so-called COPD phenotype. That is a combination of chronic bronchitis and emphysema, and is associated with significant, clinically meaningful air flow obstruction." Employer's Exhibit 5 at 18-19; Decision and Order at 28.

The administrative law judge pointed out that the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2) includes "any chronic *restrictive or obstructive* pulmonary disease arising out of coal mine employment," and found that "Dr. Tuteur's exclusion of restrictive diseases from the definition of legal pneumoconiosis casts doubt" on his conclusion that claimant's restrictive impairment could not be legal pneumoconiosis. Decision and Order at 28 (emphasis in original). Therefore, the administrative law judge reasonably determined that Dr. Tuteur's opinion was "not entitled to significant probative weight" on the issue of legal pneumoconiosis. Decision and Order at 28; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 308-09, 314-15 (4th Cir. 2012); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) (holding that "a physician's opinion based on a premise antithetical to the Black Lung Benefits Act is not probative").

As for Dr. Rosenberg, the administrative law judge determined that he failed to adequately consider whether claimant had any condition apart from clinical pneumoconiosis that was related to, or aggravated by, coal mine dust exposure. Decision and Order at 29-30. When asked at his deposition whether coal mine dust exposure was causing or contributing to claimant's restrictive impairment, Dr. Rosenberg said:

> Even if you assume he has a minimal degree of clinical CWP [coal workers' pneumoconiosis], the literature about that degree of CWP causing restriction or impairment is such that that type of CWP does not cause any significant impairment overall as far as restriction.

Employer's Exhibit 4 at 16. Citing that answer, the administrative law judge concluded that clinical pneumoconiosis was "the only possible coal mine dust-related illness [Dr. Rosenberg] considered as a potential explanation" for claimant's restrictive impairment, and that Dr. Rosenberg did not consider, or explain the absence of, any other condition

related to or aggravated by claimant's coal mine dust exposure. Decision and Order at 30. The administrative law judge found Dr. Rosenberg's "assumption that clinical pneumoconiosis was the only possible coal mine-dust related cause" of claimant's restriction to be "inconsistent with the regulatory definition of legal pneumoconiosis," and he therefore determined that Dr. Rosenberg's opinion was not entitled to significant probative weight and did not assist employer in rebutting the presumption. *Id*. Because clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, the administrative law judge permissibly discounted Dr. Rosenberg's opinion. *See* 20 C.F.R. §718.201; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901 (4th Cir. 1995).

Employer argues that the administrative law judge erred by treating the acknowledgments of Drs. Tuteur and Rosenberg that coal mine dust exposure *could* contribute to claimant's impairment as inconsistent with their conclusions that it did not. Employer's Brief at 17-18. This argument lacks merit. The administrative law judge did not discredit the opinions of Drs. Tuteur and Rosenberg for being internally inconsistent. As explained above, he discredited the physicians' opinions for being inconsistent with the definition of legal pneumoconiosis, and therefore found that they did not rebut the Section 411(c)(4) presumption that claimant's restrictive impairment arose out of his coal mine employment. *See* 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A).

Employer also contends that the administrative law judge erred when he found Dr. Tuteur's view of legal pneumoconiosis to be inconsistent with the regulatory definition that includes restrictive impairments because, employer argues, "Dr. Tuteur had already addressed restrictive impairment . . . in the context of clinical pneumoconiosis." Employer's Brief at 19-20. Dr. Tuteur acknowledged in his deposition that clinical pneumoconiosis can cause a restrictive impairment, but he concluded that claimant's restriction was "fully explained" by left ventricular dysfunction and congestive heart failure; he saw no evidence of clinical pneumoconiosis "insomuch as even the CT scans are free of changes compatible with that condition." Employer's Exhibit 5 at 25-26. Employer argues that because Dr. Tuteur addressed claimant's restriction when he discussed the existence of clinical pneumoconiosis, there was no need for him to address claimant's restriction in the context of legal pneumoconiosis. Employer's Brief at 20. This argument lacks merit because, as we have pointed out, clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, both of which employer must disprove to rebut the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis. *See* 20 C.F.R. §718.305(c), (d)(1)(i). The absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Hobbs*, 45 F.3d at 821; *Barber*, 43 F.3d at 901.

Because the administrative law judge permissibly discounted the opinions of Drs. Tuteur and Rosenberg, we affirm his determination that employer failed to establish that claimant did not have legal pneumoconiosis.[7] 20 C.F.R. §718.305(d)(1)(i)(A). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i).[8]

Finally, because Drs. Tuteur and Rosenberg did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant had the disease, the administrative law judge permissibly discredited the physicians' opinions on the issue of whether pneumoconiosis contributed to claimant's totally disabling impairment. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 33. Consequently, we 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 was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

[7] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Tuteur and Rosenberg, we need not address employer's remaining arguments regarding the administrative law judge's weighing of their opinions. Employer's Brief at 16-27. Any errors in discounting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[8] Because employer's rebuttal burden required it to prove that claimant had neither legal nor clinical pneumoconiosis, *see* 20 C.F.R. §718.305(d)(1)(i)(A)-(B), and employer failed to establish that claimant did not have legal pneumoconiosis, we need not consider employer's argument that the administrative law judge erred in considering the x-ray and CT scan evidence to find that employer failed to rebut the presumed fact of clinical pneumoconiosis. Decision and Order at 21-26, 32; Employer's Brief at 5-11. Any error regarding that finding would be harmless. *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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge