U.S. Department of Labor

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

BRB No. 16-0209 BLA

JOANN HENRY (Widow o/b/o RAYMOND B. HENRY)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 12/06/2016
CONSOL OF KENTUCKY, INCORPORATED	)	
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 Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05232) of Administrative Law Judge Colleen A. Geraghty rendered 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 August 23, 2010.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited the miner with 26.67 years of qualifying coal mine employment,[2] and found the existence of a totally disabling respiratory or pulmonary impairment established pursuant to 20 C.F.R. §718.204(b)(2), based on the parties' stipulation. Consequently, the administrative law judge found that claimant[3] invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

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, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[4]

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

[2] The parties stipulated to twenty years of coal mine employment. Joint Exhibit 1; Hearing Transcript at 5. The administrative law judge, based on the evidence of record, found that the miner was employed for 26.67 years in underground coal mine employment. Decision and Order at 8.

[3] Claimant is the widow of the miner, Raymond B. Henry, who died on January 29, 2013. Claimant is pursuing this claim on behalf of the miner. The record does not contain a separate survivor's claim.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 26.67 years of underground coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 the miner had neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of pneumoconiosis. The administrative law judge initially determined that employer successfully rebutted the presumption of clinical pneumoconiosis, finding that the x-ray and medical opinion evidence was negative for clinical pneumoconiosis.[6] Decision and Order at 10-12, 20-21; *see* 20 C.F.R. §718.305(d)(2)(i)(B). With regard to rebuttal of legal pneumoconiosis,[7] the administrative law judge considered the medical opinions of Drs. Tuteur and Selby. Dr. Tuteur opined that the miner did not have legal pneumoconiosis, but had chronic obstructive pulmonary disease (COPD), in the form of emphysema and chronic bronchitis due to smoking and not coal mine dust exposure.[8] Employer's Exhibits 5, 10. Dr. Selby

[5] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] We affirm the administrative law judge's finding that employer successfully disproved the existence of clinical pneumoconiosis, as it is unchallenged on appeal. 20 C.F.R. §718.305(d)(2)(i)(B); *see Skrack*, 6 BLR at 1-711; Decision and Order at 21.

[7] 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 impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] Based on his review of medical records, Dr. Tuteur diagnosed chronic bronchitis and emphysema, and opined that the sole cause of the miner's chronic obstructive

also opined that the miner did not have legal pneumoconiosis, but suffered from COPD, in the form of emphysema and bronchial asthma due to smoking.[9] Employer's Exhibits 1, 11. The administrative law judge found that these opinions were inadequately explained and, therefore, not sufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 23-24. The administrative law judge therefore found that employer failed to rebut the presumption that claimant has legal pneumoconiosis. *Id*.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Tuteur and Selby. We disagree. The administrative law judge permissibly questioned the physicians' opinions regarding the cause of the miner's COPD, in part because neither doctor adequately explained why he believed that the miner's years of coal mine dust exposure did not cause, contribute to, or exacerbate, the miner's COPD. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 23-24.

The administrative law judge permissibly accorded little weight to Dr. Tuteur's opinion that legal pneumoconiosis was not present, finding that Dr. Tuteur relied on generalities. Decision and Order at 23; Employer's Exhibits 5 at 4; 10 at 22-23. Specifically, the administrative law judge found that, because Dr. Tuteur relied on his view that the "relative risk" of developing COPD from smoking is greater than the risk of

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pulmonary disease (COPD) was smoking. Employer's Exhibit 5. At his deposition, Dr. Tuteur added that contributing factors to the miner's COPD were multiple childhood pneumonias, and that the miner had a degree of bronchial hyperreactivity. Employer's Exhibit 10 at 17-18, 22-23. Dr. Tuteur further opined that, with respect to the bronchial hyperreactivity, a "lay person might call it asthma, but it's—that's probably not a meaningful term in this [miner]." *Id*. at 18.

[9] Based on the results of his physical examination and objective testing, Dr. Selby opined that the miner suffered from emphysema resulting from his 40 years of smoking, but further opined that coal mine dust inhalation did not contribute to the miner's emphysema. Employer's Exhibit 1. Dr. Selby also stated that the miner had historical and physical findings consistent with asthma, as previously diagnosed, and that it was markedly exacerbated and accelerated by the miner's smoking, but that it was neither caused, nor contributed to, by coal mine dust inhalation. *Id*. Additionally, Dr. Selby opined that the miner had an abnormal EKG indicating the high probability of severe heart disease, and that "most if not all of his hypoxia is likely due to cardiac disease." *Id.*

developing it from coal mine dust exposure,[10] Dr. Tuteur did not adequately discuss why, in this case, the miner's over 26 years of coal dust exposure did not contribute to the miner's COPD, along with the miner's smoking and childhood pneumonias. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order at 23. Consequently, the administrative law judge permissibly determined that Dr. Tuteur's opinion was entitled to diminished weight. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Additionally, the administrative law judge permissibly accorded little weight to Dr. Selby's opinion because the physician relied on the results of several pulmonary function studies, which indicated improvement after the administration of a bronchodilator, to support his opinion that the miner's pulmonary impairment was due solely to smoking and asthma. Decision and Order at 23. Specifically, the administrative law judge permissibly found that, in relying on the significant reversibility of the miner's obstructive impairment to conclude that it is solely attributable to smoking and asthma, Dr. Selby did not adequately explain why the irreversible portion of the miner's pulmonary impairment, which was still fully disabling, was not due, in part, to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-279 (7th Cir. 2001); Decision and Order at 23-24. Further, the administrative law judge permissibly found that Dr. Selby's conclusion that the miner's COPD was solely due to cigarette smoking and asthma was inadequately explained in light of the prevailing view

[10] Dr. Tuteur acknowledged that "the clinical picture of COPD caused by [coal dust exposure and cigarette smoking] does not differ significantly." Employer's Exhibit 5 at 4. He stated that if a miner with COPD is also a smoker, a doctor cannot rely upon physical examination findings, pulmonary function testing and radiographic characteristics to determine the etiology or etiologies of the COPD. Rather, Dr. Tuteur stated that one has to "reason as physicians regularly do in day-to-day evaluation and management of patients employing the concept of relative risk." Employer's Exhibit 5 at 4. Applying this reasoning, Dr. Tuteur determined that the miner's COPD was due to smoking, rather than coal dust, based on the miner's smoking history and the relative risk of developing COPD from smoking (20% for persons who smoke throughout their adult life) versus coal dust (1% for miners who never smoked). *Id*. Therefore, comparing the incidence of coal dust-induced obstruction of 1-2% or less versus the incidence of the same clinical picture among adult cigarette smokers of 20%, Dr. Tuteur concluded that the miner's clinical picture of COPD is "uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id*. at 6. He further opined that "it is possible but highly unlikely, that coal mine dust influenced the COPD seen in [the miner]." *Id.*

of the medical community, as set forth in the preamble to the revised regulations, that the risks of smoking and coal mine dust exposure have an additive impact on pulmonary function. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 24.

Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Tuteur and Selby,[11] the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Because employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer could establish the second method of rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Tuteur and Selby that the miner's pulmonary impairment was not caused by pneumoconiosis because neither physician diagnosed legal pneumoconiosis, which is contrary to her finding that employer failed to disprove that the miner had the disease. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 26. As substantial evidence supports the administrative law judge's findings, we affirm her determination that employer did not rebut the Section 411(c)(4) presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[11] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Tuteur and Selby, we need not address employer's remaining arguments regarding the weight she accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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