U.S. Department of Labor

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

BRB No. 15-0082 BLA

JAMES A. STRAHIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MICON	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 12/18/2015
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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-5793) of Administrative Law Judge Richard A. Morgan awarding benefits 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). This case involves a miner's claim filed on July 29, 2011.

Applying Section 411(c)(4), 30 U.S.C. § 921(c)(4), the administrative law judge credited claimant with at least thirty years of qualifying coal mine employment,[1] and found that the evidence established that claimant has 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 invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of

[1] The record reflects that claimant's last coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305.

Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.[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. 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).

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

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Employer's Brief at 4-5.

Evaluating the evidence relevant to total disability, the administrative law judge initially considered the results of five pulmonary function studies and four blood gas studies.[4] The administrative law judge found that three of the five pulmonary function studies, including the most recent study, produced qualifying[5] results. Decision and Order at 7-8, 19-20; Director's Exhibits 12, 21; Claimant's Exhibits 1, 2; Employer's Exhibit 3. The administrative law judge, therefore, concluded that the pulmonary function study evidence supported a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19-20. The administrative law judge further found that, as all of the blood gas studies produced non-qualifying values, the blood gas study evidence did not support a finding of total disability, pursuant to 20 C.F.R.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least thirty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The administrative law judge further found that the record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

§718.204(b)(2)(ii). Decision and Order at 9, 26; Director's Exhibits 12, 21; Claimant's Exhibits 1, 2.

Turning to the medical opinion evidence, the administrative law judge considered the opinions of Drs. Gaziano, Fino, Cohen, Rasmussen, and Kaplan. Drs. Gaziano, Fino, Cohen, and Rasmussen opined that claimant is totally disabled from a respiratory standpoint. In contrast, only Dr. Kaplan opined that claimant is not totally disabled, and retains the respiratory capacity to perform his usual coal mine work. The administrative law judge accorded greater weight to the opinions of Drs. Gaziano, Fino, Cohen, and Rasmussen, than to the opinion of Dr. Kaplan. Thus, the administrative law judge found that the medical opinion evidence supported a finding that claimant is totally disabled from performing his usual coal mine work as an underground technician and supervisory crib maker, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4-5, 21. Based on the pulmonary function studies and medical opinions, the administrative law judge concluded that claimant met his burden of proof to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 21.

Employer generally asserts that the administrative law judge's finding of total disability is not supported by substantial evidence, contending that Dr. Kaplan's opinion supports the conclusion that claimant can perform light duty work. Employer's Brief at 4-5. To the extent that employer is asserting that Dr. Kaplan's opinion, that claimant retains the pulmonary capacity to perform light duty, supports a finding that claimant is not totally disabled, employer's contention lacks merit. Employer's Brief at 4. As the Director correctly notes, contrary to Dr. Kaplan's understanding of claimant's job duties, the administrative law judge found that claimant's usual coal mine work as an underground technician and supervisory crib maker required heavy manual labor, and employer does not challenge this finding. Decision and Order at 5, 20; Director's Brief at 2. Further, Dr. Kaplan specifically opined that there was "no question" that claimant cannot perform heavy labor due to his moderate airflow obstruction. Employer's Exhibit 1 at 44, 51. In light of these factors, employer has not explained how Dr. Kaplan's opinion could support a finding that claimant retains the respiratory capacity to perform his usual coal mine work. Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Gaziano, Fino, Cohen, and Rasmussen, that claimant is totally disabled, than to the opinion of Dr. Kaplan, and employer raises no specific challenge to this determination. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Decision and Order at 21. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence establishes that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(iv).

As employer raises no other challenges with respect to the administrative law judge's evaluation of the evidence, we further affirm the administrative law judge's finding that, when all of the relevant evidence is considered, claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 21.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge noted that Drs. Gaziano, Cohen, Rasmussen, and Fino each diagnosed legal pneumoconiosis, in the form of obstructive lung disease due to cigarette smoking and coal mine dust exposure. Director's Exhibits 12, 21; Claimant's Exhibits 1, 2. Conversely, although Dr. Kaplan diagnosed chronic obstructive pulmonary disease (COPD) with emphysema, he did not diagnose legal

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

pneumoconiosis and stated that claimant's airflow obstruction was "attributable primarily" to cigarette smoking. Employer's Exhibit 1.

The administrative law judge credited the opinions of Drs. Cohen, Rasmussen, and Fino as well-documented and reasoned, and supported by the objective evidence of record. Decision and Order at 18. The administrative law judge discredited the opinion of Dr. Kaplan, as poorly documented and reasoned, and inadequately explained as to the cause of claimant's obstructive airways disease and emphysema. Therefore, the administrative law judge determined that employer did not disprove the existence of legal pneumoconiosis.[7] Decision and Order at 18.

Employer contends that the administrative law judge erred in his consideration of Dr. Kaplan's opinion. We disagree. The administrative law judge correctly noted that, while Dr. Kaplan did not diagnose legal pneumoconiosis, he conceded, in his report and during his deposition, that coal dust exposure could have contributed to claimant's impairment. Decision and Order at 11, 18; Employer's Exhibit 1. The administrative law judge permissibly discredited Dr. Kaplan's opinion as to the existence of legal pneumoconiosis, because the doctor failed to adequately explain how he concluded that claimant's COPD with emphysema was not caused, in part, by claimant's thirty years of coal mine dust exposure. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 18. As the administrative law judge's basis for discrediting the opinion of Dr. Kaplan is rational and supported by substantial evidence, it is affirmed. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997).

Because the administrative law judge provided a valid reason for discrediting Dr. Kaplan's opinion, the only opinion that could support a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1). Therefore, we affirm the administrative

[7] The administrative law judge did not state what weight he accorded Dr. Gaziano's opinion. Director's Exhibit 12. However, as Dr. Gaziano diagnosed legal pneumoconiosis, his opinion does not assist employer in rebutting the presumption, pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability is caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23-25. The administrative law judge rationally found that the same reasons he provided for discrediting the opinion of Dr. Kaplan, that claimant does not suffer from legal pneumoconiosis, also undercut his opinion that claimant's disabling respiratory impairment is not caused by pneumoconiosis. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 25. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption.

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