U.S. Department of Labor

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

BRB No. 17-0544 BLA

WILLIE JAMES GEARHEART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & K COAL, INCORPORATED	)	DATE ISSUED: 12/11/2018
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, 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-05869) of Administrative Law Judge Alan L. Bergstrom 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 June 6, 2011.

The administrative law judge found that claimant had at least eighteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, he found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[2]

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.[3] 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] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least eighteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

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

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

The administrative law judge initially found that employer failed to disprove the existence of simple clinical pneumoconiosis and therefore could not establish that claimant does not have pneumoconiosis. Decision and Order at 21, *citing* 20 C.F.R. §718.305(d)(1)(i)(B). Although he stated that it was unnecessary to address whether employer disproved the existence of legal pneumoconiosis, he ultimately evaluated the medical opinions on this issue in conjunction with his analysis of whether employer proved that no part of claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).[5] Decision and Order at 21-23.

[4] 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 includes, but is not limited to, 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).

[5] As employer acknowledges, the administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis with his discussion of whether employer proved that no part of claimant's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order at 22-23; Employer's Brief at 8. Contrary to employer's argument, however, while these are two separate and distinct issues with two separate standards of proof, the administrative law judge's error in combining his analysis is harmless, as he properly analyzed employer's physicians' opinions on the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Specifically, the administrative law judge did not erroneously find that the opinions of Drs. Dahhan and Jarboe are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "rule out" coal dust exposure as a causative factor of claimant's respiratory impairment. Decision and Order at 22-23.

To disprove legal pneumoconiosis employer must establish that claimant does not have a chronic lung disease or impairment that is "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); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Dahhan and Jarboe.[6] Dr. Dahhan opined that claimant does not have legal pneumoconiosis, but has severe emphysema and a disabling respiratory impairment due to lung cancer and the damaging effects of cancer treatment. He attributed both claimant's emphysema and lung cancer to cigarette smoking. Director's Exhibit 12; Employer's Exhibit 9. Dr. Jarboe similarly opined that claimant does not have legal pneumoconiosis, but has chronic bronchitis and a disabling restrictive impairment due to lung cancer and its treatment. He opined that neither claimant's chronic bronchitis nor his lung cancer is related to coal mine dust exposure. Employer's Exhibits 4, 6, 7. The administrative law judge discredited the opinions of Drs. Dahhan and Jarboe as poorly reasoned and inadequately explained. Decision and Order at 22-23.

Specifically, the administrative law judge permissibly found that because Dr. Dahhan did not address whether claimant's eighteen years of underground coal mine dust exposure could have contributed, along with smoking, to his severe emphysema, his opinion merited "little weight." *See* 20 C.F.R. §718.201(b) (including within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

The administrative law judge correctly noted that Dr. Jarboe opined that claimant's chronic bronchitis could not be attributed to coal dust exposure because chronic bronchitis dissipates within months of the cessation of exposure to coal mine dust. Decision and Order at 23; Employer's Exhibit 4. Relying on *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 25 BLR 2-675 (6th Cir. 2014), the administrative law judge permissibly

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Rather, he permissibly discredited their exclusion of a diagnosis of legal pneumoconiosis as inadequately reasoned. *Id.*

[6] The administrative law judge also considered the opinion of Dr. Alam that claimant has both lung cancer and legal pneumoconiosis, in the form of emphysema and chronic bronchitis due to a combination of cigarette smoking and coal mine dust exposure. Decision and Order at 23; Director's Exhibits 10, 39. The administrative law judge credited Dr. Alam's opinion as documented and well-reasoned. Decision and Order at 23.

discredited Dr. Jarboe's opinion as contrary to the regulations which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Keathley*, 773 F.3d at 738, 25 BLR at 2-684-85; Decision and Order at 23.

The administrative law judge also noted that in his deposition, Dr. Jarboe appeared to rely on the absence of any significant obstructive impairment to conclude that claimant does not have legal pneumoconiosis.[7] Decision and Order at 23; Employer's Exhibit 7 at 12. The administrative law judge permissibly discredited this aspect of Dr. Jarboe's opinion as inconsistent with the regulations, which provide that coal mine dust can cause an obstructive or restrictive impairment. 20 C.F.R. §718.201(a)(2), (b); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88, 25 BLR 2-135, 2-150-51 (6th Cir. 2012); Decision and Order at 23.

Substantial evidence supports the administrative law judge's credibility determinations. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Moreover, employer has not specifically challenged any of the reasons the administrative law judge provided for discrediting the opinions of Drs. Dahhan and Jarboe on the presence of legal pneumoconiosis. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

As the administrative law judge permissibly discredited the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21.

Finally, having permissibly discredited the opinions of Drs. Dahhan and Jarboe that claimant does not have legal pneumoconiosis, the administrative law judge permissibly

[7] Dr. Jarboe testified that he based his opinion that claimant does not have legal pneumoconiosis "primarily on two observations," the first being that "he does not have airflow obstruction or if he has it, it's very minimal. His predominant finding is a . . . severe restrictive ventilatory defect." Employer's Exhibit 7 at 12.

[8] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 5-8.

found that their opinions do not establish that "no part of the Claimant's totally disabling respiratory/pulmonary impairment is due to pneumoconiosis . . . ." Decision and Order at 23; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *see also Kennard*, 790 F.3d at 668, 25 BLR at 2-741 ("no need for the [administrative law judge] to analyze the opinions a second time" at disability causation where the employer failed to establish that the impairment was not legal pneumoconiosis); Decision and Order at 22-23. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. Because the administrative law judge permissibly discredited the only opinions supportive of employer's burden on the cause of claimant's total disability,[9] we affirm his determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22-23.

[9] Dr. Alam opined that claimant is totally disabled due in part to legal pneumoconiosis. Director's Exhibit 39. The administrative law judge found that Dr. Alam's opinion is entitled to greater weight than the opinions of Drs. Dahhan and Jarboe. Decision and Order at 23.

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