U.S. Department of Labor

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

BRB No. 18-0440 BLA

HUBERT L. PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA CREWS COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 08/06/2019
	)	
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 Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05080) of Administrative Law Judge Dana Rosen, rendered on a subsequent claim filed on July 10, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 35.97 years of qualifying coal mine employment and found he established total disability based on the new evidence. 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in the applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed two prior claims, each of which was finally denied by the district director. Director's Exhibits 1, 2.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement. *See* 20 C.F.R. §§718.305; 725.309(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order Awarding Benefits at 26, 30.

[4] Because claimant's coal mine employment was in Virginia and West Virginia, 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); Director's Exhibit 5; Hearing Transcript at 23.

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[5] or "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 employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To establish claimant does not have legal pneumoconiosis, employer must demonstrate he does not have a chronic lung disease or impairment "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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Castle, Spagnolo, and Rosenberg. Each physician diagnosed obstructive and restrictive respiratory impairments related solely to claimant's smoking history and surgery for lung cancer. Director's Exhibit 16; Claimant's Exhibit 7; Employer's Exhibits 9, 12. The administrative law judge found their opinions not sufficiently reasoned to support employer's burden of proof.[6] Decision and Order Awarding Benefits at 40-44. Employer challenges the administrative law judge's determination that it failed to disprove legal pneumoconiosis, but we see no error in her credibility findings.

The administrative law judge accurately noted Dr. Castle eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary disease, in part, because he found

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary 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).

[6] Employer mentions Dr. Rosenberg's opinion in its brief but does not identify error in the administrative law judge's discrediting of it as conclusory and not reasoned. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order Awarding Benefits at 41; Director's Exhibit 16.

claimant's FEV1/FVC ratio was "very low" and therefore inconsistent with an obstructive respiratory impairment related to coal mine dust exposure. Employer's Exhibit 12. Dr. Castle explained coal mine dust exposure causes a "relatively parallel" reduction in the FEV1 and FVC values. *Id*. The administrative law judge permissibly rejected Dr. Castle's opinion because his view "coal dust [exposure] does not cause a significant loss in the FEV1 or a reduction in the FEV1/FVC ratio is not consistent with the scientific conclusions of the Department of Labor set forth in the preamble to the 2001 [regulatory revisions]." Decision and Order Awarding Benefits at 41; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Employer's Exhibit 12 at 31-39.

Dr. Spagnolo opined claimant does not have legal pneumoconiosis, in part, because the pulmonary function studies showed partial reversibility of claimant's impairment after administration of a bronchodilator, while coal dust exposure causes a fixed and irreversible impairment. Employer's Exhibit 2. As the administrative law judge noted, however, Dr. Spagnolo "did not discuss the fact that the pulmonary function [studies] were qualifying even after some reversibility following the use of a bronchodilator." Decision and Order Awarding Benefits at 43. She permissibly rejected Dr. Spagnolo's opinion on legal pneumoconiosis because he failed to adequately explain why the irreversible portion of claimant's pulmonary impairment was not related to claimant's "substantial coal mine dust exposure." *Id.*; *see* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

As the trier-of-fact, the administrative law judge has the authority 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 Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting). The Board is not empowered to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge rationally explained why she discredited the opinions of Drs. Castle and Spagnolo,[7] we affirm her finding employer did

[7] We reject employer's assertion the administrative law judge selectively analyzed the opinions of Drs. Castle and Spagnolo. Employer's Brief at 17, 19. The administrative law judge satisfied her obligation to explain the weight accorded the evidence, as she gave at least one valid reason for why each physician's opinion was not credible to disprove legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

not disprove legal pneumoconiosis.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm her determination employer did not rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Employer also asserts the administrative law judge erred in finding it failed to establish "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)(ii). Employer's Brief at 24. Having rejected employer's arguments on legal pneumoconiosis, however, we also reject its assertion the administrative law judge's erroneous findings with regard to legal pneumoconiosis undermined her analysis of disability causation. *Id*. Contrary to employer's contention, she permissibly gave little weight to the opinions of Drs. Castle, Spagnolo, and Rosenberg on the issue of disability causation because they did not diagnose legal pneumoconiosis, contrary her finding that employer failed to disprove the existence of the disease. *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); Decision and Order Awarding Benefits at 44-45; Director's Exhibit 16; Claimant's Exhibit 7; Employer's Exhibits 2, 9, 12. We therefore affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii).

[8] Because employer has the burden of proof on rebuttal and we affirm the administrative law judge's discrediting of employer's physicians, we need not address employer's argument the administrative law judge erred in finding Dr. Ajjarapu's opinion that claimant has legal pneumoconiosis to be well-reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order Awarding Benefits at 44; Employer's Brief at 22-24.

[9] Since employer did not disprove legal pneumoconiosis, rebuttal under the first method is precluded. Thus, we need not address employer's argument the administrative law judge erred in also finding it did not disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order Awarding Benefits at 40; Employer's Brief at 4-12.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge